Károly BÁRD, Central European University (Hungary)

The Defendant's Right to Be Present – Can the Right Be Waived?

1. Introduction

In this paper I shall discuss the problems of waiving rights using the defendant's right to attend the trial as the example. However, my purpose is not so much to elaborate on the details of *in absentia* proceedings, but rather to draw the human rights doctrinal framework that may help in assessing the extent to which the justice system is bound to the decision made by the defendant to make use of his rights or to refrain from doing so.

I will primarily use the case law of the ECtHR, first because I am more familiar with the case law of this regional human rights court but also because it seems to me that the ECtHR case law is the most elaborate as concerns the standards of fair trial.

As a first step, I will seek to answer the question whether an accused may waive[1] his right to be present at the trial at all. Can the trial be qualified as fair if the law authorizes proceedings in the absence of the accused – in case the latter himself so requests or gives his corresponding consent? Insofar as we conclude (and let me note in advance: that is indeed what we are going to conclude) that the right to a fair trial is not violated in such cases, then it does not necessarily follow from this conclusion that at the same time the authorities are bound by the decision of the accused.

Therefore, in the second stage of the inquiry I will examine the following question: can the enforcement of personal presence at the trial – which after all is formulated as a right of the accused – be justified if this is against the defendant's will? Is it a human right *not to attend* one's own trial? Will it potentially violate some other human right, if the accused is compelled to appear before the court against his will? If the answer is negative (allow me to again state in advance: it will be), then I will seek to determine the answer to the following: is there a limit to this compulsion? How far may the administration of justice go in compelling the accused to attend the trial without violating his human rights thereby?

In as far as we conceive of the procedural guarantees in international human rights treaties, the guarantees in Article 14 of the ICCPR or article 6 of the ECHR purely as *"personal rights and privileges"*,[2] the question as it is framed plainly does not make sense. It runs counter to the nature of personal rights that waiving them should be prohibited. An individual

1 I will also speak of a waiver when the exercise of a right is made conditional upon the potential bearer of the right making a corresponding motion which the person in question fails to make.

2 Clayton / Tomlinson (2000) 338.

should be able to waive his personal right and the authorities have to respect the choice lest they make the individual a prisoner of his own rights. But some of the components of the right to a fair trial simply are not exclusively personal rights. Thus we have to commence with the inquiry.[3]

2. Is the Waiver of the Right to be Present at Trial Permissible at all?

Starting with the inquiry the first question is whether the right to attend the trial in person can be waived at all. There are some rights among those secured by the Covenant and the Convention which may not be waived under any circumstances. The freedom from servitude and slavery are examples of these so called *inalienable rights*: the individual is not entitled to make his own provisions, that is he may not consent – not even temporarily – to fall into servitude. The drafters of the 1956 Supplementary Convention on Slavery and the ICCPR rejected the proposal that the documents should even refer to "involuntary" servitude because they regarded the notion that anybody might contract himself – i.e. voluntarily – into bondage as unacceptable.[4] Since the decision rendered by the ECtHR in the so-called *Belgian Vagrancy* case, the right to liberty is sometimes also listed among the so-called *inalienable* rights. According to the judgment, "detention might violate Article 5 even though the person concerned might have agreed to it".[5] This formulation is misleading, however – *Trechsel* correctly observes –, because "the very notion of detention implies the absence of consent."[6] In reality the Court in its judgment wished to declare: the individual does not forfeit his right to have the legality of his detention be reviewed by a court as guaranteed in Article 5 (4) of the Convention by the fact that originally she has consented to her detention. The right to liberty is inalienable only in this sense.

The right to a fair trial does not belong to the inalienable rights. According to Article 6 of the Convention and article 14 of the ICCPR this right is to be guaranteed in the determination of a "criminal charge" by a court. But the case law of the ECtHR and the HRC shows that the accused may in fact opt for accepting the decision finding him guilty and the sanctions imposed by the police or the prosecutor, and waive his right to be tried by a court. Given that the accused may waive the entire court proceedings, one could argue that he may do the same with regards to any of the components that form part of the right to a fair trial.

3 I should note that the assessment of one and the same institution differs between countries. Trial by jury is seen as an exclusively personal right in the United States and Canada, and thus the accused may waive it and his decision is binding for the court. The High Court of Australia, in contrast, took the position that the administration of criminal justice is not a private but a public concern, and hence the accused may not waive her constitutional right to a trial by jury. For sources see Clayton/Tomlinson (2000) 335-337.

4 Ovey/White (2002) 100.

5 *De Wilde, Ooms and Versyp v. Belgium*, 2832/66, 2835/66, 2899/66, judgment of 18 June 1971, A12, par. 65.

6 Trechsel (1993) 286.

This conclusion is wrong, however. Let us take the right to an independent and impartial tribunal. The human rights case law indicates that though the accused may waive his right to be tried by a court, once a court proceeding is initiated, he may not consent to have the decision in his case rendered by anything but an *impartial* tribunal. Thus, the right to an impartial tribunal may not be waived in the judicial phase of the proceedings. The explanation for this is that it is exactly the independence and impartiality of the tribunal that may guarantee that the right to the judicial proceedings is waived voluntarily.

The right to an independent and impartial tribunal is not a "personal right or privilege" of the accused, that is why he may not dispose of that right. In fact, there are certain fair trial rights that are "personal rights". In my interpretation most of the rights explicitly listed in Article 6 (3) of the Convention are such rights, like the right to be informed of the charges, have adequate time to prepare or to present witnesses on one's own behalf. These rights are rights or principles of *procedural fairness*;[7] for the sake of brevity I will term them *fairness rights.* The primary function and rationale of the *fairness rights* is to prevent the erroneous conviction of the innocent. As opposed to the so-called *fairness rights,* the right to an impartial tribunal is not primarily designed to prevent the wrongful conviction of innocents, but to *generally* ensure the correct and precise determination of the facts of the case. By accomplishing this function the court's independence and impartiality also guarantees that erroneous convictions will be prevented, but the primary rationale of independence and impartiality is that they "tend to ensure that facts will be found [...] accurately."[8] If the judge is "partial" towards, i.e. prepossessed in favour of, the defendant, the chance that he might find him guilty in spite of his innocence is obviously slim. Nonetheless, we find it unacceptable that such a judge should be permitted to try the case. The impartiality of the judge also serves as a safeguard to ensure that the guilty do not escape justice.[9] Judicial impartiality is not a

7 See Grey (1977) 184-185.

8 Grey (1977) 184.

9 Both the considerations underlying the establishment of the ICC as well Article 17 of the Statute, which expresses the complementarity principle and deals with admissibility, make it clear that the judge's predisposition towards the accused constitutes a violation of fair trial. Following from the complementarity principle, the ICC only proceeds if the national courts are unable or unwilling to conduct a criminal proceeding. Lack of willingness is suggested according to Article 17 (2) c), if "the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice". The question is whether the ICC, with reference to "unwillingness", may declare a case admissible and thereby claim jurisdiction in cases in which there is a significant probability that the law enforcement organisation and the members of the judiciary are incapable of resisting public pressure, thus making them partial towards the accused. Based on the circumstances surrounding the drafting of the relevant provision of the Statute, I believe that bias – both against and towards the accused – provides grounds for the ICC's jurisdiction. The reason is that lack of independence and impartiality – that is a situation in which the administration of justice is incapable of providing

personal right, but an issue of "public policy" or a "structural principle" of the justice system; its function is also to strengthen the public's confidence in the administration of justice. Hence its enforcement cannot be left to the discretion of the accused; he may not waive the requirement of an impartial tribunal.[10]

As I showed earlier, the *fairness rights* are meant to prevent the innocent from being convicted.[11] It is for the defendant to decide whether he wishes to exercise his *fairness rights*; these rights accordingly are personal rights or privileges. At the same time, the right to attend the trial is a precondition for exercising those *fairness rights*. Thus we could conclude that the accused may waive his right to be present at the trial in the same way as he could waive her right to be informed of the charges, to put forward arguments in his defence or present witnesses on his behalf.

However, this conclusion is correct only if the function and the rationale of the right to be present is identical with the one that justifies the listed *fairness rights*. But the function of conducting the proceedings in the presence of the accused is not only to thereby diminish the probability of wrongful convictions. According to the ECtHR, presence at the trial is simultaneously a rule that derives from the principle defining the structure of the administration of justice – the accused may not renounce this with a unilateral declaration. Without the presence of the accused, the principle of directness (*Unmittelbarkeitsprinzip*) suffers, and directness marks "a structural principle, the separation between the investigative (preliminary) phase and the trial".[12] However, the relationship between the principle defining the structure of criminal proceedings (i.e. the separation of the distinct phases of the proceedings and, correspondingly, the independent standing of the trial phase) and the defendant's personal participation is not immediate, but rather indirect: mediated by the principle of directness.[13] Therefore I believe that the administration of justice may accept the defendant's waiver to be present without violating the right to a fair trial. Laws allowing the accused *not to exercise* her right to be present at the trial are not in conflict with the Convention.[14]

impartial proceedings and the procedural guarantees for the accused were originally mentioned as reasons of "inability of the State" to prosecute. See Trifterer (1999) 394.

10 This is how the ECtHR interpreted the right, though the consistency of the case law was broken by the *Bulut* judgment. (*Bulut v. Austria*, 17358/90, judgment of 22 February 1996, Reports 1996-II.

11 One could of course argue that ultimately these guarantees contribute to maintaining and strengthening the confidence vested in the administration of justice – but obviously this relationship is rather far removed.

12 Weigend (2001) 265.

13 In contrast, the relationship between judicial impartiality and strengthening public confidence is immediate. The right to an impartial judge is therefore unacceptable. The principle of directness itself is an operational principle of criminal procedure and – unlike impartiality – it allows for limitations, it may be enforced to certain degrees.

14 On the French and Dutch regulations see the *Poitrimol* and *Lala* cases. (*Poitrimol v. France*, 14032/88, judgment of 26 October 1993, A277-A, and *Lala v. the Netherlands*, 14861/89, judgment of 22 September 1994, A297-A).

This conclusion is only erroneous if we completely deprive the defendant's presence at the trial of its rights character, as Judge *Pettiti* does in his dissenting opinion in the *Poitrimol case*[15]: to appear in person, he claims, is not a right of the accused, but his obligation. *Pettiti* explains this with the punitive nature of criminal law to which – in his opinion – criminal procedure needs to adhere to. This is why it is unacceptable, he argues, that the accused himself determine the form of the proceedings by deciding whether to be present at the trial or not. Judge *Pettiti* also raises an argument in favour of the defendant's presence that his absence would deprive the injured or private parties to the proceedings of the opportunity to cross-examine the accused, thereby violating *their* right to a fair trial. The principle of equality of arms, he continues, needs to be effective not only with regard to the relationship between the prosecution and the accused, but also in the relationship between victims or private parties and the accused. *Petitti's* reasoning is erroneous, however. True, the private party is entitled to a fair trial, and thus equality of arms needs to be ensured – but only in the context of determining civil law claims.[16] And the idea that the injured party, i.e. the victim, could benefit from the right to a fair trial in criminal cases is certainly not supported by Strasbourg case law: the right's holder is exclusively the defendant.

Even without declaring it explicitly, the decision of the majority does – in contrast to *Petitti's* claim – indeed indicate that attending the trial is not only a duty, but also a right of the accused. According to the judgment "it is open to question" whether "the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge", when the accused has previously "waived his right to appear and to defend himself" in person. This formulation allows us to conclude that trial *in absentia* is acceptable provided that the accused waived her right to be present.[17]

Several European states leave it to the discretion of the accused whether he wishes to attend the trial, though it is true that this option tends to be available in proceedings for minor offences only. The majority of criminal procedure codes allow the courts to forbear exploiting the informational advantages of the principle of directness only in minor cases; the codes merely differ in terms of how extensive the exception is that they are willing to grant in the cases involving minor offences. In the countries that use penal orders it is accepted that directness does not apply at all: the court bases its decision exclusively on the files of the investigation. In the event of a trial, however, which is held in the absence of an accused

The Hungarian Act no. I of 1973 also allowed for trying a properly summoned accused *in absentia*, though only in proceedings concerning offences punishable exclusively by a fine.

15 *Poitrimol v. France*, 14032/88, judgment of 26 October 1993, A277-A, dissenting opinion of Judge Pettiti.

16 I should note that civil rights demands can be enforced outside the criminal procedure as well. Here the equality of parties to the proceedings can be secured without violating the accused's power of disposition.

17 See *Poitrimol v. France*, 14032/88, judgment of 26 October 1993, A277-A, par. 31.

who has waived her right to be present, the court only partially renounces the advantages offered by the principle of directness.

Whether exceptions to the principle of directness are recognized at all, and if so, to what extent and degree, is not a human rights but a justice policy issue. This is why I believe that even in more serious cases where relatively heavy penalties can be imposed, it ought to be unproblematic to accept the defendant's waiver of the right to be present. This conclusion is also supported by the 1987 Recommendation of the Council of Europe's Committee of Ministers concerning the simplification of criminal justice.[18] The text does not prohibit trials in the absence of the accused in cases involving serious offences, if the accused himself so requests. Though the Committee's Recommendation does refer to minor offences (and the relatively light penalties that may be imposed), it merely suggests the following: member states should allow for *in absentia* proceedings *at least* in such minor cases;[19] thus, the recommendation does not rule out the possibility that member states allow for such an option in a wider range, thus including major offences.

The waiver must obviously be voluntary and be made in an unequivocal manner. It is not *per se* unacceptable that the law presumes the waiver of the right, but the authorities need to verify that this presumption is well-grounded. It may appear paradoxical, but it is nevertheless true: it is only if the authorities do all in their power to enforce the presence of the accused that they may assume that the defendant freely waived the right to be present at the trial. The right to a fair trial will be infringed if the authorities do not undertake to identify the whereabouts of the accused with sufficient diligence, and if they fail to take all reasonable measures to notify him of the proceedings.[20] In a number of cases against Italy, the Court found a violation of Article 6 because the authorities determined too readily, without making any real effort to identify his whereabouts, that the accused was in hiding or had absconded, thereby clearing the way for a trial *in absentia*.[21] This is also why the Hungarian Constitutional Court held

18 Rec (87)18.

19 Member states should consider allowing trial courts, at least for minor offences and having regard to the penalty which may be imposed, to hear and decide a case in the absence of the accused (provided that the latter has been duly informed of the date of the hearing and of his right to be represented legally or otherwise).

20 The authorities are obligated to ensure the proper administration of criminal proceedings, and the accused cannot be expected to assist in his own conviction. At the same time, the law may erect reasonable barriers to prevent the accused from abusing the legal guarantees he is entitled to, and to thereby thwart the proceedings, for instance by consciously making the delivery of the summons and other relevant documents impossible. The obligation of care is also incumbent upon the person who is party to the proceedings. See *Hennings v. Germany*, 12129/86, Commission's report of 30 May 1991, par. 51. Though it does not emerge unequivocally from the case-law, based on the documents concerning the *Hennings* case it is fair to assume that the degree of expected obligation of care is in inverse proportion to the gravity of the criminal offence that is the subject of the indictment.

21 *Colozza v. Italy*. 9024/80, judgment of 22 January 1985, A89; *Brozicek v.*

that the provision of the Code of Criminal Procedure, which did not make the issuing of an arrest warrant mandatory in the investigative phase, and simultaneously allowed the investigation to be conducted and afterwards the charges to be filed (and the trial to be held) in the absence of the accused, was unconstitutional. In the opinion of the Constitutional Court, an indictment may only be issued against a person who is in an unknown location, "if all the legally available means for finding the suspect have been fully exploited, and the prosecutor – after the proper period of time necessary for determining the failure – ascertained that the measures aimed at apprehending the suspect have failed to yield a result."[22]

We have thus answered the first question: the right to a fair trial will not be violated if the proceedings are conducted *in absentia*, insofar as the accused has either explicitly so requested, has consented to it, or if a waiver of the right to be present can be presumed with high probability.

From this conclusion, however, it does not necessarily follow that the choice of the accused has to be accepted (respected). A liberty does not create a right-claim. In the next step, I will examine whether there are any components of the right to a fair trial that the accused may not at all be compelled to exercise, and if so, whether the right to be present belongs to this group of rights. In other words: is it compatible with the respect for human rights if the administration of justice enforces the presence of the accused in spite of his will to the contrary?

3. Is Compelling the Accused to be Present Permissible?

The answer will obviously be negative if we conclude that abstaining from being present constitutes a part of the right to a fair trial just as much as the right to be present. Some of the rights enshrined in the Convention are in fact both positive and negative rights. Such a right, for example, is the freedom of expression: it includes also the negative freedom to withhold information, *i.e* "freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself".[23] The same is the case with the freedom of association.[24] Compelling their exercise may violate *these rights* just as much as interference with their free exercise.[25]

Italy, 10964/84, judgment of 19 December 1989, A167; *F.C.B v. Italy*, 12151/86, judgment of 28 August 1991, A208-B; *T. v. Italy*, 14104/88, judgment of 12 October 1992, A245-C; *Somogyi v. Italy*, 67972/01, judgment of 18 May 2004, Reports of Judgments and Decisions 2004-IV.; *Sejdovic v. Italy*, 56581/00, judgment of 11 October 2004.

22 Paragraph III.A.4.2.1 of Constitutional Court decision 14/2004 (V. 7.).

23 *K v Austria*, 16002/90, Commission's report of 13 October 1992, par. 45.

24 *Young, James and Webster v. United Kingdom*. 7601/76, 7806/77, judgment of 13 August 1989, A44, par. 51.

25 Since these are qualified rights, both restrictions on their exercise and compulsion used to induce individuals to exercise these rights are acceptable, provided that they are prescribed by law and based on grounds recognized by the Convention and are necessary to a democratic society.

The Convention case law seems to suggest that the right to a fair trial is not such a right: refraining from exercising it does not fall within the concept of the right. It seems that the right to a fair trial is an exclusively positive right, and this applies to its components as well. Compelling the exercise of this right can therefore not violate the right to a fair trial *itself*. It does not follow, however, that such compulsion could not violate some *other* human rights. Theoretically, this danger pertains to all components that may be waived by an individual.[26]

To determine what components of the right to a fair trial a person may not be compelled to exercise, I suggest setting out again from the functions the components serve. I propose that only *purely personal rights* fall within the range of rights whose exercise "may not be compelled". Such are the informational and participation rights of the accused, i.e. the rights are termed *fairness rights*, which are exclusively – or at the very least primarily – designed to prevent a wrongful conviction of the innocent. Let us take for instance the right to be informed of the charges or the right to defend oneself. It is difficult to imagine how their exercise might be compelled. Through intimidation the accused may be induced to read the indictment aloud, but his willingness to appreciate, to comprehend its contents cannot be enforced. We can certainly find historical examples in which the accused were forced to pretend that they were defending themselves. In those cases, however, we speak of mock trials and not of justice.

In addition to practical unfeasibility, also human rights considerations prohibit the authorities from using compulsion in order to enforce the exercise of the purely personal fairness rights.[27] Compulsion would infringe human dignity, autonomy, the individual's freedom broadly understood. The Convention does not explicitly mention these rights, but human dignity and individual autonomy are the foundations of the respect for private life as enshrined in Article 8 of the Convention. If the authorities make an attempt to force the exercise of the fairness rights, they will enter into the personal sphere; that is into a "zone of activity which is one's own and whose entry one is free to prohibit to anyone".[28] If the individual is compelled to make use of these purely personal rights, then the freedom of expression, too, will be violated.

It is indeed true, neither the respect for private life nor the freedom of expression are unqualified rights: the Convention allows for their limitation. But it is difficult to imagine that any grounds recognized by the Convention (the interests of national security or public order, the protection of health or morals, or the protection of the rights of others) could serve to justify in these cases an interference with private life or the freedom of expression. But let us assume that notwithstanding what I claim one might find such a

26 I should point out that the right to an independent and impartial tribunal established by law is different – concerning this right I established in the first step of the study that the accused may under no circumstances make dispositions concerning its enforcement. Hence the administration of justice may not accept a waiver of this right.

27 It may be more appropriate to say that due to our understanding of human rights we cannot imagine that the compulsion could be practically feasible.

28 Cohen (1993) 406.

reason, the interference, though based on a ground recognized by the Convention, would hardly withstand the scrutiny of the necessity and proportionality test. Thus we may conclude that in practical terms fairness rights are in fact both positive and negative rights.

In the case of those components of the right to a fair trial which are not exclusively intended to reduce the chances of wrongful convictions, compelling the exercise of a right is not *inherently unacceptable*. An individual may demand that his waiver of the *fairness rights* be unconditionally respected, but he cannot demand the same for other components. The right to be assisted by counsel in the civil law perspective is not only a personal right, but rather a so-called structural principle that contributes to sustaining and reinforcing the confidence vested in the administration of justice. This finds its expression also in the institution of mandatory defence: the accused may not reject the assistance of counsel. Also the right to a public trial is formulated in the Convention as the defendant's right, but courts are not bound by the defendant's decision to waive it. Publicity of the trial is a principle that strengthens the legitimacy of the justice system; it ensures that the public can supervise how courts perform their public function. Thus the accused may make a motion to exclude the public, but he has *no right* under Article 6 of the Convention to a closed hearing. Similarly, obtaining a judgment within a reasonable time is also formulated as a right of the accused, but it is simultaneously a principle that is likely to increase the credibility of the administration of justice and is a safeguard of legal certainty (*Rechtssicherheit*). Hence the administration of justice is not obliged to tolerate that the accused – by "waiving" his right to obtain judgment in reasonable time – endlessly delays the proceedings.

Being present at the hearing is a precondition for exercising the personal fairness rights. However, in itself it is not only a personal right, but also a rule stemming from the principle of directness – which reflects the separation of the investigation and the trial; a rule that helps the court in establishing the truth. The accused may waive his right to be present,[29] but cannot force the trial to be conducted in his absence. The court will have the right to compel the defendant's attendance, if it is of the opinion that obtaining a picture of who the person is that is being judged will help in determining the truth and reaching the just decision. Undoubtedly, sometimes it may be in the interest of the accused not to be seen by the decision-maker. Especially lay judges may become easily biased if an accused in detention appears in the court room accompanied by prison officers. Nonetheless, even American jurisprudence, which widely respects the defendant's choice of how he manages his case, does not accept that as a corollary to the right of confronting her accusers, the defendant would also be entitled to be absent[30] (even though – in contrast to the continental solution – the court may not even attempt to make him speak if she does not wish to testify as a witness for the defence).[31]

29 And the administration of justice – as we have seen – may accept the waiver.

30 For sources see Cook (2004).

31 In all these cases (compulsory defence, public hearing, speedy trial, presence), the rule of law requirements, or the rule of law principles – which were originally and fundamentally intended to protect the accused – are enforced

We may conclude the second part of the examination: using compulsion to enforce the exercise of personal fairness rights is prohibited. The accused may decide that he does not wish to use these rights and the administration of justice is under the duty to honour this choice. The accused *may* also choose to waive some other components of the right to a fair trial. In this event the administration of justice may accept his waiver[32], but is under no obligation to do so. Since the right to be present falls into the latter category of rights, the accused may be compelled to be present at the hearing.

4. Are there Limits to Compulsion?

In the third step I will examine whether there are any limits to this compulsion. Is there a point beyond which the administration of justice has to respect the defendant's decision to waive those components of the right to a fair trial that do not exclusively protect him from erroneous conviction, but also serve other interests? What I wish to demonstrate is that there is such a limit: beyond a certain point compulsion is no longer justifiable, respect for human rights demands that the administration of justice defer to the choice of the accused in these situations.

Let me first state that also practical considerations impose a limit on the degree of compulsion that may be applied.[33] Proceedings conducted without the presence of an accused who chose to be absent voluntarily

against the will of the accused. The rule of law authorises interference that is contrary to the interests of the accused. See Krüger (1989), 90-91. Krüger raises the issue of whether – based on proportionality considerations – the restriction or reduction of the rule of law ought to be at least offered, to thereby spare the accused of interferences that are burdensome to him. Specifically in the context of being present at the trial this means that the court needs to justify why it obliges the accused to be present when the law allows for conducting the hearings in his absence. See Krüger (1989) 91-92.

32 As I have shown, this is not the case with the requirements courts and judges have to meet. Courts have to be established by law, judges must be independent and impartial. This requirement, formulated as the rights of the defendant, may not be waived.

33 At the same time, it is not only rule of law requirements that can justify forcing the appearance in court, but so can practical considerations [Krüger (1989), 90]. In Krüger's view, compelling the appearance of the accused may also be justified by the rule of law principle of *rechtliches Gehör*, which needs to be applied regardless of whether the accused makes use of his right to speak at the hearing. "The possibility that the accused may hear the charges, that she can intervene in the course of the proceedings at any time...as well as the fact that the participants of the trial express themselves in the presence of the accused, in themselves give values to the principle of court hearing *(rechtliches Gehör)*. Similarly, considerations relating to the efficiency of the trial may also motivate compelling the presence of the accused. If, for instance, the factual or the legal situation changes as a result of the hearing, then the court is obliged to inform the accused of the resulting consequences. If the accused is not present, the court can only fulfil its obligation of care by adjourning the trial." See Krüger (1989) 91-92.

are usually justified not with reference to the respect for human rights, but with justice policy arguments: if the law insists on the principle of directness – that is on the presence of the accused – at all costs, it can thereby paralyse the administration of justice. Trials held in the absence of an accused who has absconded or put himself in a state in which he is incapable of attending the trial normally are not justified with reference to respecting the choice of the accused (i.e. that she did not wish to exercise her right to be present), but with the need to preserve the efficiency of the administration of justice. But beyond a certain point compulsion becomes unacceptable from a human rights perspective as well: this occurs when the enforcement of the components of the right to a fair trial against the will of the defendant completely *deprive the latter of its rights character* and thereby makes the accused a mere object of the proceedings.[34]

The text of the European Convention itself indicates that there may be situations in which the human rights of the accused are infringed if her choice is not respected. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the right of appeal in criminal matters. It is up to the accused to decide whether to appeal a judgment or to exercise his right to have a decision rendered within reasonable time instead. The administration of justice is bound to honour his choice. It cannot fight tooth and nail to enforce the rule according to which cases have to be settled within reasonable time, though legal certainty would so require. Similarly, the accused may waive his right to be tried in public, but the administration of justice does not have to accept this choice: as indicated earlier, the accused has *no personal right to a closed hearing*. At the same time, the Convention does indeed identify respect for the private life of the accused as one of the reasons for the exclusion of the public. It is the accused who knows which right he places a greater value on, *i.e.* the right to a public trial or the right to have his private life respected, and the court will decide whether to respect the choice of the accused. In this process of assessment the court will also consider the needs of the public as well as the interests of the administration of justice, in addition to the interests and wishes of the accused. But the interest in having one's private life protected may be so vital in certain situations that the court violates a human right if it fails to honour the choice of the accused and opts not to exclude the public.

As a general rule, compulsion may be justified also in the interest of enforcing the presence of the accused; physical force may be used and the accused may be deprived of his personal liberty. The flight of the defendant is mentioned as one of the legitimate grounds for arrest or detention in Article 5 (1) c) of the Convention, and detention of the person who absconded after the commission of the criminal offense not only ensures that the potential sentence will be carried out, but also that the

34 This is what Judge *Bonello* (*Geyseghem v. Belgium*, 26103/95, judgment of 21 January 1999, Reports of Judgments and Decisions 1999-I.) criticises the court for in his concurring opinion; he think the court assists in transforming a fundamental right of the accused into a duty. The result of this "cheerless metamorphosis," – he claims – is that the accused "may be denuded of his defence if he chooses to exercise his privilege not to attend his trial or appeal".

accused will be present during the procedure.[35] But here, too, compulsion has its limits. Not only for practical considerations do some national laws permit that the trial be held in the absence of an accused who has rendered himself incapable of participation, but also because it is recognized that beyond a certain point compelling the presence of the accused may qualify as inhumane and degrading treatment.

Procedural laws frequently attempt to make defendants who have absconded, are in hiding or are unwilling to attend the trial, appear in court by envisaging various procedural sanctions in the event of their absence. *In absentia* proceedings are such a threat in and of themselves: the accused must take into account that he will be deprived of the opportunity to defend himself in person. According to the ECtHR, the threat to deprive an accused of his procedural rights is not necessarily a violation of the Convention either: the legislature "must accordingly be able to discourage unjustified absences".[36] Implied in the concept of a threat, however, is that – from time to time – it will be enforced. In such cases it may turn out that the sanction by which the accused is threatened deprives him of the right to defence to such a degree that by this the right to a fair trial is infringed.[37]

Usually the interest in the presence of the accused is invoked to justify threats of procedural sanctions and their imposition in turn is thought to be legitimised with the argument that those who themselves violate the law or abuse their rights may not demand that their rights be respected. The notion that an abuse of one's rights may extinguish the claim to these rights also appears in the text of the Convention. It is stated in Article 17 that "nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". This provision establishes that people have rights and duties: the persons protected by the Convention are obligated to respect other people's rights.

35 Though some procedural laws handle this differently, by leaving it up to the court whether to threaten the accused with compulsion or rather to motivate him to appear by promising that they will not use compulsion until the conclusion of the proceedings. German and Austrian law both use the institution of so-called "safe conduct" (*sicheres Geleit*). The absent accused is promised that if he appears in court she will not be held in remand. See Article 295 of the German StPO and Article 419 of the Austrian StPO.

36 *Poitrimol v. France*, 14032/88, judgment of 26 October 1993, A277-A, par. 35.

37 In the *Lala* judgment, the Court found a violation of the Convention because the Dutch regulation deprived an unjustifiably absent accused even of the right to a formal defence: it forbade the counsel to proceed in the interest of the accused. *Lala v. the Netherlands*, 14861/89, judgment of 22 September 1994, A297-A. What led to the condemnation of the government in the *Poitrimol* case was that according to French regulation a person sentenced to loss of liberty in a first instance proceeding loses his right to file an appeal if he refuses to give himself up to the authorities – and a counsel may not undertake to do so in her stead, either. *Poitrimol v. France*, 14032/88, judgment of 26 October 1993, A277-A.

Respondent governments occasionally interpret Article 17 to mean that the Convention makes the exercise of rights conditional on fulfilling duties. This is why they assume that any right guaranteed by the Convention may be denied if the person in question has breached his duty to refrain from violating the rights of others. The procedural safeguards protecting persons presumed to be innocent cannot be denied using this reasoning, however, unless one does away with the presumption of innocence at the same time. In this case, the rule would say: no one may invoke his procedural rights if she is *under the suspicion* of having violated the rights of others. This would of course imply a total elimination of procedural guarantees, which is obviously unacceptable. Still, the Irish government referred to Article 17 when it attempted to justify the deprivation of individuals suspected of having committed terrorist acts of their right to initiate a judicial review of the legality of their detention.[38] The ECtHR made clear that Article 17 seeks to ward off totalitarian groups from using the rights enshrined in the Convention to achieve their objectives. The members of such groups and organisations may not invoke those rights, the exercise of which would make it easier for them to destroy the rights and liberties enunciated in the Convention.[39] But no one may be deprived of the procedural guarantees of personal liberty or of the guarantees of fair trial based on Article 17.[40] *A fortiori* we may conclude that procedural disobedience may not justify limiting the individual's right to defence. In the *Lala* case, the Commission stated that with regard to exercising the right to defence it is irrelevant "whether or not the applicant should himself have appeared at his trial";[41] thus any provision that deprives an absent accused of the right to defence by counsel "is incompatible with the respect for the fundamental guarantees which every person charged with a criminal offence should enjoy".[42] Rights to defence may not be impaired in order to establish the truth or to enforce the principle of directness which serves the aforementioned purpose: "The need to secure the attendance of an accused at the trial of his case cannot justify proceeding to judgment against him without hearing the defence he wishes to put forward through his counsel."[43]

National procedural laws – it appears – follow the Strasbourg guidelines: they have begun eliminating provisions that limit the absent accused's rights of defence. The Swiss federal code of criminal procedure serves as a case in point. According to the drafters of the law it is unacceptable that

38 The Irish government argued that *Lawless*, as a member of the IRA, which was established with the purpose of eliminating the rights of others, cannot refer to his rights under the Convention, and that for the same reason he cannot take exception to the fact that the procedural guarantees concerning personal liberty did not apply in his case. *Lawless v. Ireland*, 332/57, judgment of 1 July 1961, A3.

39 Such rights are for instance the freedom of thought/conscience, the freedom of religion, expression, assembly or association. See the Commission's decision on the admissibility of the application in the case brought by the *German Communist Party v. Germany*, 250/57.

40 See paragraph 6 of the section entitled "The Law" in the *Lawless* judgment.

41 See *Lala v. Netherlands*, 14861/89, Commission's report of 4 May 1993, par. 48.

42 See par. 51 of the report.

43 *Ibid.*

an accused should be punished for his absence by a curtailment of his procedural rights, as some cantonal procedural laws do. "*In absentia* proceedings may not justify the rights of defence guaranteed by Article 6 of the European Convention on Human Rights."[44]

5. Conclusion

Procedural rights – borrowing *Ashworth's* formulation – are "strong rights",[45] thus the 'no rights without responsibilities' thesis does not apply with regard to them.[46] These rights are fundamentally individualistic.[47] Given that they are "strong" and individualistic rights, restricting their exercise with reference to public order, the administration of justice, or the interests of the public is only permissible in a very narrow set of circumstances. Their individualistic character is so dominant that beyond a certain point the administration of justice has to recognize these rights as "negative rights" and refrain from enforcing their exercise, even if other interests so demand. If the administration of justice refuses to respect the choice of the accused in such a situation, it completely eliminates the rights character of procedural guarantees. The right to a public trial – originally intended to serve the purpose of preventing *"Kabinettjustiz"* – will turn into an obligation to suffer public humiliation, and the right to be present, whose purpose is to ensure the subject position of the accused, will turn into the obligation of the accused to assist – *through* his presence – in his own conviction as the object of the proceedings.

44 "Aus 29 mach 1. Konzept einer eidgenössischen Strafprozessordnung. Bericht der Expertenkommission ‚Vereinheitlichung des Strafprozessrechts'. Eidgenössisches Justiz- und Polizeidepartement" Bern, December 1997, 151.

45 Ashworth (2002) 76, 120.

46 "[t]he idea of rights either deriving from citizens' responsibilities or being somehow dependent on those responsibilities is a relatively weak one." See Ashworth (2002) 122.

47 See Ashworth (2002) 124.