The jurisprudence of the European Court of Human Rights on detention and fair trial in criminal matters : addenda 1999-2000

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I) Introduction

The present author has produced a substantive article bearing the same title as this one, published in this Journal in vol. 21, 2000, pp. 348-373. That main article covered a period of review from 1992 through 1998. Due to various reasons, its publication was delayed. It thus seemed appropriate to write a short addendum providing the main features of the case-law that followed, from the end of 1998 to the end of 2000. The focus of this addendum is exclusively on the jurisprudence. The general approach to the matter as well as the introductory analysis on each specific right can be consulted by the reader in the main article which should be considered as heading the present addendum.

II) Right to personal liberty (habeas corpus) and legality of detention (Article 5 ECHR)

A) General aspects

1. As to the sufficient legal basis, four cases deserve mention. At the level of the European Court of Human Rights, in the Çakiz v. Turkey case (1999), the facts were about a Kurdish activist who disappeared after his arrest. Neither the arrest nor the detention were consigned in any official register, thus reducing him to legal non-existence. The Court first seized the opportunity to stress the importance of Article 5 by summing up the main lines of its jurisprudence. In the present case, the detainee was completely deprived of any of the guarantees provided for in Article 5, since his existence was nowhere acknowledged. Thus, there was a particularly grave breach of Article 5. It can be seen that this case does not concern so much the violation of a specific right enshrined in Article 5; it is situated on a more fundamental level, concerning the very conditions under which the whole Article can become applicable. This also explains the particular gravity of the breach pinpointed by the Court. One could also analyse that case as arbitrary arrest or detention, devoid of any legal basis. In fact, this breach amounts to an enforced disappearance. At the level of the Inter-American Commission on Human Rights, the cases involving enforced disappearance featured even more prominently. In the R. Morales Zegarra e.a. v. Peru case (1999), the Commission had to deal with several persons arrested by members of the Peruvian armed forces who thereafter "disappeared". The Commission held that there had been a breach of Article 7 of the American Convention on Human Rights. The arrest of those persons was arbitrary and totally deprived of any legal basis. The practice of disappearances renders nugatory any judicial protection as guaranteed by Article 7. Such side-stepping of any habeas corpus guarantee is unlawful even in cases of public emergency. The Commission also seized the opportunity to define the notions of "arbitrary and illegal
detention". Enforced disappearances are thus seen as a means of circumventing any habeas corpus or judicial guarantees, a sort of silent ruling out of the Convention, contrary to its very object and purpose.

A much less dramatic, but not less interesting, case occurred at the level of the Human Rights Committee established under the International Covenant on Civil and Political Rights. In Spakmo v. Norway (1999), the applicant was arrested for some hours in order to prevent him from demolishing certain balconies contrary to judicial orders having been issued against him. The Committee recalled that Article 9(1) of the Covenant required not only that the arrest be legal, but also reasonable and necessary. In casu the applicant had refused to comply with several injunctions of the police. His temporary arrest was hence justified. However, Norway had not explained why it was necessary to detain the applicant for eight hours. Under that heading the arrest was not necessary and there had been a violation of Article 9(1). This last finding prompted several members of the Committee to voice dissent. In a joint Dissenting Opinion of Amor/Ando/Colville/Klein/Wieruszewski/Yalden, it was said that the Committee should have abstained from entertaining a quatre‌ème‌ insistance approach since the national judicial authorities manifestly did not exceed their margin of discretion. This dissent seems warranted to the present author. Each finding of violation by a human rights body entails that a very general rule of constitutional law-type – for instance that an arrest must be “reasonable and necessary” – prevails over a series of specific rules worked out at a more concrete level and covered by the authority historically grown at national level. Such precedence must take place where essential rights of the individual are at stake. It may however be doubted that some hours of detention for a recognised reason may call for close scrutiny by the Human Rights Committee, even assuming that there was a slight excess. The appreciation as to this is better left to the local authorities. Moreover, the applicant should bear the burden of such an eventual slight excess, as he, by his illegal conduct, gave the motive for his arrest. It would seem that the excess ceases to be slight if one day (inclusive the night) is exceeded in circumstances comparable to the present ones.

Finally, it will be recalled that the organs of the American Convention and the Committee under the Covenant both require the State to protect the individual not only against actual arrest, but also against threats of such an arrest. Thus, in W. Delgado Pérez v. Colombia (1990), the Committee said that “States cannot ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them”. In the Chongwe v. Zambia case (2000) this holding was given further extension. The applicant had been injured by fire arms used by the police. No independent investigation was initiated. The Human Rights Committee began by recalling that Article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty. The absence of any effective investigation more than three years after the accident and the refusal to grant any compensation to the applicant warrant the conclusion that the author’s right to security of person has been violated. The term “threat” to personal security has been given here a remarkable extension. Quaere if such a broad reading does not blur the limits of Article 9 with respect to other human rights guarantees, such as that to personal integrity (protection of life and limb) or such as the guarantees of fair trial (right to effective remedies). A joint breach of all these guarantees by the same acts is obviously possible, but it may be asked whether there is much gain in such a progressive merger of the protected positions.

2. As to the respect of procedural guarantees, one further precedent may be added. In the Eerkal v. Netherlands case (1998), which strictly speaking belongs to the previous period of review, an individual condemned for murder was placed in a psychiatric institution. The extension of the placement order by the prosecutor, renewing his detention, arrived with a delay of two months with respect to the time-limits set out in the relevant municipal law. The Court first recalled its approach in the matter, which consists of a renvoi matériel to the municipal law and procedure. The present case allowed it to stress the limits of that renvoi. In effect, the internal jurisprudence had constantly held that a placement order remains lawful even if the prosecutor has not respected the time-limits; delay entailed no voidance. The Court refused simply to acknowledge this practice as covered by the renvoi. It stated that Article 5(1) posed its own requirements which were aimed above all to avoiding arbitrariness. Under this perspective, two months of delay appeared excessive since it created a state of unjustifiable uncertainty for the applicant. There had thus been a violation of Article 5(1).
It may perhaps be said that a constant administrative or judicial practice contrary to the letter of the procedural law may to some extent weaken some guarantees enshrined in the Convention, if only because all interpretation entails some gap with respect to the letter and because that effective practice is the object of the renvoi made by the Convention. However, that course stops short when there is any important inroad into the Conventional guarantees. No important limitation of personal freedoms will be covered by the technique of renvoi to municipal practice. Finally, it may be added that the violation of Article 5(1) of the Convention entails a duty to make reparation, but this does not mean that the applicant had to be released as long as he constituted a danger for the collectivity and for himself, because of his state of mind.11

3. As to the illegitimate motive of arrest as established in Article 5(1), letters (a) to (f), two cases of the European Court may be discussed. In the Steel and others v. United Kingdom case (1998) there had been an arrest of several protesters for breach of peace (trouble à l’ordre public). Some of them had protested against hunting activities, others took part in antimilitarist campaigns. The Court drew a distinction. The detention for breach of peace had been lawful and justified in the case of protesters who by their acts prevented an activity to take place. Thus, the anti-hunt protesters had placed themselves repeatedly in front of the gun of the hunters in order not to allow them to shoot. In that context, there was a danger of incitement to violence, which only an arrest could avoid.12 On the other hand, there could be no breach of peace in the case of peaceful antimilitarist protest, limiting itself to the distribution of leaflets. The arrests operated in this context could therefore not be squared with the requirements of Article 5(1).13

In the Aerts v. Belgium case (1998), the Strasbourg Court had opportunity to expand on the motive of detention set out in letter (e) of Article 5(1), in particular the detention of persons of unsound mind. The applicant had been arrested after having inflicted injuries to his former wife by way of a hammer. He was placed in the psychiatric wing of an ordinary prison. He complained that this place of detention was inappropriate to his state of health. The Court seized the chance to give some details on the conditions of application of Article 5(1)(e). It stressed, inter alia, that there must be some link between the motive for the deprivation of liberty and the regime of detention.14 In casu, the psychiatrical wing of the prison could not be regarded as an appropriate place of detention for persons unsound in mind. There was neither medical treatment nor a therapeutic environment. Thus, there had been a break in the connection between the aims of the detention and the conditions under which it took place. Hence a violation of Article 5(1)(e).

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

No relevant case-law can be added at the level of the European Court. The Human Rights Committee of the United Nations has always held that there was no prompt information on the reasons of arrest if such information was provided between 10 days and 3-5 weeks after the arrest.15 In S. Daley v. Jamaica (1998) it had the opportunity to add that 6 weeks of delay a fortiori accounted for a breach of Article 9(2) of the International Covenant on Civil and Political Rights.16 These indications as to the span of time proper to a “prompt” information can be transferred by analogy to the European system. What is true in the universal system, characterised by looser solidarities on human rights, must impose itself with even more force at a regional level permeated by much deeper solidarities in that respect. Thus, the indications of the United Nations Human Rights Committee may be regarded as a sort of minimum standard in the matter.

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

1. As usual, the Court had to deal with two types of situations which fall under the heading of Article 5(3). First, the periods of detention on remand without release on bail. Second, the qualities of the judge or officer authorized to rule on the extension of detention as opposed to release on bail. On the other hand, there has been no specific case-law as to the promptness of the (first) presentation to judicial authority. As to this last point, reference is still to be had to the Brannigan and McBride case (1993) and to the Sakik case (1997).17

2. As to the length of detention on remand without release, two further precedents may be noted. In L.A. v. France (1998), the applicant was detained on remand for 5 years and 3 months in a procedure concerning a homicide. The Court first stressed that the period under consideration must be calculated from the moment of incarceration up to the moment of conviction by a competent tribunal, notwithstanding that this trial judgment can be subsequently quashed. The fact that the cession has a retroactive effect is immaterial.18 The Court then goes over to sum up the main lines of its jurisprudence on a reasonable time which a detention on remand should not exceed.19 In the present case, the

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13 Ibid., § 64.

14 Rep., 1998-V, no. 83, pp. 1939 ff., § 46: “The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must take place “in accordance with a procedure prescribed by law” and be “lawful”. The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, pp. 17–18 and 19–20, §§ 39 and 45, and the Bizzotto v. Greece judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1738, § 31). Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 21, § 44)”.

15 MA, p. 351.


17 MA, p. 352.


19 Ibid., § 102: “It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying... with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It
motives of detention invoked, such as a danger of troubles to the public order, the danger of flight, the danger of collusion, the danger of pressure upon the witnesses, the necessity to protect the applicant himself, all had their relevance at the beginning of the procedure, but they lost their weight as time elapsed. Thus, there had been a violation of Article 5(3).

The Labita v. Italy case (2000) is similar. The applicant, suspected to be part of a mafia, was detained for 2 years and 7 months between the arrest and the first judgment. In order to justify the detention, the authorities relied on the danger of an alteration of evidence, on the dangerousness of the accused, on the important pieces of evidence pointing to the guilt of the accused and on the complexity of investigations in the field of organised criminality. However, as the Court noted, the applicant was arrested on the sole basis of indications made by a pentito (a former mafioso who has decided to cooperate with the authorities); such indications are highly problematical and they hardly suffice if they are not corroborated by other objective elements. Moreover, the motives invoked were too general and lost their weight as time passed. They could not justify a detention on remand for 2 years and 7 months. Thus, Article 5(2) had been violated.

It must be stressed that the situation was not in themselves a decisive indication of a breach of Article 5(3). There is simply a ‘special diligence’ to accelerate the case and conversely a stronger presumption of excess as time passes. However, it is the motives for a (prolonged) detention on remand which are decisive. Thus, if in Labita 2 years and 7 months were considered excessive on the basis of the motives given, it may be recalled that in Van der Tang v. Spain (1995), 3 years and 2 months of detention were considered justified, since there was a real danger of absconding. The conclusion is that States may have an obvious interest in establishing a periodical review of the motives of detention within their municipal sphere, then being able to convince the European Court that the motives put forward are not only a stereotype litany, but that they correspond to a close and real appreciation of the situation. If such a course would be adopted, the Convention would have realized much of the aim of Article 5(3). Moreover, pressure has to be maintained in order that criminal proceedings be expedited, delays being a great concern in many States. It may be added that the Labita case posed an interesting problem, that of the weight to be given to incriminatory statements of a pentito. It may well be that the weakness of the motives of detention found by the Court stemmed very much from the fact that the whole procedure was based on those statements.

3. Three cases concern the qualities of the judge or officer deciding on the detention on remand and its extension. The Niedbala v. Poland case (2000) follows the lines of Brincat v. Italy (1992). It was the prosecutor who decided the detention. Could he be considered a proper judicial authority in the sense of Article 5(3)? The Court recalled that the judicial authority made available must be independent from the executive and from the parties. To the extent that a prosecutor may intervene in later stages of the proceedings, his impartiality may arouse objectively justified doubts. Moreover, the prosecutor is subject to the control of the executive. No guarantees existed in order to prevent the same prosecutor to handle the case at any further stage. Thus, there had been a violation of Article 5(3). One may say that the Brincat case has been fully upheld and that there is a settled jurisprudence on the exercise of judicial authority by a prosecutor in this context. It is still possible to ask which is the exact relationship between the two arguments invoked: the fact that the prosecutor is dependent on the executive; the circumstantial fact of a possibility for a specific prosecutor to be seized at any further stage of the same case. It seems that the latter is only a subsidiary argument, reinforcing the first one ex abundante. It is on the level of principles that the Court places the necessary independence from the executive. Therefore, this argument alone is decisive, since in case of such a dependence – which holds true for prosecutors – there will ex hypothesi be an objectively justifiable doubt about impartiality, the very outcome Article 5(3) seeks to prevent.

In the Nikolova v. Bulgaria case (1999), the applicant was placed in detention on remand in the context of a procedure for misappropriation of a large amount of funds. She claimed that her request for release on bail had not been heard by an independent magistrate. The Court held that the magistrate referred to in Article 5(3), further than appearing as objectively independent from the parties and the executive, must give a personal hearing to the accused and possess the power to order release if no valid reasons call for further detention. In casu, the investigating magistrate called upon was not independent from the prosecutor. It was not guaranteed that he would not intervene in subsequent stages of the proceedings. He did not have power to take a binding decision as to the question of detention. Thus, Article 5(3) had been breached. Finally, in Aquilina v. Malta (1999), the applicant had been placed in detention with the charge of having defiled his girlfriend in a public place and of having subsequently threatened her family. The claim of the applicant to be released on bail was heard by a Police Judge. After having summed up its jurisprudence on the matter, the Court proceeded to assess the facts of the case essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention. The persistence of reasonable suspicion that the person arrested has committed an offence – a point which was not contested in the present case – is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (see, among other authorities, the Letellier v. France judgment of 26 June 1991, Series A no. 207, p. 18, § 35 = 12 HRLJ 302 (1991)).
case. The magistrate seized had no power to order release—thus, Article 5(3) had been violated. All these precedents convey the impression of well-settled standards having crystallised in these matters.

4. So far as the promptness of the first presentation to judicial authority is concerned, there is a rich jurisprudence of the Human Rights Committee under the Covenant to which recourse may be had. The case-law reveals a great number of violations of Article 9(2) of the Covenant. It was held in Freemantle v. Jamaica (2000) that 4 days between the arrest and the presentation to the judge were an excessive delay in breach of Article 9(2). The longest delay in breach of Article 9(2) was found in the Lee Hong v. Jamaica case (1999) which revealed a delay of 3 months between the date of arrest and presentation to judicial authority. The other delays, all violative of Article 9(2), were situated somewhere in between. The jurisprudence of the Committee has been centred upon the requirement that the delay should not exceed “a few days”. Up to the year 2000, the shortest delay for which a breach was found turned around 7 days. With the quoted Freemantle case, the relevant delay was lowered to 4 days. There is thus a progressive tightening of the requirements under Article 9(2). It would seem that a further step in the same direction is hardly possible, since 4 days are the very least which can be reconciled with the general principle of “a few days” providing the supreme guideline in the matter. As the rule is that delays should not exceed a few days—which connotes the idea that to the extent the days are few, there is no injustifiable delay—two or three days must be considered regular. To hold otherwise would imply to abandon the few days-test. This would not be warranted on any account.

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

In the period under review, two cases deserve mention under the present heading. In the Nikolova v. Bulgaria case (1999), it was the extent of judicial review which was at stake. The applicant complained that her application for release had not been examined on formal and material grounds as required by the Convention. The authorities, according to her, examined only the formal gravity of the type of offence with which she was charged. The Court held that the tribunal or authority seized must examine the arguments of the accused on the merits. The guarantees of Article 5(4) would be deprived of much of their substance if the judge limited himself to a control of the legal qualification of the offence as undertaken by the prosecuting authority. Moreover, the tribunal had received written observations by the prosecutor whereas the applicant was not allowed to consult the file and to respond to the mentioned observations. There had thus also been a violation with respect to the equality of arms. For both these reasons, Article 5(4) has been violated. This precedent can be linked with all those former cases dealing with the effectiveness of the provided remedy. The Niedbala v. Poland case (2000) is even more centred on the question of equality of arms. The applicant and his lawyer had not enjoyed any access to the tribunal pronouncing itself on an extension of the detention. According to the jurisprudence of the Court there must be an oral hearing. The breach of Article 5(4) is even more striking if one takes account of the fact that the prosecutor had had access to the audience of the tribunal and that his conclusions were not communicated to the applicant or to his lawyer. It seems that on these aspects too there is a settled jurisprudence, to which the Western European States have conformed quite largely, whereas somewhat more adaptations are still necessary in the Central and Eastern European States.

v. Bulgaria judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3298, § 146). It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, pp. 21-24, §§ 44, 47 and 51 = 7 HRLJ 321 (1986)). In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention.

48. To be in accordance with Article 5 § 3, judicial control must be prompt. Promptness has to be assessed in each case according to its special features (see the De Jong, Baljet and Van den Brink judgment cited above, pp. 24 and 25, §§ 51 and 52). However, the scope of flexibility in interpreting and applying the notion of promptness is very limited (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62).

49. In addition to being prompt, the judicial control of the detention must be automatic (see the De Jong, Baljet and Van den Brink judgment cited above, p. 24, § 51). It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court (see the De Jong, Baljet and Van den Brink judgment cited above, pp. 25-26, § 57). It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (see, mutatis mutandis, the Kart v. Turkey judgment of 25 May 1998, Reports 1998-III, p. 1185, § 125). Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody (see the Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, p. 2282, § 76 = 18 HRLJ 221 (1997)).

Furthermore, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention. The same could hold true for other vulnerable categories of arrested persons, such as the mentally weak or those who do not speak the language of the judicial officer.

33 Ibid., § 63.
34 MA, p. 354.
36 Judgment of 4 July 2000, § 68.
E) Right to compensation for illegal detention, Article 5(5)

There were no relevant decisions reported during the period under review.

III) Fair trial guarantees (Article 6)

A) General Aspects

1. Two cases dealt with the problem of freedom from self-incrimination. In the Condon v. United Kingdom case (2000), the applicants claimed that the judge allowed the jury to draw inferences from their silence during the interrogation by the police, inferences which were incriminating. As in the Murray v. United Kingdom case (1996), the Court started by recalling that the prohibition to draw inferences from the silence of an accused is not absolute. Thus, silence may help to assess the force of the other incriminating elements. However, it is impossible to found a conviction solely or essentially upon silence or refusal to respond. In casu, contrary to the Murray case, the applicants, due to the advice of their counsel, made statements during the trial and even explained their previous silence. Thus, the judge should have indicated to the jury that adverse influences could be drawn from these silences only to the extent that the jury would be convinced that they stemmed from the incapacity to give an answer and that they were not due to the advice of a lawyer. The judge did not sufficiently direct the jury.

This shortcoming cannot be corrected on appeal, since the appeal judge has no power to reassess the judgment of the jury. There has therefore been a violation of Article 6(1). Contrary to the cases in the previous period of review, the Condon case is not so much concerned with the question what type of adverse inferences can directly be drawn from silences. The question here is another one: it concerns the directives that a trial judge must give a jury with respect to such drawing of inferences. On this point, it was held that the trial judge must explicitly tell the jury under what factual conditions an inference of this type may be drawn. To the question of “bridging-silences” at stake in the Murray case is now added the further one of the link with the facts – the reason of the silence, which directs the admissibility of the inferences.

The Coëme and others v. Belgium case (2000) is concerned with the incriminating use of statements which the accused had proffered when heard as a witness. The Court applied the usual “sole or accessory-element” test. It was held that the Court of cassation had founded the conviction on other elements than those statements. The essential point was that the finding of guilt of the accused was not based on evidence obtained against his will by coercion or by other means of pressure. Thus, Article 6 had not been violated. The rule applied seems akin to that on silence. It can be formulated as follows: if essential, important or at least material proof for convicting the accused is derived directly and mainly from inferences drawn from silences or statements of the accused as a witness, there will be a breach of Article 6; if on the other hand specific silences or statements are used to shed light on other evidence positively secured, Article 6 will not be breached. Quaere, however, if silences and statements should be put on a similar footing. In the case of statements, the accused chooses to speak. What is essential at that stage is that he is not coerced or lured into that conduct, for under such circumstances the right not to incriminate oneself would be circumvented. That is the reason why the Court rightly pointed out that the freedom from “coercion” is a further essential element when dealing with positive statements.

2. As to procedural aspects, four cases may be mentioned, two of them being of greater interest. In the Dikme v. Turkey case (2000), there had been a refusal to allow the accused any access to a lawyer during the whole period of detention by the police. As in Edwards v. United Kingdom (1992), the Court stated that it must look to the fairness of the proceedings as a whole, taking into account the stages of appeal and cassation. In the present case, there had been no violation of Article 6, since the incriminated judgment, which refused to take account of the unavailability of a counsel, was quashed by the court of cassation. Another problem was at stake in the Coëme and others v. Belgium case (2000). There was the absence of a loi d’application, thus rendering uncertain the procedure which the court of cassation would follow. According to the Court this state of affairs was contrary to the requirement of a fair trial since the task of the defence was considerably strained by the surrounding procedural uncertainties.

A more delicate problem was posed in the V. v. United Kingdom case (1999). A baby of 2 years had been savagely murdered by two boys 10 years old at the moment of the events. The two boys, V. and T., asked the Strasbourg Court not to reveal their identity. As the two cases were joined the Court delivered two separate judgments with the same result and identical reasoning. The national trial of these boys took place in front of an ordinary court, judging also adults. It was the formal procedure – albeit somewhat modified in order to take account of the age of the accused – which was followed. It has been claimed that this formal and solemn procedure had profoundly troubled the young accused to the point of not permitting an adequate defence. The European Court of Human Rights first stated that Article 3 of the Convention had not been breached: there was no inhuman or degrading treatment. As regards fair trial, the Court held that the formal procedure, with its public scrutiny, had troubled the accused, not allowing him to consult regularly with his counsel. Thus, there had been a violation of Article 6(1).

It is quite remarkable that the decision on this point was taken with only one dissenting voice, which by the way was not the one of the British ad hoc-judge, but that of Judge Baka. Judge Baka held that Article 6(1) does not require that a child charged with a criminal offence should always be tried either by a juvenile court or by an adult court in private; he added that the proceedings on a
serious criminal charge almost inevitably cause strong feelings of anxiety; and finally, a series of special measures were taken, designed to ensure that the accused would be able adequately to participate in the trial. Moreover: "In this situation, fairness of a criminal trial cannot mean much more than ensuring that the child is defended adequately by highly trained professional counsel and that the necessary facilities for the defence are fully provided - as they were in the present case. In terms of fairness of criminal proceedings, it is rather illusory to expect that a child of this age could give any legally relevant instruction to his or her lawyer in order to facilitate his or her defence". In this sensitive case, much turns on the assessment of the relevant evidence, an assessment which cannot be undertaken from the outside. It however seems to the present commentator that all necessary adjustments to the procedure in order to suit the peculiarity of the accused had been made. To this, one may add a general consideration. While it is necessary to avoid all excess, a certain solemnity of the procedure (and equally minor facts as that of the judge raised on a dais) serves also proper purposes. It is essential that the young boys realize the gravity of their acts since that is the very basis of a mental and moral progress. Too lenient a conduct blurs that feeling and may even lead to a heroisation of the act. Thus, it seems that the dissent of Judge Baka has much to recommend itself. It may be added to this, with respect, that the dissents who blamed the majority for not having found also a breach of Article 3 gave a highly undesirable interpretation to the scope of that Article. If such a trial, procuring some stress to the accused not the least because of the gravity of their crime, is accounted as an 'inhuman or degrading treatment' not too far from the shades of torture, one may well ask where we will end up.

An interesting case arose also in the *Grindin v. Russia* case (2000) at the level of the United Nations Human Rights Committee. This case centred on an atmosphere of hostility against the accused in the courtroom. It was claimed that the judges did nothing to counter this atmosphere of pressure upon the accused. A proper defence would have been impossible, while the witnesses against the accused could not have been interrogated properly. On the face of these facts, the Committee concluded that Article 14(1) of the Covenant had been violated.

3. Finally, one may mention the advisory opinion of the Inter-American Court of Human Rights on *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* (1999). By a request dated 9 December 1997, Mexico asked the Inter-American Court to pronounce on a series of questions relative to the consequences of Article 36 of the Vienna Convention on Consular Relations (right of the accused to receive consular assistance) within the Inter-American system of human rights. The answers given by the Court interest us on four points.

(a) The rights and duties accorded by the Convention do not extend only to detainees awaiting capital punishment, but to all persons in detention and charged with a criminal offence (§ 100-1). The authorities of the detaining State must inform the detainee of his rights to consular protection at the moment of deprivation of liberty or at least before the person concerned makes his first declaration to them. This interpretation stems from considerations of *effet utile* recognized under Article 36 of the Convention (§ 106).

(b) An effective and equitable defence for a foreigner depends very much upon his possibility to get in contact and to enjoy the protection of the consular authorities of his home-State. Therefore, the notification provided in Article 36 of the Convention must be seen as a minimum guarantee for a fair trial, as required by Article 14(1) of the Covenant on Civil and Political Rights, applicable to the American States (§§ 121-124).

(c) If the duty of notification imposed by Article 36 has not been respected, the carrying out of a death sentence constitutes a violation of the prohibition to deprive arbitrarily an individual of his life (§ 137).

41 Partly Diss. Op. Baka: "In the present case the authorities took a series of special measures designed to ensure that the accused boys could participate adequately in the trial. These measures included familiarising them with the courtroom, an explanation of the procedure, a shortened court day with regular break intervals corresponding to the normal school schedule and the presence of social workers prior to and during proceedings. The trial judge also made it clear that he would adjourn whenever the social workers or defence lawyers told him that one of the defendants was showing signs of tiredness or stress".

48 *ibid.* = 20 HRLJ 480 (1999).

49 Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens and Butkeyevich: "In our view the applicants’ trial and their sentence taken together amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. The combination in this case of (i) treating children of ten years of age as criminally responsible, (ii) prosecuting them at the age of eleven in an adult court, and (iii) subjecting them to an indeterminate sentence, reached a substantial level of mental and physical suffering. Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all. (…)"


52 Cl. §§ 121-122:

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

122. The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial".
(d) The fact that a State is organised as a federal or as a unitary entity is a purely domestic question which has no influence upon the international obligations of the State, in particular those under the Vienna Convention on Consular Relations or those under human rights instruments (§ 140).54

HOLDINGS (c) and (d) became relevant in the slightly later decision of the International Court of Justice in the LaGrand case (Germany v. USA) (2001) where it was held that the rights under Article 36 of the Convention were not only inter-State rights but also rights accruing directly to the individual. Thus, by non-notification, both the rights of Germany and of its citizen had been infringed. As there had been no means of redress of the violation of these rights at the municipal level, the United States were held to have breached the Convention.55

B) Equality of arms

Apart from the cases already mentioned under Article 5(4), i.e., the Nikolova and the Niedbala judgments,56 and apart from the Gridin case,57 which all raised also questions as to equality of arms, two further cases deserve mention under the present heading. In Visoinc v. France (2000), it was the absence of communication of the conclusions of the avocat général to the accused or his counsel which was at stake. Not having received these conclusions, the applicant was unable to respond to them in the proceedings held at the level of the court of cassation. The Court dryly found that there had been an infringement of equality of arms. Having regard to the importance of the proceedings for the applicant, he ought to have had access to these conclusions.58 The Rowe and Davis v. United Kingdom case (2000) also concerns non-disclosure of relevant elements. Certain elements of the evidence had not been disclosed to the applicant or his counsel on grounds of public interest. The Court starts by recalling that the right to disclosure of material evidence is not absolute. Some reasons of non-disclosure are recognized, such as national security, the protection of witnesses or other. Assessment on this point pertains to the national judge. The Court has only to ascertain if the procedure has been fair overall, in particular if the requirements of adversarial proceedings and of equality of arms have been respected. The present case was found unfair: the prosecution did not disclose the evidence even to the trial judge, who therefore was not in a position to appreciate it. Thus, Article 6(1) had been violated.59 The result was in both cases quoted that the balance tilted in favour of the prosecution, either because it could submit unchallenged evidence, or because it could appreciate alone, without any judicial scrutiny, if non-disclosure was appropriate. The holdings of the Court thus seem legitimate.

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

As to this right, there is no relevant case-law of the European Court. However, two cases of the United Nations Human Rights Committee may be noted. The Maleki v. Italy case (1999) concerns the classical problem of judgment in absentia. The applicant had been convicted for drug offences without his personal presence at trial. According to the Committee, in an opinion more densely motivated than usual, a trial in absentia is compatible with Article 14 of the Covenant only to the extent the accused has been put on notice of the hearing in reasonable time. It must be secured that he knows that proceedings have been initiated against him. In the present case, the State party did not show that these requirements were respected. It limited itself to contend that it "assumed" the applicant had been put on notice. This is not sufficient. However, the default could have been cured if the applicant had enjoyed the right to request a new judgment assuring his personal presence. It seems that this was impossible. Hence, there had been a violation of Article 14(1) of the Covenant.60

In the Gallimore v. Jamaica case (1999), the applicant had not been allowed to participate personally in the proceedings relative to the legal qualification of his acts ("capital / non-capital offence") and in particular to the fixation of a non-parole period (set at 15 years). The Committee notes that in these proceedings the judge exercises discretionary powers which form an essential part of the determination of a criminal charge. Article 14(1) and 14(3)(d) of the Covenant were violated, since the author was not afforded the opportunity to make any submissions prior to the decision of the judge nor the opportunity to seek review of that decision.61

D) Right to adversarial proceedings and right to challenge evidence

- See the Rowe and Davis v. United Kingdom case (2000), above, B) Equality of arms.

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

1. This heading ordinarily prompts large amounts of case-law. In the short period under review, two cases deserve particular mention. In the Çıranklar v. Turkey case (1998), the problem turned around the presence of a military judge in the tribunal which decided on the charges against a student having participated in an unauthorised pro-Kurdish demonstration. In that National Security Court, one of the three judges was a regular army officer. The Court first sums up the main features of its jurisprudence on the question of independence and impartiality of a tribunal.62 In the present case, some

54 § 140: "Moreover, the Vienna Convention on the Law of Treaties provides that: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'. The Court has established that no intention to establish an exception to this provision can be read from either the letter or the spirit of the Vienna Convention on Consular Relations. The Court, therefore, concludes that international provisions that concern the protection of human rights in the American States, including those recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure". 55 LaGrand case = 22 HRLJ 36 (2001), §§ 64 ff., partic., §§ 73 ff. and 79 ff.
56 See above, II.D. at p. 355.
57 See above, III.A.2, at p. 357.
62 Rep., 1998-VII, no. 94, p. 305ff, § 38: "The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the Findlay v. the United Kingdom judgment of 25 February 1997, Reports 1997-I, p. 281, § 73). As to the condition of "impartiality" within the
aspects could objectively justify the doubts of the applicant as to the independence and impartiality of the tribunal: (1) the military judges appointed still continued to belong to the army; (2) they remained subject to military discipline and assessment reports were compiled on them for that purpose; (3) their appointment to a great extent depended on the action of administrative authorities of the army; (4) their term of office was only four years, but could be renewed. Taking account of the foregoing aspects, the fears as to the independence and impartiality of the tribunal seemed objectively justified. Thus, Article 6(1) had been violated.

In the *Tierce and others v. San Marino* case (2000), it was the impartiality of the *Commissario della Legge* which was at stake. First, there had been confusion between functions of investigation and of trial judgment; later, the same *Commissario* exercised again functions of investigation, when the case passed on appeal. As the Court stressed, it is the objective impartiality (appearance of impartiality) of the *Commissario della Legge* which constitutes the kernel of the problem.\(^{64}\) In casu, the fears of the applicant with respect to that impartiality may be considered as objectively justified. The *Commissario* had conducted detailed investigations on the applicant during two years and finally condemned him. Thus, there had been a violation of Article 6(1).\(^{65}\)

2. At the level of the United Nations Human Rights Committee, one may add one further case dealing with improper instructions to the jury.\(^{66}\) Thus, in the *M. Robinson v. Jamaica* case (2000), the Committee reiterated its jurisprudence on the matter. Its scope of control is limited to examine if there have been arbitrary instructions, a denial of justice or if the judge manifestly violated his obligation of impartiality. The rest is a matter of appreciation left to the municipal tribunals.\(^{67}\)

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

1. It needs to be appreciated that “reasonable time” is a circumstantial question depending on the particularities of the case. The legal norm applicable tends in this matter towards a strong individualisation, by moulding the particular facts of the single situations. The two main forces of the law – generality and predictability, individualisation and flexibility – here very openly manifest themselves and enter into collision as they do in other fields of international law, especially in the law of maritime delimitation. The Human Rights Committee privileged strongly the individualising element, concluding more or less discretionarily that a particular time-period was or was not unreasonable.\(^{68}\) The European Court searched for a more balanced approach, by trying to make explicit the elements which typically intervene for holding a specific time-period excessive or not.\(^{69}\) Some new precedents may be added to those mentioned in the main article.

2. The European Court dealt with allegations of unreasonable delay in eight cases. In the *Coeme and others v. Belgium* case (2000) the proceedings up to the judgment had lasted 4 years and 7 months. However, Article 6 had not been violated since the case was complex, questions of immunities were at stake and there had been no period of inactivity imputable to the authorities of the State.\(^{70}\) In the *Martins and García Alves v. Portugal* case (2000), 12 years and 1 month had elapsed before a judgment was delivered. The requirement of reasonable time had been violated, if only because of the total inactivity of the prosecutor during 4 years and 7 months.\(^{71}\) In *Kadla v. Poland* (2000) the delay before judgment was of 9 years; it was excessive,

→ meaning of that provision, there are two tests to be applied: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. It was not contested before the Court that only the second of these tests was relevant in the instant case. When applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. As in regard to independence, appearances may be of some importance; it follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important. It is not, however, decisive; what is decisive is whether the fear can be held to be objectively justified (see, for example, the *Gauterin and Others v. France* judgment of 20 May 1998, Report 1998-II, pp. 1030–31, § 58).\(^{72}\)


\(^{64}\) Judgment of 25 July 2000, § 76: “Seule l'impartialité objective est en cause dans cette affaire, car le requérant n’a pas mis en cause l’impartialité subjective du Commissario della Legge, ce qui peut expliquer qu’il n’ait pas présenté une demande en récusation; il échêt dès lors de se demander si, indépendamment de la conduite du juge, certains faits vérifiables autorisent à suspecter de son impartialité. En la matière, même les apparences peuvent revêtir de l’importance. Il y va de la confiance que dans une société démocratique les tribunaux se doivent d’inspirer au public, à commencer, au pénal, par les prévenus (arrêt Padovani précité, p. 20, § 27). Les inquiétudes subjectives du requérant, pour compréhensibles qu’elles puissent être, ne constituent pas l’élément déterminant: il échêt avant tout d’établir si elles peuvent passer pour objectivement justifiées en l’occurrence (arrêts Fey c. Autriche du 24 février 1993, série A n° 255-A, p. 12, § 30 et Nortier c. Pays-Bas du 24 août 1993, série A n° 267, p. 15, § 33)” (for the moment, only the French text of the judgment is available).

\(^{65}\) **Ibid.** §§ 79-80.

\(^{66}\) **MA,** p. 363, in particular footnote 169.

\(^{67}\) *Communication no. 731/1996,* 13 April 2000, § 9.4: “With regard to the author’s allegations of violations of article 14, paragraphs 1 and 2, on the ground of improper instructions from the trial judge to the jury on the issues set out in para. 3.4 supra, and the admission of the confession statement and the police-officers’ testimony into evidence, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge’s instructions to the jury and the conduct of the trial were in compliance with domestic law. As both parties also have pointed out, the Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge’s instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. The material before the Committee and the author’s allegations do not show that the trial judge’s instructions or the conduct of the trial suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol”. See also *Hunkle v. Jamaica* (1999), *Communication no. 710/1996,* § 6.5.

\(^{68}\) **MA,** pp. 364-365.

\(^{69}\) **MA,** p. 363.

\(^{70}\) *Judgment of 22 June 2000,* §§ 131 ff.

also with regard to the depressive character of the accused (put on detention on remand) which asked for a special
diligence.73 In Selmouni v. France (1999), the applicant had
suffered maltreatment in a police station; he had been
beaten and insulted.75 The Court held that a delay of 6
years and 7 months in order to rule on these events is
excessive, in particular with regard to the fact that the
violation of an essential right was at stake. No
circumstance known to the Court could justify such a
delay. Thus, Article 6 had been violated.74

The Court dealt along similar lines with a series of other
cases: Cherekrak v. France (2000), delay of 4 years and 9
months (excessive);75 Bertin-Mourot v. France (2000),
delay of 14 years and 6 months (excessive);76 Guisset v.
France (2000), delay of 5 years and 1 month (excessive);77
Bouriaia v. France (2000), delay of 9 years and 3 months
between arrest and judgment on appeal (excessive).78

Summing up, one may say that the cases fit into the
classical categories: (1) the complexity of the case (cf.
Coëme case); (2) the handling of the case by the State
organs: whether reasonably active or not (cf. Martinia
case); (3) the importance of the end of the procedure in
the personal situation of the accused (cf. Kudia; Selmouni).
The importance just mentioned may also stem
from the importance of the right breached, e.g. acts of
torture.

3. The Human Rights Committee for its part continued
its purely casuistic approach, generally moving directly to
the violation of Article 14(3)(c) of the Covenant without
delivering any more general framework of criteria
underlying its decision. This course has already been
criticised.79 Thus, in Brown and Parish v. Jamaica (1999),
31 months elapsed between the arrest and trial
judgment, and 28 months between trial judgment and the
judgment on appeal. The Committee held that the delay
had been excessive.80 A series of cases deal with delay
between the arrest and trial judgment. In that context it
was held that 23 months,81 29 months,82 33 months,83 1 year
and 9 months,84 2 years,85 2 years and 5 months,86 and 2 1/2
years87 were all excessive delays. Another series of cases
deal with delay between trial judgment and judgment on
appeal. In this context it was held that 23 months,88 25
months,89 2 years and 4 months,90 2 years and 7 months,91
and 4 years92 were all excessive delays.

G) Presumption of innocence

Under this heading, one case decided by the Human
Rights Committee deserves mention. In Gridin v. Russia
(2000), there had been several public statements, including
those of judicial personnel, which presented the applicant
as guilty before his conviction. These statements had
aroused a great interest in the media. The Committee
recalled its General Comment no. 13 where it stressed that
the public authorities have a duty to avoid prejudging the
outcome of a criminal trial. This duty had been breached
in the present case, amounting to a violation of Article
14(2) of the Covenant.93 The Gridin case thus adds up to
the quite similar Allêmt de Ribenmont case (1995) discussed
in the previous period of review.94

H) Right to public audiences and to a publicly pronounced
judgment

1. As to this aspect, there had been no relevant case-law in
the previous period of review. In the year 2000, the
question was raised three times. First of all, it may be
useful to recall the bases of the right to publicity: “The
Court reiterates that it is a fundamental principle
enshrined in Article 6 § 1 that court hearings should be

95 Judgment of 28 July 1999 = 20 HRLJ 228 (1999), § 82: “The
applicant complained that he had been subjected to various forms
of ill-treatment. These had included being repeatedly punched,
kicked, and hit with objects; being forced to kneel down in front of
a young woman to whom an officer had said “Look, you’re
going to hear somebody sing”; having a police officer show him
his penis, saying “Here, suck this”, before urinating over him;
being threatened with a blowlamp and then with a syringe; etc.
The applicant also complained that he had been raped with a
small black truncheon after being told “You Arabs enjoy being
screwed”. He stressed that his allegations had neither varied nor
been inconsistent during the entire proceedings and submitted
that the expert medical reports and the evidence heard from the
doctors who had examined him established a causal link with the
events which had occurred while he had been in police custody
and gave credence to his allegations”; § 99: “The acts
complained of were such as to arouse in the applicant feelings of
fear, anguish and inferiority capable of humiliating and debasing
him and possibly breaking his physical and moral resistance.
The Court therefore finds elements which are sufficiently serious
to render such treatment inhuman and degrading (see the Ireland v.
The United Kingdom judgment cited above, pp. 66-67, § 167, and
the Tomasi judgment cited above, p. 42, § 115 = 13 HRLJ 453
(1992)). In any event, the Court reiterates that, in respect of a
person deprived of his liberty, recourse to physical force which
has not been made strictly necessary by his own conduct
diminishes human dignity and is in principle an infringement of
the right set forth in Article 3”.
74 Ibid., § 112 ff.
77 Judgment of 26 September 2000.
79 MA, p. 364.
80 Communication no. 665/1995, § 9.4-9.5:
“9.4 The authors have claimed to be victims of a violation of
Article 14, paragraph 3(c), both in regard of the trial and the
appeal, as the trial was not held until 31 months after the
arrest of the authors and the appeal was not decided until 28
months after the trial. With regard to the first period, the
Committee found that it should be examined on the merits
also under article 9, paragraph 5, with regard to these delays, the Committee finds that there has been a
violation of the said provisions, without offering any further
explanation. In the absence of any circumstances justifying
these delays, the Committee finds that there has been a
violation of articles 9, paragraph 3, and 14, paragraph 3(c),
with regard to the first period, and article 14, paragraph 3(c),
in conjunction with Article 14, paragraph 5, with regard to the
second period”.
85 Smart v. Trinidad and Tobago, Communication 672/1995,
§ 10.2.
89 Smith and Stewart v. Jamaica, Communication 666/1995,
§ 7.4.
held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society. The principle is thus that criminal proceedings have to be public, especially at trial stage. At higher stages, e.g. on appeal, there must be publicity to the extent that an oral phase takes place, for example if witnesses have to be heard. The publicity extends to the pronouncement of the judgment. A summary of the reasons is enough at trial stage. At higher stages, especially on cassation, it is sufficient that the judgment be delivered in written form to the parties, the public being able to request a copy of the judgment or to consult it at the seat of the court. Several reasons may justify the exclusion of the public during a trial: the interests of morals, public order or national security; the interests of juveniles or the protection of private life; the interests of justice.

2. In the Stefanelli v. San Marino case (2000) there had been criminal proceedings (for illegal sale of some milk products) without public audience at the trial. The Court simply found that none of the motives for the exclusion of the public provided in the European Convention applied. Thus, there had been a violation of Article 6(1). The same conclusion was reached in Tierce v. San Marino (2000) where there had been no public audience on appeal, and in Guissot v. France (2000) where there had been no public hearings at the Cour de discipline budgétaire et financière. For this traditionally well-settled aspect, which has never prompted much jurisprudence by the Court, the three cases mentioned reflect an unusual upsurge of precedents. It cannot however be said that this foreshadows a brighter jurisprudential future for this right whose life avoids the glittery limelight.

I) Adequate time and facilities for the preparation of the defense

Only sporadic precedents may be added to this heading. At the level of the Human Rights Committee, three cases may be mentioned. In Philipp v. Trinidad and Tobago (1998), the lawyer for the accused was appointed only three days before the trial. Thus, there could be no adequate preparation of the defense. In Brown v. Jamaica (1999), the lawyer of the accused had been absent during the deposition of witnesses of great importance. There had thus been absence of effective defence.

As can be seen, there is nothing really new under this heading. There is only addition to the previous case-law along the same lines.

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

1. Under this heading too, the addenda are rather sporadic. The Khalfaiou v. France case (1999) reveals a violation of Article 6(1) by the requirement that the applicant constitutes himself prisoner in order to be able to exercise a remedy against a conviction. This aspect had already formed a part of the Poutiämä v. France judgment (1993). In Oktimo v. Turkey (2000), the problem had been the refusal to allow the applicant to consult counsel during the whole period of pre-trial arrest. It was held that the fairness of the proceedings had not been compromised, since the incriminated judgment, not taking account of the mentioned contention, had been quashed by the Court of cassation, the matter being again handled by the lower court. The Biba v. Greece case (2000) can be added to the Twalib v. Greece case (1998) of the previous period of review. Both are concerned with the conditions under which legal aid counsel must be granted.

96 Cf. Axen (supra, footnote 95), §§ 20-28; Pretto (supra, footnote 95), §§ 29-32; Sutter (supra, footnote 95), §§ 31-34.
98 Judgment of 8 February 2000, §§ 21-22: "21. Although the Government did not rely on this provision, the Court points out that under the second sentence of Article 6 § 1 the press and public may, in certain circumstances, be excluded from the trial. The Court notes that the fact that no hearing was held did not result from a decision by the judge but from the application of the law in force. However, having regard to the facts of the case and the applicant's alleged omissions, the Court is of the opinion that none of the sets of circumstances set out in that provision was applicable.
22. Accordingly, the Court holds that there has been a violation of Article 6 § 1 of the Convention in that the applicant's case was not heard in public by the trial and appellate courts."

The test thus focuses on the motives for exclusion of the public.

100 Judgment of 26 September 2000, § 76.
102 Communication no. 773/1997, § 6.6: "With regard to the author's representation at the preliminary hearing, the Committee notes that it appears from the trial transcript that the author's representative was absent during the deposition of two prosecution witnesses at the preliminary hearing on 8 June 1992, and that the magistrate continued the hearing of the witnesses and only adjourned when the author indicated that he did not wish to cross-examine the witnesses himself. The cross-examination was then adjourned to 17 June 1992, and, in the absence of the lawyer, again to 7 July 1992. After the adjournment of 17 June 1992, the judge appointed new counsel for the author, who however declined to cross-examine the witnesses. The Committee refers to its jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases. See inter alia, the Committee's Views in respect of communication No. 750/1996 (Clarence Marshall v. Jamaica), adopted on 3 November 1998. In the present case, the Committee is of the opinion that the magistrate, when aware of the absence of the author's defence counsel, should not have proceeded with the deposition of the witnesses without allowing the author an opportunity to ensure the presence of his counsel. The Committee is of the opinion that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant."
2. At the level of the United Nations Human Rights Committee, three aspects have produced new case-law. First, in Brown v. Jamaica (1999), the lawyer of the accused had been absent during the deposition of important witnesses; this accounted for a breach of Article 14(3)(d) of the Covenant.108 Second, in Forbes v. Jamaica (1998) the applicant complained that this legal aid counsel was a junior counsel without much experience. According to the Committee, there had been no violation of Article 14 of the Covenant. The appointed counsel was a qualified lawyer who collaborated with the principal lawyer of the accused.109 Third, there is a series of cases which deal with the frequent problem of a legal aid counsel who, finding no merit in the appeal, decides not to proceed to it. In such cases, the State party must appoint another lawyer. Moreover, the counsel has to inform the accused that he finds no merit in the appeal so as to allow him to appoint another lawyer, especially in cases of capital sentence.110


K) Right to call and cross-examine witnesses

In the period under review, one rather interesting case dealt with witnesses not personally confronted to the accused and who turned out to be the real basis for the conviction. In the A.M. v. Italy case (1999), the applicant was accused of sexual assault on a minor and gross indecency in a public place committed during a stay in the United States of America. The victim, his parents and other witnesses involved in the case, all domiciled in the United States, had not been present during the trial held in Italy. Thus the accused was never confronted to witnesses deposing against him. The Court first recalls the principles carved out of its former jurisprudence.115 In the present case, there has been a conviction based solely on the declarations made before trial by the several witnesses in the United States. The accused has not been confronted to these witnesses at any stage of the proceedings. Thus, there has been a violation of Article 6(1). This case manifestly adheres to the controlling criterion used by the case-law up to now: if unconfirmed testimony constitutes the sole basis for the conviction, there is no fair trial. Such witness evidence to be accountable must be corroborated by other evidence. In view of the importance of a close examination of witness evidence, it is hardly possible to escape that conclusion. Otherwise, one risks a series of unjustified convictions, since it will be easier to forge a case. On the other hand, the present case also reveals the great difficulty of this course. Could it be expected of the presumptive victims and witnesses of these sexual offences to undertake a journey to a State lying far away in order to be confronted with the alleged aggressor? This may seem to ask too much, but then some form of video conference could be organised – to the extent that this is permissible under the municipal law of the concerned State.

L) Right to a reasoned judgment

Two new cases from the United Nations Human Rights Committee may be added to those discussed in the previous period of review. It may be recalled that under the system of the Covenant and of the American Convention, the right to a reasoned judgment is the necessary basis for the enjoyment of the guaranteed right to appeal (see Article 14(5) of the Covenant on Civil and Political Rights; Article 8(2)(h) of the American Convention on Human Rights). The Lumley v. Jamaica case (1999) deals with the simple situation of a judgment which was not communicated to the accused – in blatant violation of the right to a reasoned judgment.117 In Bailey v. Jamaica (1999), it was held that in the case of a judgment delivered orally, some notes reproducing its main points may suffice.118

108 See above I) at p. 361.
110 MA., p. 369, footnote 288.
111 Communication no. 663/1995, § 8.6: "(...) the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, the author should have been informed that legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him. (...) The Committee concludes that there has been a violation of Article 14, paragraph 3 (d)."
112 Communication no. 668/1995, § 7.3.
114 Communication no. 750/1997, § 7.5.
115 Judgment of 14 December 1999, §§ 24-25:

"24. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (...).

25. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (...). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see the Van Mechelen and Others judgment cited above, p. 712, § 55; the Safdi v. France judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; and the Unterpreuter v. Austria judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 51-53)".

116 Ibid., § 28.
118 Communication no. 709/1996, § 7.4: "With regard to the alleged violation of Article 14, paragraph 5, on the ground that the Court of Appeal did not issue a duly reasoned judgment, the Committee recalls its prior jurisprudence (Communication No. 230/1987, Henry v. Jamaica, Views adopted on 1 November 1991; Communication No. 283/1988, Little v. Jamaica, Views adopted on 1 November 1991) where it has held that in order to enjoy the right to have his conviction and sentence reviewed by a higher tribunal according to law, a convicted person is entitled to have, within a reasonable time, access to duly reasoned, written judgements. Even though Article 14, paragraph 5, itself merely
M) Right to appeal

As already mentioned, Article 14(5) of the Covenant on Civil and Political Rights grants everyone convicted of a crime the right to have his conviction and sentence reviewed by a higher tribunal according to law. In the Vázquez v. Spain case (2000), the remedy existed only for some quite limited defects of law; in particular, questions of fact could not be raised on appeal. According to the Committee, Article 14(5) had been violated since the inadmissible trial judgment could not be fully reviewed on appeal. It may be noted that the applicant had recourse to the United Nations Committee and not to the European Court. This is due to the fact that the European Convention contains no guarantee equivalent to the one in Article 14(5) of the Covenant.

IV) Prohibition of retroactive criminal law (Article 7)

The question of retroactivity arose in the Westernman v. Netherlands case (1999) at the level of the United Nations Human Rights Committee. The applicant had been convicted for refusal to obey military orders on the basis of an amended provision of the military penal code. According to the Committee, there was no violation of Article 15 of the Covenant. The deeds for which the applicant had been convicted were already punishable under the old code. The sentence of 9 months of imprisonment was not heavier than that applicable also under the old code. Thus, one could not speak of a retroactive application of a criminal law. One may therefore say that if the application of the new provision does not involve any detriment to the accused (either because it is a lex mitior or because of equivalence of consequences), there will be no impeachable retroactivity. The legal qualification or classification of the acts may well be different under the old and the new law, but this is not material. The real point is if the acts at stake constituted a criminal offence also under the old law, and if the term of sentence can be squared with the penalties applicable under the previous legislation.

V) Conclusion

As the journey through the addenda of the years 1999 and 2000 has shown, the new case-law fits into the lines of the previous one without any marked novelty. It is mainly confirmatory. However, recent events pose new challenges which presumably will have their influence on the human rights jurisprudence. There are disquieting claims of an upsurge of criminality in many European States, e.g. in France. This in turn produces a social pressure as to a more efficacious – and also a more expedited – State action to combat crime. As the law is always a reflection of social realities, values and needs (to which it reacts with some time-lag), one may wonder if certain conventional guarantees will not be slightly softened in order to achieve greater efficacy. The events of the 11 September 2001 and the consequential measures envisaged to prevent and suppress terrorism may even produce more square inroads into conventional guarantees. Thus, the British Government of T. Blair envisaged to pass legislation allowing it to intern foreigners suspected of terrorist activities without the intervention of a judge and without specific time-limits. This would suppose that Article 5 of the European Convention be temporarily suspended, doubtless by invoking Article 15 of the same Convention. Other European States may envisage similar measures derogating to some extent from conventional guarantees. It is not to be discussed here to what extent these measures are necessary or what (evident) dangers they may carry with them. The law in general and the human rights jurisprudence in particular is a living piece of engineering which relates back to the evolving social situations and to the historical events in the life of peoples. From this perspective, some adaptations in the field of personal liberty and of fair trial can be expected. The exciting thing is to see how the new balances will be struck and how, step by step, the probable new input will be digested.