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The accused's right to be tried by a competent, independent and impartial tribunal: The drafting history of Article 14(1) of the International Covenant on Civil and Political Rights and how it has been implemented in practice

Abstract: The right to a fair trial is made-up of many (sub) rights and one of these is the right to be tried by a competent, independent and impartial tribunal. According to the Human Rights Committee, this is an absolute right. This right is protected in international and regional human rights instruments. It is also provided for in the constitutions and/or pieces of legislation of most countries whether or not they have ratified, acceded to or signed the International Covenant on Civil and Political Rights (the ICCPR). In this paper, the author illustrates the drafting history of Article 14(1) of the ICCPR and how it has been interpreted by the Human Rights Committee. He also illustrates how this right has been protected in other international and regional human rights treaties. The author also studied the constitutions of over 190 countries to demonstrate how they have implemented Article 14(1) of the ICCPR (for those that have ratified or signed the ICCPR). The study shows that in countries which have ratified/acceded to the ICCPR, six different approaches have been taken to give effect to this right. These approaches range from countries where the constitutions provide for this right in full (mentioning the three elements) to those where this right is not mentioned at all. It is argued that irrespective of which of the six approaches is followed, states which have ratified the ICCPR have an obligation to give effect to this right in full. Based on the criteria set by the International Law Commission, the author argues that the right to be tried by a competent, independent and impartial tribunal/court has attained the status of *jus cogens* (peremptory norm) in international law. The author also briefly illustrates how the issues of judicial independence and recusal are dealt with in the constitutions of different countries.

Keywords: fair trial; Article 14 of ICCPR; impartial court or tribunal; independent court or tribunal; competent court or tribunal; recusal

1. Introduction

The right to a fair trial is made-up of many rights and one of these is the right to be tried by a competent, independent and impartial tribunal.¹ This is an absolute right.² This right is protected in international and regional human rights instruments and in the constitutions of different countries. At the international level, Article 10 of the Universal Declaration of Human Rights (1948) provides that “[e]veryone 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.” Likewise, Article 14(1) of the International Covenant on Civil and Political Rights (1966) provides, *inter alia*, that “[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The right to a fair hearing by a competent, independent and impartial tribunal is also provided for in other international human rights instruments such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)³ and the Convention on the Rights of the Child (1989).⁴ It is also provided for in regional human rights instruments such as under Article 8 of the American Convention on Human Rights (1969) and Article 13(1) of the Arab Charter on Human Rights (2004). Both the European Convention on Human Rights (Article 6(1)) and the African Charter of Human Rights (Articles 7(1)(d) and 26) provide for the right to be tried by an independent and impartial court. They are silent on the issue of the competency of the court. However, as will be discussed below, their jurisprudence provides that for the right to a fair trial to be guaranteed, the courts must be competent, independent, and impartial. This right is also provided for in the constitutions of many countries but in different forms. There are many publications on the right to be tried by a competent, independent and impartial tribunal. However, none of them discusses this right in detail at international, regional and

¹ In *Justice Thomas S. Masuku v. The Kingdom of Swaziland* (Communication 444 of 2013) [2021] ACHPR 518 (19 July 2021) para 147, the African Commission on Human and Peoples’ Rights held that “the right to a fair hearing applies equally to administrative, civil, criminal or military cases.” It is beyond the scope of this article to discuss the right to a fair hearing in civil matters in detail. However, some of the principles discussed here are applicable to both civil and criminal matters.

² *Kodjo v Republic of Togo* (ECW/CCJ/APP/ 25 of 2020) [2022] ECOWASCJ 8 (24 March 2022) para 123 (referring to the practice of the Human Rights Committee).

³ Article 18(1).

⁴ Article 40(2)(b)(iii).

domestic levels.⁵ In this paper, the author relies on the constitutions of over 190 countries and on international and regional human rights instruments and jurisprudence to argue, inter alia, that the right to be tried by a competent, independent and impartial tribunal/court has attained the status of *jus cogens* (peremptory norm) in international law. The author concludes the paper by illustrating the circumstances in which a judicial officer is required to recuse himself/herself if there is evidence to show that the accused's right to be tried by an independent and impartial tribunal is likely to be violated.

2. The drafting history of Article 14(1) of the ICCPR

Unlike the relevant provisions of the International Covenant on Civil and Political Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and the Convention on the Rights of the Child, Article 10 of the UDHR does not require the tribunal to be “competent.” All it requires is that the tribunal should be independent and impartial. In other words, it does not include the word “competent.” During the drafting of the ICCPR, Clause 14(1) of the draft ICCPR which was submitted by the Commission on Human Rights provided, in part, that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁶

The Rapporteur did not suggest changes to that part of clause 14(1) of the draft Covenant.⁷ The United Kingdom (UK) had suggested that the first part of Clause 14(1) (with deals with equality) was redundant and should be deleted because the draft Convention included detailed provisions which dealt with the right to equality before the law and freedom

⁵ See for example, A. Clooney and P. Webb. *The Right to a Fair Trial in International Law*. Oxford University Press. (2021) p. 66–135; L. Doswald-Beck. *Human Rights in Times of Conflict and Terrorism*. Oxford University Press. (2011) p. 318–345; R. Pati. *Due Process and International Terrorism: An International Legal Analysis*. Brill. Nijhoff (2009) p. 269; J. Genser. *The UN Working Group on Arbitrary Detention Commentary and Guide to Practice*. Cambridge University Press. Cambridge. (2019) p. 283–297.

⁶ Official Records of the General Assembly (14th Session: 15 September to 13th December 1959) p. 298.

⁷ *Ibidem*, p. 294.

from discrimination.⁸ This view was supported by Argentina⁹ and Ceylon (Sri Lank).¹⁰ The Indian delegate argued that he could only support the UK proposal if the UK came up with more convincing reasons.¹¹ The Sri Lankan delegate argued that he would have supported the retention of the first part of the provision if its intention was to draw “a distinction between tribunals and courts.”¹² The Italian delegate argued that he opposed the UK proposal to delete part one of clause 14(1) because, inter alia,

“The Commission on Human Rights had had, however, other reasons for including that important statement of principle. It was not enough to recognize that all persons had equal rights. That equality had to be made a reality, and the same conditions had to obtain in practice for all persons at the different stages of proceedings. That fundamental principle was laid down in the first sentence and was developed in the rest of the provision, especially in the sub-paragraphs of paragraph 2. Thus, to make article 14 fully comprehensible, it was essential to retain the first sentence.”¹³

The United Arab Republic’s delegate also asked the United Kingdom to clarify why it wanted such an important safeguard to be deleted from the draft Convention.¹⁴ The Ukrainian delegate also opposed the United Kingdom amendment on the ground that deleting those words would make the whole of Article 14 “meaningless.”¹⁵ Likewise, the Philippine,¹⁶ Yugoslav,¹⁷ Ghanaian,¹⁸ Afghan,¹⁹ Saudi Arabian²⁰ and Polish²¹ delegates also opposed the United Kingdom’s proposal. In the light of many objections, the United Kingdom withdrew its amendment.²² Argentina,

⁸ United Nations General Assembly, 14th Session, Third Committee, 961st Meeting (19 November 1959) (A/C-3/SR/961) para 1.

⁹ *Ibidem*, para 4.

¹⁰ United Nations General Assembly, 14th Session, Third Committee, 962nd Meeting (19 November 1959) (A/C-3/SR/962) para 2.

¹¹ *Ibidem*, para 9.

¹² *Ibidem*, para 2.

¹³ *Ibidem*, para 7.

¹⁴ *Ibidem*, para 12.

¹⁵ *Ibidem*, para 17.

¹⁶ *Ibidem*, para 18.

¹⁷ *Ibidem*, para 25.

¹⁸ *Ibidem*, para 26.

¹⁹ *Ibidem*, para 29.

²⁰ *Ibidem*, para 35.

²¹ United Nations General Assembly, 14th Session, Third Committee, 963rd Meeting (20 November 1959) (A/C.3/SR/963) para 25.

²² United Nations General Assembly, 14th Session, Third Committee, 963rd Meeting (20 November 1959) (A/C.3/SR/963) para 27. See also Official Records of the General Assembly (14th Session: 15 September to 13th December 1959) p. 299.

Israel and Italy suggested changes to the above draft part of Article 14(1). The Argentina delegate suggested that clause 14(1) should be replaced by the following:

“Everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal, in the determination of any charge or accusation made against him, or of his rights and obligations in a suit at law. Every judgement shall be given due publicity except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes.”²³

He argued that the above amendment was necessary because, *inter alia*, “the word ‘criminal’ before the word ‘charge’ in the second sentence was redundant as all charges were criminal charges”.²⁴ The Argentine amendment also omitted the words “public hearing.” This is because it was common practice in most Latin American countries for trials to be conducted on the basis of “written dispositions.”²⁵ However, what is evident is that the Argentina proposal also retained the words “competent, independent and impartial tribunal.” Israel suggested that the clause beginning with the words “by a competent, independent and impartial” should be replaced “by an independent and impartial tribunal of competent jurisdiction established by law”.²⁶ In support of that proposal, the Israel delegate argued that:

“[T]he text as drafted by the Commission was obviously based on article 10 of the Universal Declaration of Human Rights in which, however, the word “competent” did not appear. As used in paragraph 1, it was probably intended to mean “a tribunal of competent jurisdiction”, but it might easily be construed as meaning that the tribunal should possess the necessary knowledge or integrity. He could not agree with that interpretation. A judge might be incompetent according to those criteria but, provided he was lawfully qualified and appointed, the trial in question could not be deemed to constitute a violation of human rights. He felt that the wording which he proposed clarified the text.”²⁷

²³ Official Records of the General Assembly (14th Session: 15 September to 13th December 1959) p. 291.

²⁴ United Nations General Assembly, 14th Session, Third Committee, 961st Meeting..., para. 5.

²⁵ *Ibidem*, paras 6 and 19.

²⁶ Official Records of the General Assembly (14th Session: 15 September to 13th December 1959) p. 290.

²⁷ United Nations General Assembly, 14th Session, Third Committee, 961st Meeting..., para. 10.

The Chilean delegate supported the Israel amendment above because “the wording was excellent.”²⁸ The Sri Lankan delegate also supported the Israel amendment because the amendment “brought out the intention of the Commission on Human Rights much better than did the Commission’s own draft.”²⁹ The Venezuelan delegate also supported the Israel amendment because it “was more precise than the Commission’s text. It expressed clearly the idea that everyone was entitled to be tried by a court competent to deal with the case.”³⁰ The Iranian delegate also supported the Israel amendment.³¹ The United Kingdom delegate argued that the Israel amendment “was unexceptionable and he had no objection to it.”³²

In other words, the Israel delegate was of the view that a “competent tribunal” should be interpreted to mean “a tribunal of competent jurisdiction.” This means that the tribunal had the jurisdiction over the offence and the person. It should not be interpreted to mean that the “tribunal should possess the necessary knowledge and integrity.” According to him, as long as a person met the minimum requirements for appointment to the tribunal/court and he/she was legally appointed, his/her incompetence does not render the trial unfair. The Bulgarian delegate wanted to know “whether the words ‘established by law’, in the text proposed in the amendment to the second sentence of paragraph 1 referred to the word ‘tribunal’ or to the word ‘jurisdiction’.”³³ In response, the Israel delegate argued that the amendment referred to “the tribunal that was established by law.”³⁴ The Sri Lankan delegate:

“[S]aw no need to specify that tribunals should be competent, independent and impartial, since in many countries there was no other possibility, and the mere statement of that principle would not suffice to change the state of affairs in countries where it was not yet recognized and applied. In that connexion it should be remembered that the independence of the judiciary from the executive had not been established by a provision of law but was the fruit of a long historical development.”³⁵

²⁸ United Nations General Assembly, 14th Session, Third Committee, 962nd Meeting... ,para. 20.

²⁹ United Nations General Assembly, 14th Session, Third Committee, 963rd Meeting..., para. 8.

³⁰ *Ibidem*, para 13.

³¹ *Ibidem*, para 21.

³² *Ibidem*, para 32.

³³ United Nations General Assembly, 14th Session, Third Committee, 961st Meeting... ,para. 23.

³⁴ *Ibidem*, para 24.

³⁵ United Nations General Assembly, 14th Session, Third Committee, 962nd Meeting..., para 3.

The Indian delegate argued, *inter alia*, that “it was a mistake to use the word ‘fair’ in the second sentence of paragraph 1, for it was impossible to determine whether a tribunal had been fair until it had heard and judged a case.”³⁶ He argued further that “[t]here was likewise no need of the word ‘competent’, since a tribunal established by law was quite clearly competent.”³⁷ The Italian delegate argued that Clause 14(1) should be amended to read as follows:

“All persons shall have equal rights and possibilities before the courts and tribunals. Therefore, everyone shall be entitled to a fair hearing by a competent, independent and impartial court or tribunal in the determination of any charge or accusation made against him, or of his rights and obligations in a suit at law.”³⁸

This proposed amendment was opposed by the United Kingdom delegate on the ground that it was vague on the issue of rights and responsibilities.³⁹ The Peruvian delegate suggested that the words “courts and tribunals” should have been replaced by the words “judges and tribunals” because in the Peruvian system there was “hardly any difference between a tribunal and a court.”⁴⁰ The delegates from Burma,⁴¹ Iraq,⁴² Poland,⁴³ and Pakistan,⁴⁴ argued that Article 14(1) as suggested by the Commission was satisfactory and there was no need to amend it. The Romanian delegate argued that he supported Article 14(1) as suggested by the Commission because, *inter alia*, the principle of “juridical independence” was contained in the Romanian constitution and that Romanian law “gave even wider and more numerous safeguards of impartiality.”⁴⁵ He added that he supported the retention of Clause 14(1) because:

“The key paragraph of the article was paragraph 1, and the first sentence of that paragraph was of capital importance. It reminded every judge that the law was impartial and that he, too, should be impartial in

³⁶ *Ibidem*, para 7.

³⁷ *Ibidem*, para 7.

³⁸ *Ibidem*, para 10.

³⁹ *Ibidem*, para. 15.

⁴⁰ *Ibidem*, para. 21.

⁴¹ United Nations General Assembly, 14th Session, Third Committee, 963rd Meeting..., para. 1.

⁴² *Ibidem*, para. 4.

⁴³ *Ibidem*, para. 23.

⁴⁴ United Nations General Assembly, 14th Session, Third Committee, 966th Meeting (24 November 1959) (A/C.3/SR/966) para. 20.

⁴⁵ United Nations General Assembly, 14th Session, Third Committee, 964th Meeting (23 November 1959) (A/C.3/SR/964) para. 4.

administering the law. Administering the law was not a purely automatic operation. A judge sometimes had to interpret legislative provisions. Moreover, the law itself often gave him a certain power of discretion when, for example, he had to decide on a penalty, within specified limits, to fix damages, to weigh the value of statements by witnesses or of circumstantial evidence, or to decide on the amount of surety for bail. It was not enough, therefore, to proclaim the principle of equality before the law in article 24. It was also necessary to see that the law was administered impartially. For that reason, he would vote against the first Argentine amendment...With regard to the first Israel amendment to paragraph 1..., he thought it would be preferable to retain the recognized expression “tribunal competent” in the French text.”⁴⁶

The French delegate argued that he supported the retention of Article 14(1) as drafted by the Commission because it balanced the interests of different legal systems and it was “complete and perfectly balanced.”⁴⁷ He added that:

“Some delegations had maintained that the word “independent” was redundant. But the separation of powers ensured the independence of the judiciary only vis-a-vis the political power; protection against the influence of pressure groups was still needed. The word “independent” was therefore essential to article 14.”⁴⁸

He added that:

“The adjective “competent” obviously did not have the same meaning in all languages-which explained why various representatives had criticized its use. The wording proposed in the Israel amendment ...was preferable, in that respect, to the original text, but it still failed to satisfy all members of the Committee. The word “competent” might perhaps prove generally acceptable if it was preceded by the word “legally” which would require the deletion of the words ‘established by law’.”⁴⁹

He added that he agreed with the United Kingdom’s argument that “paragraph 2, unlike...paragraph 1, applied exclusively to criminal proceedings.”⁵⁰ The Israel delegate noted that “the Committee had correctly interpreted the Israel delegation’s amendment to the second sentence in paragraph 1. What was important was not that each of the judges indi-

⁴⁶ Ibidem, para. 6.

⁴⁷ Ibidem, para. 15.

⁴⁸ Ibidem, para. 17.

⁴⁹ Ibidem, para 18.

⁵⁰ Ibidem, para 22.

vidually should have the necessary competence, but that the court should be legally competent to try the case.”⁵¹ The Soviet delegate argued that:

“It was incorrect to state that equality before the law was the same as equality before the courts. Equality before the courts could exist only if that principle was laid down in a law and if there was a single system of courts for everyone. If, on the contrary, the law provided for different courts for different races, for instance, there could be no equality before the courts.”⁵²

He also supported the formulation of Article 14(1) as proposed by the Commission because it was “in harmony” with USSR law.⁵³ The Jordanian delegate argued that “words ‘established by law’ in the second sentence of paragraph 1 appeared to be superfluous, since it was obvious that the competent tribunal must have been established by law and have thus been authorized to deal with certain matters.”⁵⁴ However, he endorsed Article 14 as drafted by the Commission.⁵⁵ The United Kingdom delegate:

“Stressed the fact that the second sentence of [Article 14] paragraph 1 drafted by the Commission on Human Rights on Human Rights contained two different ideas, one expressed by the words “established by law” and the other by the words “competent, independent and impartial”. In the text proposed by the Israel delegation...for that sentence, the first of those ideas had disappeared, or at least it was expressed much less clearly than in the text of the Commission on Human Rights or in the previous amendment by Israel.”⁵⁶

The Indian delegate argued that “[t]he drafting of paragraph 1 of article 14 was not sufficiently precise. Fairness and impartiality were ideas hard to pin down, and nobody knew who would be responsible in practice for applying them.”⁵⁷ He added that his delegation was prepared to support the draft proposed by the Commission.⁵⁸ The Indonesian and Yugoslav delegates also supported the draft proposed by the Commission.⁵⁹ Israel’s

⁵¹ *Ibidem*, para 27.

⁵² United Nations General Assembly, 14th Session, Third Committee, 965th Meeting (23 November 1959) (A/C.3/SR/965) para 15.

⁵³ *Ibidem*, para 17.

⁵⁴ United Nations General Assembly, 14th Session, Third Committee, 966th Meeting... ,para. 5.

⁵⁵ *Ibidem*, para 8.

⁵⁶ *Ibidem*, para 9.

⁵⁷ *Ibidem*, para 30.

⁵⁸ *Ibidem*, para 35.

⁵⁹ *Ibidem*, para 36 and 42.

amendment to the second part of Article 14(1) was rejected at the vote.⁶⁰ Since most of the delegates supported the draft provision as proposed by the Commission, it was adopted and would later become Article 14(1) of the ICCPR.⁶¹ In a summary of the drafting history of Article 14(1), the report of the UN Secretary General states that:

“Some representatives considered that the terms “independent” and “impartial” as applied to tribunals were without precise legal meaning. Nevertheless, most of the Committee considered it necessary to retain those terms, which were generally used in constitutions and domestic laws. It was pointed out that the term “competent” could refer to the professional qualifications of judges, whereas the authors had in mind the legal notions of competence *ratione materiae*, *ratione personae*, and *ratione loci*.”⁶²

The following observations should be made about the drafting history of Article 14(1) and particularly the first two sentences. First, the delegates understood a “competent” tribunal or court under Article 14(1) to mean a court with jurisdiction over the offence and the person. This means that a tribunal/court which does not have jurisdiction to try the offence is incompetent within the meaning of Article 14(1). In other words, the proceedings are invalid. There was no objection to the Israeli delegate’s argument that competence of a court does not mean “that the tribunal should possess the necessary knowledge or integrity.” However, Principle 6 of the UN’s Bangalore Principles of Judicial Conduct interprets competence to include the competency of the judicial officer to execute his/her duties effectively. In General Comment No. 32 on Article 14 (the Right to equality before courts and tribunals and to a fair trial),⁶³ the Human Rights Committee does not define or describe a competent court. However, courts in different countries and some regional human rights bodies have held that a “competent court” means a court with competent jurisdiction over the person and the subject matter (for example, the offence).⁶⁴ Second, although the word “independent” was not defined,

⁶⁰ United Nations General Assembly, 14th Session, Third Committee, 967th Meeting (25 November 1959) (A/C.3/SR/967) para 23.

⁶¹ Official Records of the General Assembly (14th Session: 15 September to 13th December 1959) p. 303.

⁶² *Ibidem*, p. 300.

⁶³ Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and To A Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007).

⁶⁴ *Social Justice Coalition and Others v Minister of Police and Others* [2022] ZACC 27 (19 July 2022) para 139 (South Africa); *Le Forum Pour Le Renforcement De La Societe Civile and Others v Attorney General of the Republic of Burundi and Another* (Appeal 2

the debates show that some delegates were of the view that a court has to be independent not only from “political power” (executive and the judiciary) but also from “pressure groups.” This is also how independence is interpreted under Principle 1 of the Bangalore Principles of Judicial Conduct and in the Human Rights Committee’s General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial.⁶⁵ Third, one of the delegates understood impartiality to mean that a judicial officer should apply the law to the parties equally. However, this “understanding” was neither endorsed nor objected to by any of the delegates. As the Israel delegate explained, the words “independent and impartial tribunal or court” were copied from Article 10 of the Universal Declaration of Human Rights. This means that the drafting history of the UDHR could be relied on to establish how the drafters understood those concepts. However, the drafting history of Article 10 of the UDHR is silent on what the delegates meant by these words. In fact, the delegates did not discuss the meaning of those two concepts at all.⁶⁶ This could be explained by the fact that those concepts were already known in the laws of the countries that participated in the drafting of the UDHR.

of 2020) [2021] EACJ 35 (19 November 2021) para 87 (East African Court of Justice); *Ajavon v Benin* (Application No. 013/2017) [2019] AfCHPR 12 (29 March 2019) para 140–141 (African Court of Human and Peoples’ Rights); *Dankwa and Another Vrs AngloGold Ashanti Ltd* (J4 22 of 2018) [2019] GHASC 11 (14 February 2019) p. 5 (Ghana); *Bofihla Makhalane v Letseng Diamond (Pty) Ltd and Others* (CIV/APN 159 of 2012) [2013] LSHC 42 (30 May 2013) (Lesotho); *Chirambo v Manica Malawi* [2018] MWHC 917 (17 August 2018)(Malawi); *S v Nghixulifwa* [2018] NAHCMD 326 (17 October 2018) (Namibia); *Verlaque v Seychelles International Mercantile Banking Corporation (nouvo-banq)* (211 of 2003) [2009] SCSC 9 (20 January 2009) (Seychelles); *Sunshine Furniture Co. Ltd vs Maersk China Shipping Co. Ltd & Another* (Civil Appeal 98 of 2016) [2020] TZCA 1934 (23 January 2020) (Tanzania); *Foundation for Human Rights Initiative v Attorney General* (Constitutional Petition No. 53 of 2011) [2020] UGCC 7 (3 July 2020) (Uganda); *People v Lungu and Ors* (3 of 2022) [2022] ZMHC 15 (31 October 2022) (Zambia); *S v Kandawasvika & Anor* (HH 148 of 2004) [2004] ZWHHC 148 (15 August 2004) (Zimbabwe); *Family Bank Limited v Shemsa Nassoro Hamdu* [2021] eKLR (Kenya); *State (NCT of Delhi) v. Brijesh Singh alias Arun Kumar and Anorther* [2017] INSC 845 (9 October 2017) (India).

⁶⁵ General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, (CCPR/C/GC/32) (23 August 2007) paras 19 and 20.

⁶⁶ Commission on Human Rights, Second Session, Working Group on the Declaration on Human Rights, Summary Record of the Fourth Meeting Held at the Palais des Nations, Geneva, on Monday, 8 December 1947 (E/CN.4/AC.2/SR/4) (8 December 1947) p. 6–7 (morning session); Commission on Human Rights, Second Session, Working Group on the Declaration on Human Rights, Summary Record of the Fourth Meeting Held at the Palais des Nations, Geneva, on Monday, 8 December 1947 (E/CN.4/AC.2/SR/5) (8 December 1947) 4–7 (afternoon session).

The lack of a definition of these concepts means that they could have different meanings in different countries. This was evident during the drafting of Article 14 of the ICCPR. Since the drafting history of both the UDHR and ICCPR is silent on the meaning of these concepts, the Human Rights Committee,⁶⁷ the UN's Social and Economic Council (the Bangalore Principles of Judicial Conduct) (2002),⁶⁸ the African Commission on Human and Peoples,⁶⁹ the European Court of Human Rights⁷⁰ the Inter-American Commission on Human Rights⁷¹ and the Inter-American Court of Human Rights⁷² have explained what they mean. It is beyond the scope of this article to discuss how all these bodies have explained these concepts. International law requires states to perform their treaty obligations in good faith.⁷³ One of the ways in which states comply with their human rights treaty obligations is to ensure that the rights in those treaties are enforceable in their domestic courts. Thus, states have adopted two broad approaches: in some of them, ratified treaties are part of domestic law (monist approach) whereas in others legislation is enacted to incorporate the treaties or some of their provisions in domestic law (dualist approach).⁷⁴ The author illustrates how this right is protected in the constitutions of countries from different parts of the world. This will show the extent to which these countries have incorporated Article 14(1) of the ICCPR into their constitutions. Incorporating this right into the constitutions is the first step towards its enforceability at the domestic law.

⁶⁷ General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32 (23 August 2007) paras. 17–24.

⁶⁸ Principles 1 and 2.

⁶⁹ See Principles 4 and 5 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (DOC/OS(XXX)247) (adopted at the 11th Ordinary Session in March 1992).

⁷⁰ Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb) (Updated on 31 August 2022) p. 20–32. Available at https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng (accessed 09 January 2024).

⁷¹ Inter-American Commission on Human Rights, Corruption and Human Rights, Resolution 1/18 (Approved in the city of Bogota, Colombia, during its 167 Period of Sessions, on the second day of March of 2018) para 1. Available at <https://www.oas.org/en/iachr/decisions/pdf/resolution-1-18-en.pdf> (accessed 07 January 2024).

⁷² In *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* (Preliminary Objection, Merits, Reparations, and Costs) (Judgment of 5 August 2008, Series Case No. 182), para 52–57 the Inter-American Court of Human Rights explains the concepts of a competent, independent and impartial court or tribunal.

⁷³ Article 26 of the Vienna Convention on the Law of Treaties (1969) provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

⁷⁴ J Dugard. *International Law: A South African Perspective*. Juta. Cape Town. (2005) p. 47–48.

3. The right to be tried by a competent, independent and impartial tribunal/court in the constitutions of different countries

As at the time of writing, the ICCPR had been signed⁷⁵ or ratified by all UN member states except a few.⁷⁶ Of all the states that had ratified or acceded to the ICCPR, none had made a reservation or declarative interpretation on the accused's right to be tried by a competent, independent and impartial tribunal. This implies that all state parties agree that they have to give effect to this right in their domestic law. The drafting history of Article 14(1) of the ICCPR, as illustrated above, shows that the right to be tried by a competent, independent and impartial tribunal/court is a single right. It means that for a trial to be fair, the tribunal/court must possess all the three elements: competence, independence and impartiality. If one or more of these elements are missing, the right to a fair trial is violated. However, a survey of the constitutions of 193 countries shows that countries have adopted six different approaches to protect the accused's right to be tried by a competent, independent and impartial tribunal.⁷⁷ The first approach, which fully complies with Article 14(1) of the ICCPR, is found in countries where the constitutions provide for the accused's right to be tried by a competent, independent and impartial tribunal/court⁷⁸ or judge⁷⁹ or 'tribunals and judges'.⁸⁰ In Fiji, the judiciary is supposed to be

⁷⁵ Countries which had signed but not yet ratified the ICCPR were: Saint Lucia, Palua, Nauru, Cuba, China, and Comoros.

⁷⁶ The countries which had neither ratified nor signed this treaty were: United Arab Emirates, Tuvalu, Tonga, South Sudan, Solomon Islands, Singapore, Saudi Arabia, Saint Kitts and Nevis, Oman, Niue, Myanmar, Micronesia (Federated States of), Malaysia, Kiribati, Holy See, Cook Islands, Brunei Darussalam and Bhutan.

⁷⁷ Copies of the constitutions were obtained from: https://constituteproject.org/constitutions?lang=en&status=in_force (last accessed 09 January 2024).

⁷⁸ Article 120(I) of the Constitution of Bolivia (2009); Article 30(2) of the Constitution of Cyprus (1960); Article 69(2) of the Constitution of Dominican Republic (2015); Article 1(1) of the Constitution of Fiji (2013)(in this case the right is implied); Article 12(1) (a) of the Constitution of Namibia (1990); Article 20(9) of the Constitution of Nepal (2015); Article 45(1) of the Constitution of Poland (1997); Article 19 of the Constitution of Tajikistan (1994) (this provision also adds that such courts must be established by law); Article 49(3) of the Constitution of Venezuela (1999). Some of the countries which have signed but not yet acceded to the ICCPR have also followed this approach. See for example, Article 94(d) of the Constitution of Cuba (2019); Article 8(1) of the Constitution of Saint Lucia (1978) (instead of the word competent court, this constitution provides for a court 'established by law'). Although South Sudan has neither signed nor ratified the ICCPR, its Constitution (2013) provides for the right to be tried by a competent court and also for the independence and impartiality of the judiciary under Article 122.

⁷⁹ Article 76(7)(k) of the Constitution of Ecuador (2008).

⁸⁰ Article 16 of the Constitution of Paraguay (1992).

independent, impartial, competent and accessible.⁸¹ The second approach is found in countries where the constitutions provide for the accused's right to be tried by an independent and impartial tribunal/court/judge. However, they are silent on the issue of competency of courts.⁸² Many of these constitutions also provide that the independent and impartial court shall be 'established by law.'⁸³ This implies that the law in question

⁸¹ Article 1(c) of the Constitution of Fiji (2013).

⁸² Article 42(2) of the Constitution of Albania (2016); Article 15(1) of the Constitution of Antigua and Barbuda (1981); Article 63(1) of the Constitution of Armenia (1995); Article 20(1) of the Constitution of Bahamas (1973); Article 35(3) of the Constitution of Bangladesh (1972); Article 18(1) of the Constitution of Barbados (1966); Article 6(2) of the Constitution of Belize (1981); Article 10(1) of the Constitution of Botswana (1966); Article 4 of the Constitution of Burkina Faso (1991); Article 11(d) of the Constitution of Canada (1867); Article 36(1) of the Constitution of Czech Republic (1993); Article 81 of the Constitution of Dominica (1978); Article 21 of the Constitution of Eswatini (2005); Article 24(1) of the Constitution of the Gambia (1996); Article 8(1) of the Constitution of Grenada (1973); Article 144 of the Constitution of Guyana (1980); Article XXVIII(1) of the Constitution of Hungary (2011); Article 70 of the Constitution of Iceland (1944); Article 16(1) of the Constitution of Jamaica (1962); Article 50(1) of the Constitution of Kenya (2010); Article 31(2) of the Constitution of Kosovo (2008); Article 12(1) of the Constitution of Lesotho (1993); Article 42(2)(f) of the Constitution of Malawi (1994); Article 39 of the Constitution of Malta (1964); Article 10(1) of the Constitution of Mauritius (1968); Article 32 of the Constitution of Montenegro (2007); Article 25(a) of the Constitution of New Zealand (1852); Article 36(1) of the Constitution of Nigeria (1999); Article 95 of the Constitution of Norway (1814); Article 37(3) of the Constitution of Papua New Guinea (1975); Article 8(1) of the Constitution of Saint Vincent and the Grenadines (1979); Article 9(1) of the Constitution of Samoa (1962); Constitution of Senegal (2001)(proclaim); Article 32 of the Constitution of Serbia (2006); Article 19(1) of the Constitution of Seychelles (1993); Article 23(1) of the Constitution of Sierra Leone (1991); Article 46(1) of the Constitution of Slovakia (1992); Article 23 of the Constitution of Slovenia (1991); Article 34(2) of the Constitution of Somalia (2012); section 34 of the Constitution of South Africa (1996); Article 10 of the Constitution of Suriname (1987) (the word 'judge' is used); Article 19 of the Constitution of Togo (1992); Article 5(2)(f) (ii) of the Constitution of Trinidad and Tobago (1976); Article 28(1) of the Constitution of Uganda (1995); Article 6 of the Constitution of the United Kingdom (1215); Article 5(2)(a) of the Constitution of Tuvalu (1980); Article 18(1) of the Constitution of Zambia (1991); section 69(1) of the Constitution of Zimbabwe (2013). Some of the countries which have signed but not yet acceded to the ICCPR have also followed this approach. See for example, Article 10(2) of the Constitution of Nauru (1968). Some of the countries which have neither signed nor acceded to the ICCPR have also followed this approach. See for example, Article 65(1)(e) of the Constitution of Cook Islands (1965); Article 10(1) and (8) of the Constitution of Kiribati (1979); Article 10(1) and (8) of the Constitution of St Kitts and Nevis (1983); Article 10(1) and (8) of the Constitution of Solomon Islands (2014); Article 22(2) of the Constitution of Tuvalu (2010).

⁸³ See for example Article 8(1) of the Constitution of Saint Vincent and the Grenadines (1979); Article 9(1) of the Constitution of Samoa (1962); Article 32 of the Constitution of Serbia (2006); Article 19(1) of the Constitution of Seychelles (1993);

provides for the jurisdiction of the courts hence its competence.⁸⁴ Even in countries where the constitutions do not expressly state that courts have to be established by law,⁸⁵ the constitutions provide for the jurisdiction of different courts. This implies that such courts are established by law. The third approach is found in countries where the constitutions provide that an accused has a right to a fair trial which includes the right to be tried by an impartial court. They are silent on the right to be tried by an independent court. However, the constitutions of most of these countries provide that the courts shall be independent.⁸⁶ This means that such courts are competent, impartial and independent. The fourth approach is found in countries where the constitutions provide that an accused has a right to a fair trial which includes the right to be tried by an independent court. However, they are silent on the issues of impartiality and competence.⁸⁷

The fifth approach is found in countries where the constitutions do not provide for the accused's right to be tried by a competent, independent and impartial tribunal/court. However, they provide that the judiciary shall be independent and that judicial officers shall perform their duties with impartiality⁸⁸ or that the judiciary shall be independent

Article 23(1) of the Constitution of Sierra Leone (1991); Article 23 of the Constitution of Slovenia (1991).

⁸⁴ Some constitutions do not provide that the courts shall be established by law. See for example, the Constitution of New Zealand (1852).

⁸⁵ Such as Somalia.

⁸⁶ This is the case, for example, under Articles 10 and 85 the Constitutions of Andorra (1993); Articles 111 and 104 of the Constitution of Italy (1947); Articles 37 and 76 of the Constitution of Japan (1946); Article 21 (h) of the Constitution of Liberia (1986) (the constitution of Liberia does not provide for judicial independence expressly); Articles 42(b) and 142 of the Constitution of Maldives (2008); Articles 17 and 100 of the Constitution of Mexico (1917); section 14 and 3 of the Constitution of the Philippines (1987); Article 124 of the Constitution of Romania (1991); Amendment XI of the Constitution of the United States of America (1789) (it uses the word "jury"). Some of the countries which have signed but not yet acceded to the ICCPR have also followed this approach. For example, Article X of the Constitution of Palau (1981) provides for judicial independence and Article IV(7) provides for the right to an "impartial trial."

⁸⁷ Article 103 of the Constitution of Viet Nam (1992).

⁸⁸ Articles 116 and 119 of the Constitution of Afghanistan (2004); Article 175 of the Constitution of Angola (2010); Article 127 of the Constitution of Azerbaijan (1995); Article 214 of the Constitution of Burundi (2018); Article 128 of the Constitution of Cambodia (1993); Article 94 of the Constitution of Egypt (2014); Article 110 of the Constitution of Morocco (2011); Article 217 of the Constitution of Mozambique (2004); Article 121 and 132(5) of the Constitution of Sao Tome and Principe (1975); Article 134 of the Constitution of Syria (2012); Article 80 of the Constitution of Taiwan (1947); Article 188 of the Constitution of Thailand (2017); Articles 102–104 of the Constitution of Tunisia (2014).

(without mentioning impartiality).⁸⁹ However, since the independence of the judiciary is guaranteed, this right can be inferred. Some of these

⁸⁹ Article 114(6) of the Constitution of Argentina (1853); Article 87 of the Constitution of Austria (1920); Article 104 of the Constitution of Bahrain (2002); Article 151 (1) of the Constitution of Belgium (1831); Article 2 of the Constitution of Brazil (1988); Article 117 of the Constitution of Bulgaria (1991); Article 37 of the Constitution of Cameroon (1972); Article 221(3) of the Constitution of Cape Verde (1980); Article 146 of the Constitution of Chad (2018); Article 76 of the Constitution of Chile (1980); Article 228 of the Constitution of Colombia (1991); Article 149 of the Constitution of the Democratic Republic of Congo (2011); Article 168 of the Constitution of Congo (2015); Article 9 of the Constitution of Costa Rica (1949); Article 115 of the Constitution of Croatia (1991); Article 62 of the Constitution of Denmark (1953); Article 71 of the Constitution of Djibouti (1992); Article 172 of the Constitution of El Salvador (1983); Article 89 of the Constitution of Equatorial Guinea (1991); Article 10 of the Constitution of Eritrea (1997); Articles 146 and 147 of the Constitution of Estonia (1992); Article 78 of the Constitution of Ethiopia (1994); section 3 of the Constitution of Finland (1999); Article 64 of the Constitution of France (1958); Article 68 of the Constitution of Gabon (1991); Article 59 of the Constitution of Georgia (1995); Article 97 of the Constitution of Germany (1949); Article 125 of the Constitution of Ghana (1992); Article 87 of the Constitution of Greece (1975); Article 203 of the Constitution of Guatemala (1985); Article 120(4) of the Constitution of Guinea-Bissau (1984); Article 303 of the Constitution of Honduras (1982); Article 70 of the Constitution of India (1949); Article 24(1) of the Constitution of Indonesia (1945); Article 156 of the Constitution of Iran (1979); Articles 19, 87 and 88 of the Constitution of Iraq (2005); Article 35 of the Constitution of Ireland (1937); Article 2 of the Constitution of Israel (1958) (basic law on the judiciary); Article 27 and 97 of the Constitution of Jordan (1952); Articles 77 and 79 of the Constitution of Kazakhstan (1995); Article 166 of the Constitution of the Democratic Republic of Korea (1972); Article 103 of the Constitution of Republic of Korea (1948); Article 163 of the Constitution of Kuwait (1962); Article 98 of the Constitution of Kyrgyzstan (2010); Article 94 of the Constitution of Lao Peoples' Democratic Republic (1991); Article 83 of the Constitution of Latvia (1922); Article 20 of the Constitution of Lebanon (1926); Article 32 of the Constitution of Libya (2011); Article 95 of the Constitution of Liechtenstein (1921); Article 107 of the Constitution of Madagascar (2010); Article VI(1)(1) of the Constitution of Marshall Islands (1979); Article 89 of the Constitution of Mauritania (1991); Article 116 of the Constitution of Moldova (1994); Article 88 of the Constitution of Monaco (1962); Article 49 and 64 of the Constitution of Mongolia (1992); Article 166 of the Constitution of Nicaragua (1987); Articles 116 and 118 of the Constitution of Niger (2010); Article 98 of the Constitution of North Macedonia (1991); Preamble to the Constitution of Pakistan (1973); Articles 97 and 98 of the Constitution of Palestine (2003); Article 210 and 211 of the Constitution of Panama (1972); Article 139 of the Constitution of Peru (1993); Article 203 of the Constitution of Portugal (1976); Articles 130 and 131 of the Constitution of Qatar (2003); Article 120 of the Constitution of Russia (1993); Article 150 of the Constitution of Rwanda (2003); section 117 of the Constitution of Spain (1978); Article 107 of the Constitution of Sri Lanka (1978); Article 30 of the Constitution of Sudan (2019); Article 3 (Chapter 11, Part 2) of the Constitution of Sweden (1974); Article 191c of the Constitution of Switzerland (1999); Article 107B of the Constitution of Tanzania (1977); Article 119 of the Constitution of Timor-Leste (2002); Article 138 of the Constitution of Turkey (1982); Article 98 of the Constitution

countries have also ratified regional human rights instruments which guarantee the accused's right to be tried by a competent, independent and impartial tribunals. These include the European Convention on Human Rights. In some of these treaties, the ICCPR, by virtue of ratification, is part of domestic law.⁹⁰

The sixth approach is found in countries where the constitutions are not only silent on the accused's right to be tried by a competent, independent and impartial tribunal, but also silent on the issue of judicial independence.⁹¹ This is the case although some of these constitutions were adopted or amended after the respective countries had ratified/acceded to the ICCPR.⁹² However, judicial independence is guaranteed in other pieces of legislation⁹³ or by treaties ratified by these countries which are expressly made part of domestic law⁹⁴ and/or courts are required to refer to it when dealing with human rights issues.⁹⁵ A closer examination of all the six approaches above shows that irrespective of which approach has been adopted, state parties to the ICCPR have provided for the right to be tried by an a competent, independent and impartial

of Turkmenistan (2008); Article 126 of the Constitution of Ukraine (1996); Article 149 of the Constitution of Yemen (1991). A similar approach is also followed in some of the countries that have neither signed nor acceded to the ICCPR. For example, Articles 21(1) and (15) of the Constitution of Bhutan (2008); Article 19(a) of the Constitution of Myanmar (2008); article 60 of the Constitution of Oman (1996); Article 83A of the Constitution of Tonga (2016); Article 46 of the Constitution of Saudi Arabia (1992); Article 94 of the Constitution of the United Arab Emirates (1971).

⁹⁰ For example, Article 11(2) of the Constitution of Cape Verde (1980); Article 215 of the Constitution of the Democratic Republic of Congo (2011); Article 223 of the Constitution of Congo (2015); Article 115 of the Constitution of Croatia (1991); Article 93 of the Constitution of Egypt (2014).

⁹¹ See for example, the Constitution of Australia (1901); the Constitution of Bosnia and Herzegovina (1995); the Constitution of Haiti (1987); Constitution of Luxemburg (1868); Constitution of the Netherlands (1814); Constitution of Uruguay (1966). A similar approach is also followed in some of the countries that have neither signed nor acceded to the ICCPR. For example, Constitution of Brunei (2006); Constitution of Malaysia (1957); Constitution of Micronesia (1990); and Constitution of Singapore (2016).

⁹² For example, Bosnia and Herzegovina acceded to the ICCPR in August 1993 and its constitution was adopted in 1995; Haiti acceded to the ICCPR in February 1991 and its Constitution (1987) was last amended in 2012.

⁹³ See for example, J Wiwinius. *Independence of the Luxembourg Judiciary Through a Council for the Judiciary – A Never-Ending Story*. In: *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*. Eds. Gunnar Selvik et al. Springer. Berlin 2019. p. 211–220.

⁹⁴ Annex 1 of the Constitution of Bosnia and Herzegovina (1995) provides that several international treaties, including the ICCPR, are applied in that country

⁹⁵ Article 98 of the Constitution of North Macedonia (1991)

tribunal/court in their constitutions exclusively or in their constitutions read in tandem with their international treaty obligations and/or domestic legislation.

Although, as discussed above, the drafting history of Article 14(1) of the ICCPR shows that a competent court means one with jurisdiction, the constitutions of some countries require judicial officers to be competent. For example, Article 141 of the Constitution of Côte d'Ivoire (2016) provides that '[t]he magistrate must be competent. He must demonstrate impartiality, neutrality and honesty in the exercise of his official duties. Any breach of these official duties constitutes professional misconduct.' Likewise, Article 103 of the Constitution of Tunisia (2014) provides that 'judges must be competent, and should be characterised by neutrality and integrity. They shall be held accountable for any shortcomings in their performance.' In Eritrea, the judiciary is not only required to be independent but also competent.⁹⁶ This implies that competence is understood to mean that the judicial officers should have the necessary qualifications to execute their duties.

The fact that this right has been recognised by an overwhelming number of countries in different forms means that it has acquired the status of *jus cogens*. Put differently, the right to be tried by a competent, independent and impartial tribunal/court is now a peremptory norm under international law.⁹⁷ The International Law Commission defines *just cogens* as follows:

“A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁹⁸

⁹⁶ Article 10(1) of the Constitution of Eritrea (1997)

⁹⁷ It has been argued that since the right to a fair trial is recognised in international and regional human rights, it has attained the status of *jus cogens* but with permissible exceptions. See P. Robinson, “*The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.*” “Berkeley Journal of International Law Publicist” 2009, 3 pp. 1–11. For a discussion of the concept of *jus cogens* in detail, see for example, H. Charlesworth and C Chinkin: *The Gender of Jus Cogens.* “Human Rights Quarterly” 1993, 15(1), pp. 63–76 U. Linderfalk. *Understanding Jus Cogens in International Law and International Legal Discourse.* Edward Elgar Publishing. Cheltenham Glos. (2020).

⁹⁸ Conclusion 3[2] of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022). See also Article 53 of the Vienna Convention on the Law of Treaties (1969).

The International Law Commission stated further that:

- “1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).”⁹⁹

The International Law Commission added that:

- “1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.”¹⁰⁰

Relying on the above criteria, it is argued that the following factors support the view that the right to be tried by a competent, impartial and independent tribunal has attained the status of *jus cogens*. First, the majority of UN member states have not only ratified the ICCPR, most importantly, none of them has made a reservation or declarative interpretation on the second sentence of Article 14(1) (which deals with the right to be tried by a competent, independent and impartial court).¹⁰¹

⁹⁹ Conclusion 5 of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

¹⁰⁰ Ibidem, Conclusion 8.

¹⁰¹ Six countries made reservations on the right to a public hearing under Article 14(1). In its reservations on Article 14(1), Australia stated that “Article 14 of the Covenant will be applied provided that the principles governing the publicity of trials as set forth in article 90 of the Federal Constitutional Law as amended in 1929 are in no way prejudiced...” In its reservation, Belgium stated that “With respect to article 14, the Belgian Government considers that the last part of paragraph 1 of the article appears to give States the option of providing or not providing for certain derogations from the principle that judgements shall be made public. Accordingly, the Belgian constitutional principle that there shall be no exceptions to the public pronouncements of judgements is in conformity with that provision...” In its reservation, the Government of Liechtenstein stated that “The Principality of Liechtenstein reserves the right to apply the provisions of article 14, paragraph 1 of the Covenant, concerning the principle that hearings must be held and judgements pronounced in public, only within the limits deriving from the principles at present embodied in the Liechtenstein legislation on legal proceedings.” Denmark submitted a revised reservation which provides, inter alia, that “Article 14, paragraph 1, shall not be

Second, this right is protected in other international and regional human rights treaties. Third, the right is protected in the constitutions of the overwhelming majority of countries. Even in the constitutions in which it is not expressly protected, it can be inferred from other legal sources. It should be mentioned that although the prohibition against torture is *jus cogens*, there are over 30 countries whose constitutions do not expressly prohibit torture.¹⁰² This means that the right to be tried by a competent, independent and impartial tribunal is guaranteed in more constitutions than the right to freedom from torture. Fourth, the decisions of many national and regional courts (as demonstrated below when dealing with the issue of recusal) emphasise the importance of this right. Finally, there are resolutions and/or general comments by human rights bodies at the UN level (the Human Rights Committee's General Comment No. 32 and the Bangalore Principles) and at the regional level (African and European level) which protect this right. In *Goiburú et al. v. Paraguay*,¹⁰³ the Inter-American Court of Human Rights held that access to justice is *jus cogens*. However, in *Al-Dulimi and Montana Management Inc. v. Switzerland*,¹⁰⁴

binding on Denmark in respect of public hearings. In Danish law, the right to exclude the press and the public from trials may go beyond what is permissible under this Covenant, and the Government of Denmark finds that this right should not be restricted.” Other countries which made reservations on Article 14(1) (the right to a public hearing) included: Switzerland and Finland. However, Australia, Finland and Switzerland withdrew their reservation Article 14(1) of the ICCPR. This means that only three countries (Belgium, Denmark and Liechtenstein) retain their reservations on Article 14(1). See https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind (accessed 15 September 2023).

¹⁰² See for example, the constitutions of Australia 1901 (rev. 1985); Austria 1920 (reinst. 1945, rev. 2013); Belgium 1831 (rev. 2014); Brunei Darussalam 1959 (rev. 2006); Cambodia 1993 (rev. 2008); Canada 1867 (rev. 2011); Chile 1980 (rev. 2021); China (People's Republic of) 1982 (rev. 2018); Costa Rica 1949 (rev. 2020); Equatorial Guinea 1991 (rev. 2012); France 1958 (rev. 2008); Germany 1949 (rev. 2014); Haiti 1987 (rev. 2012); India 1949 (rev. 2016); Ireland 1937 (rev. 2019); Israel 1958 (rev. 2013); Italy 1947 (rev. 2020); Korea (Democratic People's Republic of) 1972 (rev. 2016); Lao People's Democratic Republic 1991 (rev. 2015); Lebanon 1926 (rev. 2004); Libya 2011 (rev. 2012); Luxembourg 1868 (rev. 2009); Malaysia 1957 (rev. 2007); Malta 1964 (rev. 2016); Micronesia (Federated States of) 1978 (rev. 1990); Monaco 1962 (rev. 2002); Myanmar 2008 (rev. 2015); Netherlands 1814 (rev. 2008); Panama 1972 (rev. 2004); Saudi Arabia 1992 (rev. 2013); Senegal 2001 (rev. 2016); Singapore 1963 (rev. 2016); Taiwan (Republic of China) 1947 (rev. 2005); Tonga 1875 (rev. 2013); Trinidad and Tobago 1976 (rev. 2007); United States of America 1789 (rev. 1992); Uruguay 1966 (reinst. 1985, rev. 2004); and Uzbekistan 1992 (rev. 2011); and Vanuatu 1980 (rev. 2013). However, torture is prohibited in some of the treaties ratified by these countries.

¹⁰³ *Goiburú et al. v. Paraguay* (Judgment of 22 September 2006).

¹⁰⁴ *Al-Dulimi and Montana Management Inc. v. Switzerland* (Application no. 5809/08) (21 June 2016).

the Grand Chamber of the European Court of Human Rights held that it 'does not consider these guarantees [under Articles 14 and 6 of the ICCPR and the European Convention of Human Rights] to be among the norms of *jus cogens* in the current state of international law.'¹⁰⁵ In my view, all the (sub) rights under Article 14 which make-up the right to a fair trial may not have attained the status of *jus cogens*. However, as demonstrated above, the right to be tried by a competent, independent and impartial tribunal/court has attained the status of *jus cogens*. As discussed above, the constitutions of most countries provide that courts/tribunals or judges are supposed to be independent. This raises the question of the measures these countries have taken in their constitutions to guarantee judicial independence.

4. Modes of guaranteeing independence of the judiciary

Countries have adopted different approaches to deal with the issue of judicial independence. The first approach is found in countries where the independence and impartiality of the judiciary is guaranteed in general terms.¹⁰⁶ In other words, the constitutions state that the judiciary shall be independent. They do not explain what that independence entails. The second approach is found in countries where the constitutions impose a duty on some people to guarantee the independence of the judiciary. For example, in some countries, apart from providing for an independent judiciary, the constitutions impose a duty on the president(s) to guarantee that judicial independence.¹⁰⁷ Some of these constitutions provide that in guaranteeing judicial independence, the president(s) shall be assisted by some constitutional bodies.¹⁰⁸ In Norway, the constitution imposes the duty of protecting judicial independence on all state agencies. Thus,

¹⁰⁵ Ibidem, para. 136.

¹⁰⁶ Article 164 of the Constitution of Armenia (1995); Article 116A of the Constitution of Bangladesh (1972); Article 129 of the Constitution of Burkina Faso (1991); Articles 81 and 82 of the Constitution of Czech Republic (1993); Article 62 of the Constitution of Eswatini (2005); Article 4(5) of the Constitution of Kosovo (2008); Article 31 of the Constitution of Lithuania (1992); Article 10(8) of the Constitution of Mauritius (1968)

¹⁰⁷ Article 169 of the Constitution of Algeria (2020); Article 8(IV) of the Constitution of Azerbaijan (1995); Article 214 of the Constitution of Burundi (2018); Article 37(3) of the Constitution of Cameroon (1972); Article 68 of the Constitution of Gabon (1991).

¹⁰⁸ See for example, Article 139 of the Constitution of Côte d'Ivoire (2016); Article 73 of the Constitution of Djibouti (1992); Article 64 of the Constitution of France (1958); Article 107 of the Constitution of Madagascar (2010); Article 89 of the Constitution of Mauritania (1991); Article 132 of the Constitution of Syria (2012); Article 115 of the Constitution of Togo (1992).

Article 95 provides that '[t]he authorities of the State shall secure the independence and impartiality of the courts and the judges.' The Constitution of Algeria imposes this duty on the judges themselves when it provides that '[j]udges shall guard against any infringement of their independence and impartiality.'¹⁰⁹ This implies that the duty is imposed on the judges to ensure that they are independent and impartial. In some countries the constitutions require the government and all its agencies and departments to accord assistance to the courts which they require to protect their independence.¹¹⁰

The third approach is found in countries where the constitutions specify the relationship between the judiciary and other arms of government. Countries following this category have followed two methods. The first method is to describe this relationship briefly. For example, the Constitution of Brazil provides that the judiciary, legislature and executive are 'independent and harmonious with each other.'¹¹¹ The Constitution of Rwanda provides that the judiciary and the other two branches of the government are 'independent from each other but are all complementary.'¹¹² The second method is to specify that the judiciary is independent either from the executive or both the executive and the legislature. For example, in some countries, the constitutions provide that the judiciary is independent from the executive.¹¹³ They are silent on the relationship between the judiciary and the legislature. In others, the constitutions provide that the judiciary is independent from the executive and the legislature without outlining the acts which the executive and the legislature are prohibited from doing to undermine the independence of the judiciary.¹¹⁴ However,

¹⁰⁹ Article 179 of the Constitution of Algeria (2020).

¹¹⁰ Article 120(4) of the Constitution of the Gambia (1996); Article 127(2) of the Constitution of Ghana (1992)

¹¹¹ Article 2 of the Constitution of Brazil (1988).

¹¹² Article 61.

¹¹³ Article 62 of the Constitution of Denmark (1953); Article 50 of the Constitution of India (1949)

¹¹⁴ Article 214 of the Constitution of Burundi (2018); Article 37(2) of the Constitution of Cameroon (1972); Article 146 of the Constitution of Chad (2018); Article 149 of the Constitution of the Democratic Republic of Congo (2011); Article 168 of the Constitution of Congo (2015); Article 71 of the Constitution of Djibouti (1992); Article 89 of the Constitution of Equatorial Guinea (1991); Article VI(1)(1) of the Constitution of Marshall Islands (1979); Article 89 of the Constitution of Mauritania (1991); Article 129 of the Constitution of Nicaragua (1987); Article 116 of the Constitution of Niger (2010); Article 88 of the Constitution of Senegal (2001); Article 106 of the Constitution of Uzbekistan (2011) (it also provides that the judiciary is independent from political parties and other public associations). Some of the countries which have signed but not yet acceded to the ICCPR have also followed this approach. See for example, Article 94 of the Constitution of Comoros.

in a few countries, the constitutions prohibit the executive and legislature from performing specific acts aimed at undermining the independence of the judiciary. For example, 76 of the Constitution of Chile (1980) provides that:

“The power to hear civil and criminal cases, to resolve them and to enforce judgments, is vested exclusively to the courts established by law. Neither the President of the Republic nor the Congress may, in any case, exercise judicial functions, take over pending cases, review the grounds or contents of their decisions or revive closed cases.”

Article 138 of the Constitution of Turkey also prohibits the legislature and the executive from carrying out specific acts aimed at compromising the independence of the judiciary.¹¹⁵ Article 168 of the Constitution of Ecuador provides for different ways in which judicial independence should be guaranteed. It is to the effect that:

- (1) The bodies of the Judicial Branch shall benefit from both internal and external independence. Any breach of this principle shall entail administrative, civil, and criminal liability, in accordance with the law.
- (2) The Judicial Branch shall benefit from administrative, economic and financial autonomy.
- (3) By virtue of the jurisdictional unity, no authorities of the other branches of government shall be able to perform duties for the ordinary administration of justice, without detriment to the jurisdictional powers recognized by the Constitution.”

The constitutions of some other countries also include detailed provisions on judicial independence.¹¹⁶ In some countries, the judiciary is not only independent from the executive and the legislature but also from other state organs. For example, Article 64(2) of the Constitution of Mongolia (1992) provides that the judiciary is ‘independent of any organisations, officials or from other persons.’ These ‘other persons’ include

¹¹⁵ It states that “[1] Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law. [2] No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. [3] No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. [4] Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.”

¹¹⁶ Article 186 of the Constitution of Egypt (2014).

‘non-officials.’ In some countries, the constitutions do not have express provisions on the independence of the judiciary. However, this independence could be inferred from other provisions. For example, where it is stipulated that the accused has a right to a fair trial before an independent and impartial court.¹¹⁷ The constitution of Greece (1975) provides that judges ‘shall enjoy functional and personal independence.’¹¹⁸

As mentioned above, the drafting history of Article 14(1) shows that delegates did not oppose France’s argument that the judiciary should be independent ‘vis-a-vis the political power’ but also ‘against the influence of pressure groups.’ Therefore, even in countries where the constitutions mention that the judiciary is independent from the executive or from the executive and the legislature or where judicial independence is not mentioned at all, judicial independence, as contemplated in the drafting history of the Article 14 and as expounded on further by the international and regional human rights bodies, should be upheld in legislation and in practice. Therefore, whichever approach is followed, the bottom line is that judicial independence, as contemplated in the drafting history of Article 14(1) and in the jurisprudence and practice of the international and regional human rights bodies, should be guaranteed in practice. It is one thing for the constitution to provide for judicial independence and quite another for such independence to be guaranteed in practice. It has been illustrated above that impartiality of the judicial officer is essential for one to get a fair trial. This raises the issue of the steps that a litigant has to take when he/she has reasons to believe that the judicial officer is biased against him/her. It is to this issue that we turn.

5. Recusal

An important question that arises when dealing with the right to a fair trial relates to the remedy a litigant has if he/she has a reason or reasons to believe that a judicial officer or one of the judicial officers presiding over his/her case lacks the necessary impartiality. Case law from international human rights bodies, regional human rights bodies and national courts is to the effect that if there is evidence to cast doubt on the judicial officer’s impartiality, he or she must recuse himself/herself from the case. None of the constitutions of the 193 countries referred to in this article deals with the issue of recusal of judicial officers.¹¹⁹ Human

¹¹⁷ Article 70 of the Constitution of Iceland (1944).

¹¹⁸ Article 87(1).

¹¹⁹ Article 233 of the Constitution of Honduras (1982) mentions, in passing, that the General Prosecutor may recuse himself.

rights bodies such as the European Court of Human Rights,¹²⁰ the African Commission on Human and Peoples' Rights,¹²¹ the East African Court of Justice¹²² and the Inter-American Commission on Human Rights¹²³ have explained the circumstances in which a judicial officer should recuse himself/herself when an allegation of bias is made against him/her or the conditions which have to be met to prove bias on the part of a judicial officer. Likewise, national/domestic courts in countries in Africa,¹²⁴

¹²⁰ See for example, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial* (criminal limb)...., p. 26–30.

¹²¹ See, for example, *Isaak v Republic of Eritrea* (Communication 428 of 2012) [2018] ACHPR 135 (27 April 2018) para 32.

¹²² In *A.G. of Kenya v Nyong'o and Others*. (Application 5 of 2007) [2007] EACJ 1 (6 February 2007) para 32, the East African Court of Justice held that: "There are two modes in which the courts guard and enforce impartiality. First, a judge, either on his own motion or on application by a party, will recuse himself from hearing a cause before him, if there are circumstances that are likely to undermine, or that appear to be likely to undermine his impartiality in determining the cause. Secondly, through appellate or review jurisdiction, a court will nullify a judicial decision if it is established that the decision was arrived at without strict adherence to the established principles that ensure judicial impartiality. The first is that 'a man ought not to be a judge in his own cause'. The second, which additionally is intended to preserve public confidence in the judicial process, is that 'justice must not only be done but must be seen to be done'."

¹²³ *Gustavo Gómez López v Venezuela* (Report No. 82/981, Case 11.703)(28 September 1998) para 22, the Inter-American Commission on Human Rights referred to the case law of the European Court of Human Rights and held that "the decisive point is not the subjective fear of the interested party regarding the impartiality of the court that is to hear the case, but rather whether the circumstances indicate that his fears can be objectively justified."

¹²⁴ Lesotho: *R v Mokhantso & Others* (CRI/T 95 of 2) [2002] LSCA 142 (23 September 2002); *R v Manyeli* (C of A (CRI) 14 of 2007) [2008] LSCA 29 (17 October 2008). Malawi: *Kumwembe & Anor. v R*[*Kasambala v R* (6 of 2017; Criminal Appeal 5 of 2017) [2017] MWSC 4 (12 August 2017). Namibia: *S v SSH* (29 of 2016) [2017] NASC 28 (19 July 2017). Seychelles: *Michel & Others v Dhanjee & Ors* [recusal] (SCA 5 of 2012) [2012] SCCA 23 (31 August 2012). Sierra Leone: *Kadie Kallon (nee Davies) v Josephine H.M Jackson* (EP CIV APP 59 of 2019) [2020] SLCA 3 (15 April 2020). South Africa: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (Judgment on recusal application) 1999 (4) SA 147. Tanzania: *Hobokela Fred Mwangota & Another vs Augustino Mwangota* (Misc. Civil Cause 271 of 2021) [2022] TZHC 13818 (13 October 2022). Uganda: *In Re application for Recusal of Owiny - Dollo CJ* (Civil Miscellaneous Application No. 3 of 2021) [2021] UGSC 7 (17 March 2021); *Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & Solicitors & Anor* (Civil Appeal No. 2 of 2013) [2014] UGSC 9 (3 July 2014). Zambia: *Champo v People* (CAZ Appeal 40 of 2016) [2017] ZMSC 9 (28 July 2017). Zimbabwe: *Mupungu v Minister of Justice, Legal and Parliamentary Affairs And 6 Others* (7 of 2021) [2021] ZWCC 7 (22 September 2021); *Mawere and 5 Others v Mupasiri and 2 Others* (2 of 2022) [2022] ZWCC 2 (9 March 2022). Liberia: *Yancy et al v RL* [1978] LRSC 3; 26 LLR 374 (1978); *Vargas v Reeves et al* [1999] LRSC 6; 39 LLR 368 (1999) (21 January 1999).

Asia,¹²⁵ Europe,¹²⁶ Australasia¹²⁷ and North America¹²⁸ have also explained the circumstances in which a judicial officer should recuse himself/herself when an allegation of bias is made against him/her or the conditions which have to be met to prove bias on the part of a judicial officer. In some of these cases, courts have relied on the Bangalore Principles of Judicial Conduct (2002),¹²⁹ which, according to the Supreme Court of India, ‘are accepted world-wide both in civil law and common law countries.’¹³⁰ A combined reading of this case law shows that there are generally three situations in which judicial officers recuse themselves: (a) recusal *mero motu* (without an application from one of the parties or both parties);¹³¹

¹²⁵ See for example, Menteri Hal Ehwal Dalam Negeri v Raja Petra Bin Raja Kamarudin [2009] MYFC 23 (Malaysia); Heng Aik Swan v Wee Poh Thuan Arthur – [2012] SGDC 496 (21 December 2012) (Singapore). Article 32 of the Code of Civil Procedure of Taiwan provided for the circumstances in which a judge should recuse himself *mero motu* and also for circumstances in which an application for recusal may be made. For the interpretation of Article 32, see J.Y. Interpretation NO-256 [1990] TWCC 7 (4 April 1990).

¹²⁶ See for example, Tracey v The Minister for Justice and Equality and Law Reform & Ors (Approved) [2019] IEHC 950 (25 October 2019)(High Court of Ireland).

¹²⁷ See for example, Capilano Honey Ltd v Dowling [2018] NSWSC 876 (4 April 2018) (Supreme Court of New South Wales).

¹²⁸ See for example, Minister of Budget Management v Belize Food and Transportation Ltd [2003] BZCA 4 (17 October 2003) (Belize); United States v Lauersen [2003] USCA2 451; 348 F.3d 329 (United States); Frederick Hawkesworth et al v The Superintendent of Prisons et al [2013] BBHC 73 (Barbados); Fatahi-Ghandehari v. Wilson, 2019 ONSC 3584 (CanLII) (Canada); R. v. Sway, 2021 ONSC 7349 (CanLII) (Canada).

¹²⁹ See for example, O’Driscoll -v- Hurley and Health Service Executive [2016] IESC 32 (14 June 2016) (Supreme Court of Ireland); In re Dolin [2021] PWSC 40 (30 December 2021)(Supreme Court of Palau); Minister of Justice v Kim [2021] NZSC 57; [2021] 1 NZLR 338 (4 June 2021)(Supreme Court of New Zealand); Independent State of Papua New Guinea v Transferees [2015] PGSC 45; SC1451 (5 August 2015)(Supreme Court of Papua New Guinea); Supreme Court Advocates-on-Record Association and Another. v. Union of India [2015] INSC 776 (16 October 2015); ZN v. Secretary for Justice and Others [2015] HKCFI 2078; [2016] 1 HKLRD 174; HCAL 15/2015 (13 November 2015) (Hong Kong); Kumar v State [2022] FJCA 83; AAU83.2019 (14 July 2022) (Court of Appeal of Fiji); Al Jedda v Secretary of State for Defence [2010] EWCA Civ 758 (08 July 2010) (England and Wales Court of Appeal).

¹³⁰ Supreme Court Advocates-on-Record Association and Another. v. Union of India [2015] INSC 776 (16 October 2015) para 350.

¹³¹ Fako v Director of Public Prosecutions (C of A (CRI) 3 of 20) [2020] LSCA 49 (30 October 2020) para 21 (Court of Appeal Lesotho) (the judge ‘recused himself from an appeal against a rape conviction, because he had presided in the application for bail pending the outcome of the appeal. The main reason for dismissing the bail application was that the appeal had no prospects of success on the merits.’). See also the following Supreme of Court Ghana decisions: Republic v High Court (land Division) Accra and Others (J5 62 of 2020) [2020] GHASC 55 (14 October 2020) p.30 (Supreme Court of Ghana) (recusal *mero motu*); Republic v High Court Ex Parte: Opuni (20 of 2021) [2021] GHASC 95 (26 October 2021) para 88 (Supreme Court of Ghana)(recusal *mero motu*).

(b) recusal on the basis of an application by one of the parties;¹³² and (c) a judge recusing himself/herself through the nullification of his/her decision on appeal or review on the ground that he/she lacked the necessary impartiality to preside over the matter. In other words, he/she is compelled to recuse himself/herself pursuant to the order of an appellate court.¹³³ This raises the fundamental question of the conditions that an applicant for the judge's recusal has to meet to prove bias on the part of the judge. In the first and third scenarios above, bias is presumed to exist. In the first scenario, the judge himself/herself is of the view that he/she lacks the necessary impartiality to preside over the case. In the second scenario, the review or appellate court concludes that the judge lacks necessary impartiality. This happens, for example, in cases of retrial after a conviction has been set aside. The second ground is the most contentious one: how does one prove bias on the part of a judge? In *Isaak v Republic of Eritrea*,¹³⁴ the African Commission on Human and Peoples' Rights held that:

In *S v Stewe* (SA 2 of 2018) [2019] NASC 3 (15 March 2019), the Supreme Court of Namibia set aside the magistrates' decision to recuse themselves on the basis that they had been side-lined for promotion. The court held that this had nothing to do with the impartiality of the court and their four not a valid ground for refusal. In *Vidyadhar G. Chavda v Pravinchandra G. Chavda* (Civil Revision 7 of 2016) [2017] TZCA 197 (9 February 2017) (Tanzania), the judge recused himself before he had dealt with the same case as a practicing lawyer before his appointment to the bench. In *Acting Director of Public Prosecutions v Manda* (S.C.Z. Judgment 39 of 1974) [1974] ZMSC 22 (22 October 1974) (Zambia) the judge recused himself because the accused was his relative. *Manana And Others v Acting President, Industrial Court And Others* (56 of 2013) [2013] SZSC 48 (30 October 2013) (Swaziland) para 23 (if there is a family relationship between the judge and the deponent of the affidavit of one of the parties to the proceedings); *Valabhji & Anor v Republic & Anor* (CM 28 of 2023) [2023] SCSC 396 (1 June 2023) (Seychelles) para 18 (if there is a social relationship between the judge and the accused). See also *The Seychelles Human Rights Commission and Others v The Speaker of the National Assembly of Seychelles and Others* [2024] SCCA 14 (3 May 2024) (Seychelles Court of Appeal).

¹³² Cases in which judges have recused themselves on this ground include: *KPMG/Harley & Morris Joint Venture N.O. Liquidators of Lesotho Bank (in Liquidation) v Mopeli* (CIV/APN 183 of 2) [2002] LSCA 73 (20 June 2002) (Lesotho)(the adverse remarks they made against one of the parties before the commencement of the hearing of the case);

¹³³ *Commander Lesotho Defence Force and Others v Lt. Maluke (C of A (CIV) 30 of 2014)* [2014] LSCA 42 (24 October 2014) (where the Lesotho Court of Appeal held that members of court martial who had presided over the appellant's trial were biased and should have recused themselves). In *S v Munuma and Others (3)* (SA 10 of 2010) [2013] NASC 10 (15 July 2013) the Supreme Court of Namibia held that since the judge had made adverse findings against the accused when dismissing the plea of jurisdiction which insinuated that the appellants had committed the offences, he should not have presided over their trial.

¹³⁴ *Isaak v Republic of Eritrea* (Communication 428 of 2012) [2018] ACHPR 135 (27 April 2018).

“The existence or non-existence of bias can be tested in a number of ways. The Commission will adopt the approach taken by the European Court of Human Rights (the European Court) which identifies two distinctive ways of testing impartiality; the subjective approach and the objective approach. Whereas the subjective approach seeks to ascertain the actual existence of bias by assessing the personal conviction of a given judge in a given case, the objective approach asks whether the same judge offered guarantees sufficient to exclude any legitimate doubt of impartiality.”¹³⁵

A large body of case law has been developed on the second of the three situations above: recusal on the basis of an application by one of the parties. Case law from domestic courts in different parts of the world on this issue shows, *inter alia*, that in an application for recusal, the applicant must prove actual or apprehended (objective) bias on the part of the judicial officer (using the reasonable man standard).¹³⁶ In other words, ‘[e]vidence in support of a recusal application must of necessity be of high probative quality and sufficiently cogent if it to be relied upon.’¹³⁷ This evidence could be oral or documentary.¹³⁸ A judge should only recuse himself/herself based on the facts as they exist and not as they are reported or surmised in newspapers.¹³⁹ The application must be made before the judge in question has finalised the case.¹⁴⁰ The standard of proof is one of balance of probabilities.¹⁴¹ A judge’s refusal to recuse himself/herself when the evidence shows that he/she should have recused himself/herself nullifies

¹³⁵ *Isaak v Republic of Eritrea* (Communication 428 of 2012) [2018] ACHPR 135 (27 April 2018) para 32.

¹³⁶ *Mandie v Memart Nominees Pty Ltd (No 3)* [2016] VSC 267 (23 May 2016) (Supreme Court of Victoria); *Director of Public Prosecutions v S.W.* [2022] IECA 310 (08 December 2022) para 29.

¹³⁷ *African Echo [pty] Ltd and Others v Simelane* (48 of 2013) [2013] SZSC 71 (29 November 2013) para 61.

¹³⁸ *Aupindi v Shilemba and Others* (7 of 2016) [2017] NASC 24 (14 July 2017) para 34 (Supreme Court of Namibia). See also *Champo v People* (CAZ Appeal 40 of 2016) [2017] ZMSC 9 (28 July 2017) p. 10 (Zambia Supreme Court).

¹³⁹ *Cheney v US Dist Ct* [2004] USSC 193; 541 U.S. 913 (18 March 2004) para 1. See also *Inhle Transport (Pty) Ltd v Dorbyl Vehicle Trading & Finance Company (Pty) Ltd* (Civil Appeal 15 of 2000) [2000] SZSC 2 (1 January 2000) (Eswatini – formally Swaziland).

¹⁴⁰ *Mamba and Others v Madlenya Irrigation Scheme* (37 of 2014) [2015] SZSC 222 (9 December 2015) para 23. See also *Director of Public Prosecutions v S.W.* [2022] IECA 310 (08 December 2022) para 29 (where the judge had dismissed two preliminary objections by the applicant before he applied for the judge’s recusal).

¹⁴¹ *Vehicle Tech Ltd v Commissioner of an Garda Siochana & Others* [2020] IECA 314 (18 November 2020) (Irish Court of Appeal).

the proceedings.¹⁴² For a judge's decision to recuse himself/herself to be valid, it has to be based on solid grounds. Otherwise it will be set aside on appeal¹⁴³ in countries where the judge's refusal to recuse himself/herself is appealable.¹⁴⁴ In some countries, if a judge refuses to recuse himself/herself, the applicant can appeal against his/her decision.¹⁴⁵ Principle 2.5 of the Bangalore Principles provides that:

“A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.”

This implies that it is the judge whose impartiality is questioned that has the discretion decide whether or not to disqualify himself/herself. In many countries, this is the practice. However, there are also instances in which a judge who is a member of the panel recuses himself/herself from hearing the recusal application against him/her. In that case, the application is heard by the remaining members of the panel and they decide whether or not their colleague should recuse himself/herself.¹⁴⁶

¹⁴² Minister of Finance and Another v Hollard Insurance Company of Namibia Limited and Others (3) (8 of 2018) [2019] NASC 13 (28 May 2019) para 95 (Supreme Court of Namibia).

¹⁴³ S v SSH (29 of 2016) [2017] NASC 28 (19 July 2017) (Namibia Supreme Court). The High Court judge had recused himself from the case because he was aware of the accused's previous conviction. On appeal by the prosecution against the recusal, the Supreme Court held that this was not a valid reason for recusal. In Issack Mwamasika & Others vs CRDB Bank Limited (Civil Revision 6 of 2016) [2016] TZCA 546 (19 September 2016) (Tanzania), the judge, while in the process of writing the judgement, received a threatening message on his phone relating to the case. He recused himself and Court of Appeal set aside the recusal. See also Juan Carlos Tafur Rivera v Peru (Report No. 83/19, Petition 403-08)(OEA/Ser.L/V/II.Doc. 92, 31 May 2019) (Inter-American Commission on Human Rights) para 5 where it is reported that 'on August 1, 2006, the plaintiff requested the recusal of the trial judge, who on August 17, 2006 was recused from the case. The journalist appealed this decision. According to the petitioner, with the replacement of the judge on September 5, 2006, the recusal was set aside.' See also Rogelio Miguel Ortiz Romero V Ecuador (Report No. 7/18, Petition 310-08)(OEA/Ser.L/V/II.167, Doc. 11 24 February 2018) (Inter-American Commission on Human Rights) para 3

¹⁴⁴ In some countries such a decision is not appealable. See for example, Stone v Moore [2015] SASC 46 (24 March 2015)(Supreme Court of South Australia).

¹⁴⁵ Bofihla Makhalane v Let'seng Diamonds (Pty) Ltd and Others (C of A (CIV) 10 of 2012) [2013] LSCA 18 (18 October 2013) para 16 (Lesotho Court of Appeal)

¹⁴⁶ See for example, Menteri Hal Ehwal Dalam Negeri v Raja Petra Bin Raja Kamarudin [2009] MYFC 23 (Malaysia); Tikoniyaroi v State [2011] FJCA 47 (Fiji); Button v. Jones, 2003 CanLII 16098 (ON SC) (Canada) 24–26. See also Miguel Ángel Aguirre Magaña v El Salvador (Report No. 24/21)(Case 13.047)(OEA/Ser.L/V/II.179 Doc.27, March 23,

6. Conclusion

In this article, the author has demonstrated the drafting history of Article 14(1) of the ICCPR particularly on the rights of equality before courts and the right to be tried by a competent, independent and impartial tribunal established by law. The author has also demonstrated how the right to be tried by a competent, independent and impartial tribunal is protected in the constitutions of over 190 countries. The study has shown that an overwhelming number of countries provide for this right in their respective constitutions albeit in different forms. Against that background and relying on the criteria set by the International Law Commission, the author has argued that the right to be tried by a competent, independent and impartial tribunal has attained the status *jus cogens*. The author has also indicated how the independence of the judiciary is generally provided for in different countries. The article concludes by discussing the circumstances in which a judicial officer is required to recuse himself/herself from a case.

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