

**DENIAL OF A FAIR TRIAL**

**DOES A TRIAL IN ABSENTIA CONSTITUTE AS DENIAL OF A  
FAIR TRIAL**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws  
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By

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## DECLARATION

I, OWINO EUNICE ANYANGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: \_\_\_\_\_



Date: \_\_\_\_\_

26 / April / 2019

This dissertation has been submitted for examination with my approval as University Supervisor.

ALLAN M. MUKUKI

Signature: \_\_\_\_\_



26/4/2019

**ABSTRACT**

*A fair trial is one of the most fundamental right that the judicial system can give an accused person to a criminal trial. This is due to the fact that the violation of the right to a fair trial my render the whole trial process unjust. A trial in absentia on the other had means that the accused person was absent from*

*This dissertation seeks to show that in absentia trials are in themselves a violation of the right to a fair trial, the right of the accused person to be present during their own trial therefore accommodations should be made for the accused person to be present during their trial.*

## LIST OF CASES

*Civil Liberties Organization, Legal Defence Center, Legal Defence and Assistance project/ Nigeria 218/98*

*Crosby v United States, 1993.*

*Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990).*

*Diaz V United States 223 US 442 (1912).*

*Foucher v France (1997).*

*Gregačević v. Croatia application no. 58331/09.*

*Illinois v Allen, 397 U.S. 337 (1970).*

*Johnson v Zerbst, 304 U.S. 458 (1938).*

*Kyprianou v Cyprus, application no. 73797/01.*

*Lala v Netherlands (1994), ECtHR application no. 14861/89.*

*Lewis v United States (1892), 146 U.S 370, 13 S.Ct. 136, 36 L.Ed. 1011*

*Maleki v. Italy, Comm. No. 699/2996, 1 2.1., U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999).*

*Malone v The United Kingdom application No. 869/79.*

*Murtazaliyeva v Russia (2018).*

*Ninn-hansen v Denmark, application no. 28972/95*

*Pelladoah v The Netherlands [1994], Application no. 16737/90, judgment*

*Prager and Oberschlick v Austria, Application No.15974/90*

*Prosecutor v Slobodan Milošević, case No.IT-02-54-AR 73.*

*Re Provisional Court Judges (1997) 3 S.C.R.3*

*Stafford v The United Kingdom, Application No. 16295/99*

*Taylor v United States, 414 U.S. 17 (1973)*

*United States V Tortora, 464 F.2d 1202 (2d R 1970)*

## LIST OF LEGAL INSTRUMENTS

African charter for human and Peoples rights 27 June 1981, treaty series rev. 5, 21 I.L.M.  
58

American Convention on Human Rights 18 July 1978 treaty series vol. 1144, 1-17955.

The International Convention on Civil and Political Rights, 19 December 1976, treaty  
series vol. 999, pp 171.

The Rome Statute of the International Criminal Court, 17 July, 1998 treaty series vol. 2187

International Criminal Court Draft Statue 22 July 1994, treaty series vol. 276, p.3.

Universal Declaration on Human Rights, 10 December, 1948.

## **LIST OF ABBREVIATIONS**

ACHPR African Charter on Human and People's Rights.

ECTHR European Convention on Human Rights.

ICCPR International Convention on Civil and Political Rights.

ICTY International Criminal Tribunal for former Yugoslavia.

UDHR Universal Declaration on Human Rights.

UN United Nations.

## CHAPTER ONE: DENIAL TO A FAIR TRIAL

### Does a trial in absentia constitute as denial of a fair trial?

#### 1.1. INTRODUCTION

*“Every accused person is innocent until proven guilty. This principle can be determined by the process of a fair and effective legal process. The main aim of the right to a fair trial is not just to protect suspects and defendants but to make the society safer and stronger and without the fair trial the society would lose its confidence in the justice system. Jago Russell.”<sup>1</sup>*

International Human Rights Law adopted and designed a norm where its main aim was the protection of individuals from unlawful and tyrannical deprivation of their basic human rights and freedoms through a fair trial. <sup>2</sup> This right is assured under Article 14 of the International Convention on Civil and Political Rights (ICCPR) which states that every person is entitled to the right of a fair and public hearing by a competent, independent and impartial tribunal established by law. <sup>3</sup>

Article 50(2) of the Constitution of Kenya 2010 <sup>4</sup>states that every accused person has a right to a fair trial which includes the right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed and Article 63 of the Rome Statute<sup>5</sup> states that the accused person shall be present during the trial.

Denial of a fair trial can constitute itself in two forms; first, in form of a trial that did not follow the judicial procedures and did not accord the accused the judicial guarantees required by the applicable international law such as the absence of the accused in his criminal proceeding and secondly the complete absence of trial. <sup>6</sup>However, this article will

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<sup>1</sup> <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> on 20 January, 2018.

<sup>2</sup> Joubert (2001) et al op cit 78.

<sup>3</sup> Article 14, International Convention on Civil and Political Rights, 1976.

<sup>4</sup> Article 50, Constitution of Kenya, 2010.

<sup>5</sup> Article 63, Rome Statute of the International Criminal Court, 1998.

<sup>6</sup> International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976

focus on the first form which is when the trial did not afford the judicial guarantees for instance when the accused is not present at his trial.

Trial in absentia is a criminal proceeding before a court of law where an accused person is not physically present to defend a case against himself or herself. The right has various guarantees and principles which among others includes the right of the accused person to be present during his or her own trial. However, there are instances where an accused person is not physically present to defend and answer charges in person. This may be considered as a violation of the principle of natural justice and a fair trial.<sup>7</sup>

The purpose of this dissertation is to examine whether trial in absentia constitutes as a denial of a fair trial. It deals with in the area of International Criminal Law and shows where accused persons have been denied their right to fair trial through trial in absentia. This will be done in four chapters of this dissertation and it will seek to answer the following;

Chapter 1 will give clear definitions of a fair trial and trial in absentia. A fair trial is mainly concerned with the concept of fairness and as being just and equitable and trial in absentia is the accused absence from his trial. The history of both a fair trial and a trial in absentia tracing back trial in absentia to the days of the Anglo-Saxon law when defendants were tried in absentia a judgment and sentence entered in his absence.

Chapter 2 assesses the right of a fair trial and a trial in absentia in both national and international law under the specific articles in both international and national instruments and introduces the concept of waiver of the right of an accused person to be present during their trial.

Chapter 3 will assess the legality of the principle of a trial in absentia using the test of proportionality, legitimacy and the legality. The test for proportionality provided that the limitation of the right must balance individual rights and public interests to avoid

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<sup>7</sup> Klerks A. Trials in Absentia International Criminal Law, what is the exact position of the in Absentia-principle in International (Criminal) Law and what is the influence of the Special Tribunal for Lebanon on this position?

arbitrariness, the test for legitimacy states that the limitation must peruse a legitimate aim and legality states that the limitation must be provided for in law.

Chapter 4 assesses the importance of the right to a fair trial as a non-derogable right and the role of the rule of law in the right of a fair trial. The main aim of the rule of law is to curb against arbitrariness by prescribing the limitation in law subject to certain conditions and the consequences of having a trial in the absence of the accused by both the courts and the accused.

Chapter 5 will give an independent opinion of the right to a fair trial and any recommendations to handling cases when accused persons become fugitives. This comes about after the reviewing different authors on the topic of a trial in absentia and understanding their point of view merging their common aspects and subsequently giving an independent view of the issue and making recommendations to the same.

## **1.2. Background of Study**

### **1.2.1. History of Trial in Absentia**

The right of an accused to be present at his trial can be forged back to the days of the Anglo-Saxon law and an accused person who without lawful cause absented himself was never tried in absentia nor a default judgment of guilty entered. He was in this case declared an outlaw. Here, no tribunal or court would enter a verdict on a complaint brought forward unless the accused was physically present in court. Among the most common early methods used in England which required the defendant to be present was trial by ordeal, and after the Norman Conquest in 1066 a trial by battle was developed. However, a trial by ordeal was abolished by the clergy in 1219 but maintained trial by battle for a number of years.<sup>8</sup>

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<sup>8</sup> Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

However, when the charge was serious in nature and attracted a capital punishment, the defendant's presence was deemed a must to jurisdiction and the right was absolute and non-waivable. <sup>9</sup>

Over the years, an exception to the rule that an accused ought to be present in trial and was a non-waivable right was grafted. Various states and federal courts still upheld the principle that an accused person presence was mandatory in capital cases and defendants of non-capital cases would waive the right to be present by his own will absenting himself from trial, trial by jury which replaced trial by battle and trial by ordeal. Absence of a defendant in the trial made it difficult for the court to continue a case it had already begun or and most importantly deprived the court of jurisdiction preventing the trial from beginning. <sup>10</sup>

Thus after the modification of the law on trial in absentia over the recent years after the decision in *Diaz*<sup>11</sup> where the Court of Appeal concluded that for non-capital offences the accused can waive his right to be present in court, courts were reluctant to state that a felony trial could be held in the absence of the accused. <sup>12</sup>

However, the United States Court of Appeal in the case of *United States V Tortora, 464 F.2d 1202 (2d R 1970)* <sup>13</sup> became the first court to uphold a conviction of a felony in the defendant's absentia who had fled before trial had commenced. <sup>14</sup>

### 1.2.2. History of a Fair Trial

The right to a fair trial is an ancient principle and is linked to the trial process. After a number of years of its implementation, the right to a fair trial was finally codified in the international human rights instrument post World War 2 which is now universally applied.

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<sup>9</sup> Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>10</sup> Judge Patrick Robinson, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>11</sup> Starkey GJ, Trial in Absentia, 53, *St. John's law review*, (2012), *Diaz v United States* 223 US 442 (1912).

<sup>12</sup> Starkey GJ, Trial in Absentia, 53, *St. John's law review*, (2012).

<sup>13</sup> Starkey GJ, Trial in Absentia, 53, *St. John's law review*, (2012).

<sup>14</sup> Starkey GJ, Trial in Absentia, 53, *St. John's law review*, (2012).

<sup>15</sup> Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

The principles of the right to a fair trial can be traced back to the law of the Twelve Tables which were the first written code of laws in the Roman Republic around 455 B.C which laws required all parties by right to be present at the hearing which is also found in today's laws as an essential to a fair trial which require the accused to be heard and to defend him or herself before an independent and impartial tribunal. <sup>16</sup>

In 1215, King John signed the Magna Carta Liberatum which entailed in article 39 that no freeman shall be taken, or imprisoned, or disseized, or outlawed save by the lawful judgment of his peers or by the law hence the right of the accused to be present in court for his trial. <sup>17</sup>

At the turn of the 18<sup>th</sup> Century, the right to right to a fair trial is further developed and codified when the political regime diverted from a despotic system to a democratic system. These change was written in laws and as a result it embodied the right to a fair trial. <sup>18</sup>

In 1791, the United States after it adopted the 6<sup>th</sup> Amendment to its constitution in its bill of rights amendment VI which was interpreted that the criminally accused trials be held in all fairness although not absolute. <sup>19</sup>

Every person by virtue of being human has the right to enjoy his or her own fundamental basic human rights, whether he or she is an accused person or innocent. A fair trial is a basic human right and is essential to the prevention of the arbitrary abuse of all human rights. <sup>20</sup>

A fair trial entails many judicial guarantees and of the most important one and the basis of this research is the right of the accused to be present at his trial to answer a case against him and to adduce evidence to defend himself. Accused persons charged with criminal

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<sup>16</sup>Judge Patrick Robinson, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>17</sup> Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>18</sup> Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>19</sup>, Judge Robinson P, the Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.

<sup>20</sup>Fair Trial: The History of an Idea Ian Langford, Volume 8, *Journal of human rights*, 2009-issue 1.

offences should be allowed a chance to present a defense to support their case, thus the right to a fair trial.<sup>21</sup>

Article 63(1) of the Rome Statute states that the accused person shall be present during the trial unless his presence disrupts the trial and make a provision for the accused for him or her to observe the trial and instruct counsel from outside the courtroom. This article makes it clear that the accused person ought to be present at his trial to answer the case against him or her.<sup>22</sup>

Further, Article 6 of the European Convention on Human Rights states that every accused shall be entitled to a fair and public hearing within a reasonable time and under an impartial tribunal and article 6(3) (c) states that every accused person charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing.<sup>23</sup>

Article 8 (2) (d) of the American Convention on Human Rights under the right to a fair trial guaranteed accused person to defend himself personally or to be assisted by legal counsel of his own choosing this can also be translated to the accused presence in court.<sup>24</sup>

The above international human rights instruments show the importance of having the accused present in court during his trial as a way of ensuring that the accused has a fair trial and the adherence to the rule of law.

The right to a fair trial and an accused person be present during trial is illustrated by the proposal by the U.S to include it in the non-derogable rights provided for in article 4(2) of the ICCPR.<sup>25</sup>

In relation to this analysis of the history of a fair trial which also shows the importance of accused persons rights to a fair trial to be respected and they should be accorded the right

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<sup>21</sup> <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/a-fair-chance-to-present-a-defence/> on 20 January 2018.

<sup>22</sup> Article 63(1), Rome Statute, 1998.

<sup>23</sup> Article 6, European Convention on Human Rights, 1953.

<sup>24</sup> Article 8 (2) (d), American Convention on Human Rights, 1978.

<sup>25</sup> WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice, March 2000, *Lawyers Committee for Human Rights*.

of being present during their trial. It shows that the right of an accused to be present during his trial should not be limited and that accused persons should be tried in their presence.<sup>26</sup>

This dissertation will analyze the legality of the principle of a trial in absentia and look at what test is provided by law for the limitation of the right of an accused to be present the trial.<sup>27</sup> Under the microscope it will look at various tests that permit the limitation of the right to an accused being present during his trial. Such tests include proportionality which states that the limitation must be absolutely necessary and reasonable.<sup>28</sup>

Legality, which simply addresses if the limitation is provided in law and does it fit in international law.<sup>29</sup>

And legitimacy, the limitation must pursue a legitimate objective, rationally connected to the objective and less restrictive means.<sup>30</sup>

### 1.3. Justification of study

This topic is important because by virtue of being human, there are certain rights and principles that every individual is entitled to and those are the basic human rights. A fair trial is one of the basic human right that accused persons where innocent or guilty are entitled to which is also tied to the principle of presumption of innocent until proven guilty.<sup>31</sup>

The judicial guarantee of the right to a fair trial that is the right of the accused to be present in court is one of the basic rights accorded to accused persons and the courts should adhere to the rule of law in making sure that all accused persons are accorded this right.<sup>32</sup>

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<sup>26</sup> Article 63, Rome Statute of the International Criminal Court, 1998.

<sup>28</sup> Cianciardo J, the Principle of Proportionality: The Challenges of Human Rights, *Journal of Civil Law Studies*, Volume 3, 1-1-2010.

<sup>29</sup> Peters A, Legality as a Principle of Global Constitutional Law (Abstract), ESIL-ECTHR Conference "European Convention on Human Rights and the Crimes of the Past," 26 February 2016.

<sup>30</sup> Permissible limitation, <http://www.ag.gov.au> on 28 January, 2018.

<sup>31</sup> <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> on 28, January, 2018.

<sup>32</sup> <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> on 28, January, 2018.

## **1.4. Statement Objective**

### **1.4.1. Main Objective**

The general objective of this study is to analyze the question of whether a trial in absentia can be or is constituted as denial of a fair trial.

### **1.4.2. Specific Objectives**

To give a clear definition on the concept of the right to a fair trial and trial in absentia.

To give clear examples of when accused have been sentenced in absentia and to assess the legality of the principle of trial in absentia.

To evaluate the importance of the right to a fair trial as a non-derogable right and prove if a trial in absentia can be rendered as just.

### **1.4.3. Research Questions**

What is the definition of a fair trial and trial in absentia?

What is the legality of the principle of a trial in absentia?

What is the importance of the right to a fair trial as a non-derogable right?

## **1.5. Literature Review**

This section analyzes the writing of different authors and their perceptions on the view of the right to a fair trial, a trial in absentia, the importance of the right to a fair trial and an accused to be present during his trial and further show if the principle of a trial in absentia is a just practice.

### 1.5.1. Definition of a fair trial and a trial in absentia

### 1.5.2. Defining a fair trial

Judge Patrick Robinson in his article the right to a fair trial in international law, defines fairness as being just and equitable.<sup>33</sup> He quotes Judge Shahabuddeen in the trial of Slobodan Milošević stating that fairness of trial need not require perfection in every detail and that the essential question is whether the accused has had a fair chance of dealing with the allegations against him.<sup>34</sup>

He also states that the ICCPR provides for derogation from obligations in times of public emergencies and with this regard a fair trial can be derogated during public emergencies.<sup>35</sup> However, the derogation is only limited to times of public emergencies and that when countries derogate from this right they must show that the procedures they adopted are fair and in the context of those exceptional circumstances.<sup>36</sup>

He states that the standard of fairness is the same in both the international and domestic courts and stresses with regard to the sameness of the character of fairness in both courts whether the crime is serious or non-serious in nature. He concludes by stating that every accused is entitled to the right to a fair trial and from its history it is shown that the right have attained universal recognition and acceptance by being incorporated in the constitution of various countries and the codified in international conventions and treaties. Judges must be careful in their pursuit of justice and fairness making sure that accused persons are accorded to the full extent protection of the law.<sup>37</sup>

In this regard, it is seen that the right to a fair trial is not absolute but relative. It is relative with reference to a particular condition or results.<sup>38</sup>

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<sup>33</sup> Judge Robinson P, The Right to a Fair Trial in International law, with specific Reference to the work of the ICTY.

<sup>34</sup> Judge Shahabudeen Mohammed separate opinion, *Prosecutor v Slobodan Milošević, case No.IT-02-54-AR 73*.

<sup>35</sup> Article 4(1), International Convention on Civil and Political Rights, 1966.

<sup>36</sup> Judge Robinson P, The Right to a Fair Trial in International law, with specific Reference to the work of the ICTY.

<sup>37</sup> Judge Robinson P, The Right to a Fair Trial in International law, with specific Reference to the work of the ICTY.

<sup>38</sup> Judge Robinson P, The Right to a Fair Trial in International law, with specific Reference to the work of the ICTY.

This dissertation concurs with Judge Robinson in his article when he states that every accused is entitled to the right of a fair trial because it is as of right and provided for under the rule of law.<sup>39</sup> It however disintegrates from the fact that this right can be limited in a case of public emergencies. This is because the right to a fair trial separates the guilty from the innocent and protecting accused against injustice and without this the public will lose its faith in the judicial system and the rule of law.<sup>40</sup> Thus accused persons should be accorded the right to a fair trial despite there being a public emergency and after all the trial could always wait until after the fourteen days which is the legal window that the state is allowed to declare a public emergency. This is also to avoid the arbitrariness of the different arms of governance.

In day and era, this dissertation is meant to provide for the standard by which legal systems as well as states should abide by. It is stated that during public emergencies which put the security of the state at stake and the legislative arm of the government declares a state of emergency, putting trials at a hold it interferes with the duties of the judiciary that is to hold trials yet the two arms of the government are meant to be separate without interferences but checks and balances.

Further, despite of the state declaring a public emergency, trial process should still proceed in the presence of the accused and public emergencies should not exceed the designated period of fourteen days. The Supreme Court should also analyze the validity of a public emergency to determine whether it is dire for the violation of a public emergency.

Shajeda Akther and Dr. Rohaida Ninti Nordin in their article discuss fair trial guarantees. In their article they state that no one should be punished without being accorded a fair trial. This ensures that every accused person is given sufficient opportunity to defend themselves. The principle underpins the right of the accused to defend themselves thus the right to bring evidence for your case and the right for the accused person to be present during their trial. This is mostly in capital offences

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<sup>39</sup> Judge Robinson P, The Right to a Fair Trial in International law, with specific Reference to the work of the ICTY.

<sup>40</sup> Defending the Human Right to a fair trial, <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/> on 28 January, 2018.

where the accused is facing serious punishment for the crime that they committed therefore a high level of fairness and equal treatment is called for because the accused liberty or life may be deprived. Further the Shajeda and Dr. Rohaida state that it is not possible to state that the justice has been delivered if the accused is punished proportionally and rightly but not fairly that is to say the process of coming to a just verdict that may be proportional and fair must be in line with the procedures of a fair trial starting from the time of arrest to the time of sentencing.<sup>41</sup> The process of a fair trial is universal and thus practiced by many courts worldwide and apply to everyone regardless of the crime that they committed. This means that accused persons worldwide are to have the same procedural rights and guarantees despite the charge against them this is also referred to as the equality of arms. The principle also entails that every accused person who is a party to a criminal proceeding must have a reasonable chance of representing his case in court under the conditions which are not prejudicial to his case. In their article they state the essential components of the principle of equality of arms which include;<sup>42</sup> the right of the accused to be tried in his presence which is the back bone of this dissertation, the right to access to a lawyer, the right to defend oneself in person or through a legal counsel, the right to be receive free legal assistance, the right to examine or have examined the witness.<sup>43</sup>

The following elements are tied to the right to a fair trial and mostly the right of the accused person to be present in court to defend his case personally or through his legal counsel.

In conclusion, for purposes of this dissertation, this dissertation strongly agrees with Shajeda Akther and Dr. Rohaida Binti Nordin as to the fact that an accused person should not be punished without being accorded a fair trial regardless of the punishment that they are facing. This is because as the article states that justice

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<sup>41</sup> Shaheda A, Dr. Rohaida NB, Equality of arms: A Fundamental Principle of a Fair Trial Guarantee Developed by International and regional human Rights Instruments.

<sup>42</sup> Shaheda A, Dr. Rohaida NB, Equality of arms: A Fundamental Principle of a Fair Trial Guarantee Developed by International and regional human Rights Instruments.

<sup>43</sup> Shaheda A, Dr. Rohaida NB, Equality of arms: A Fundamental Principle of a Fair Trial Guarantee Developed by International and regional human Rights Instruments.

cannot be delivered however proportional and fair to the circumstance if they process of arriving to the justice is unfair or not in line with the elements of a fair trial.<sup>44</sup>

A fair trial is a right/ law that protects accused persons from the arbitrary limitation and the lack of other rights as well as freedoms that are deemed to be basic rights or laws. It is a guarantee that every citizen earns the right to have the fundamental rights and freedoms.<sup>45</sup>

From the principle of equality provided for above, this dissertation aims at showing that a trial process that does not accord an accused person the above rights is unfair and unjust to the accused person and is in violation to the right of a fair trial which will be answered later in this dissertation.

### **1.5.3. Defining Trial in Absentia.**

The defendant's right to be present during the criminal process is a guarantee of the right to a fair trial and the criminal process is based on two main requirements, firstly that the defendant be present during the trial and that the accused is able to understand the proceeding. It is not enough that they be present but that they are aware of the ongoing proceeding and nothing bars them from understanding what is going on.<sup>46</sup>

A trial in absentia presents itself in two ways, firstly, partial in absentia where the accused only appears at the beginning of the trial process and does not appear again and secondly total absentia where the accused does not take part in any of the process from investigation to the final decision.<sup>47</sup>

In the article diverse approaches to total and partial in absentia trials, Mohammad Hadi and Anne- Marie define a trial in absentia as to a trial where the accused is absent or not present and the standard to determine the presence of the accused is

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<sup>44</sup> Shaheda A, Dr. Rohaida NB, Equality of arms: A Fundamental Principle of a Fair Trial Guarantee Developed by International and regional human Rights Instruments.

<sup>45</sup> Reyhan T, Protecting Individual citizen's Rights to a Fair Trial in African countries, JoMUN XII Human Rights Commission.

<sup>46</sup> [http://www.jeanmonnet.org.tr/Portals/0/scholars\\_database\\_thesis/basri\\_bagci\\_tez.pdf](http://www.jeanmonnet.org.tr/Portals/0/scholars_database_thesis/basri_bagci_tez.pdf) on 2 February, 2018.

<sup>47</sup> [http://www.jeanmonnet.org.tr/Portals/0/scholars\\_database\\_thesis/basri\\_bagci\\_tez.pdf](http://www.jeanmonnet.org.tr/Portals/0/scholars_database_thesis/basri_bagci_tez.pdf) on 2 February, 2018.

his/her physical presence in the courtroom during the trial. They state that in absentia includes two instances which are when the accused is completely absent from the criminal trial also known as trial by default and the second one partial trial where the accused in one or specific hearings while still under the control of the court in order to undergo sentencing when found guilty.<sup>48</sup>

Anne Klerks defines in a trial in absentia in two ways, where the accused is present during the arraignment and the incitement and after which the accused decides if to attend trial or not and the second one is when the accused has never appeared at any stage of the trial.<sup>49</sup>

From the above definitions it is seen that all the three authors define a trial in absentia in two ways, one of which is the complete absence of the accused from the trial process and the second one is the partial absentia where by the accused only appeared during arraignment maybe for purposes of taking a plea. However Anne Klerks in her definition she alluded to the fact that the accused person waived his right of being present during the criminal proceeding.<sup>50</sup>

This dissertation is meant to show with the aid of case law when accused persons have been tried in their absentia and how courts have attempted to define a trial in absentia.

Furthermore it will show and state whether the accused presence is mandatory and when presence can be dispensed with in criminal trials.

Furthermore, with the emergence of technology, show how technology can try to solve the problem of accused to be present during trial when it is difficult for the accused presence to be secured in court.

#### **1.5.4. What is the limitation provided by law for a trial in absentia?**

This dissertation will analyze the legality of the principle of a trial in absentia and look at what test is provided by law for the limitation of the right of an accused to be present the

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<sup>48</sup> Zakerhossein MH, Anne-Marie de Brouwer, Diverse Approaches to Total and Partial In Absentia trial by the International Criminal Tribunals, *Criminal law Forum* (2015) 26:181-224.

<sup>49</sup> Klerks A, 'Trial in Absentia in International Criminal Law' LLM International and European Public Law-thesis June 2008.

<sup>50</sup> Klerks A, 'Trial in Absentia in International Criminal Law' LLM International and European Public Law-thesis June 2008.

trial.<sup>51</sup> Under the microscope it will look at various tests that permit the limitation of the right to an accused being present during his trial. The right of the accused to be present in court may be limited by law of general application provided that such limitation shall be permitted to the extent that is reasonable<sup>52</sup>

In Daniel Brown's article, the International Criminal Court and a Trial in Absentia, he states that the right of the accused to be tried in his presence can be found in international human rights covenants such as the International Convention of Civil and Political Rights, the prohibition of a trial in absentia is not is not precisely considered as a fundamental human right in the criminal context because the right for an accused to be tried in his presence is perceived to be a "core" international human right. He noted that although many nations provided for the prohibition of a trial in absentia, most of them made reservations for specific exceptions for when a trial in absentia may be permitted.<sup>53</sup>

Further he states that the issue of permitting a trial in absentia had led to quite a big debate among the International Criminal Court commentators who hold different views on whether a trial in absentia should be permitted and if it should be permissible under the Statute.<sup>54</sup>

Daniel Brown notes that trials in absentia need to be regulated to be consistent with human right standards for example make provisions for notification of the accused, setting aside the judgment and sentence when the accused appears. Under the International Criminal Court Draft Statute article 37(2) provided for a trial in absentia when the accused s absent because of ill health and for security reasons. They however fall short in stating what precisely is termed as ill health and security.<sup>55</sup>

He notes that the principle of in absentia is aimed at targeting the accused who deliberately avoids trial either by hiding and refusing representation form the government.<sup>56</sup>

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<sup>52</sup> Stuart Woolman, Limitation.

<sup>53</sup> Brown D, the International Criminal Court and Trial in Absentia, 24, *Brooklyn Journal of International Law*,(1999)

<sup>54</sup> Brown D, the International Criminal Court and Trial in Absentia, 24 *Brooklyn Journal of International Law*, (1999).

<sup>55</sup> Brown D, the International Criminal Court and Trial in Absentia, 24, *Brooklyn Journal of International Law*,(1999)

<sup>56</sup> Brown D, the International Criminal Court and Trial in Absentia, 24, *Brooklyn Journal of International Law*,(1999)

Further in the United States, the Supreme Court held that trials in absentia are permitted when the accused was initially present at any point during the trial but however voluntarily absents himself from trial after its commencement.<sup>57</sup> Further the same Supreme Court<sup>58</sup> in comparison to the Draft Statute Article 37<sup>59</sup> provide from when a trial in absentia is necessary which is when the accused has fled the jurisdiction after the commencement of the trial and when his conduct of the accused makes it difficult for the trial to continue.<sup>60</sup>

In conclusion, in his article, Daniel Brown notes that a trial in absentia is not absolutely prohibited the International Criminal Courts Draft Statute under Article 37 and the judgments from the Supreme Court ruling, but they however fail to give a full list of when an accused can be absent from his trial and rather give a vague list by stating when the accused is ill or rather for security reasons. It is not stated whether the ill health is rather mentally or physical and what security risk they refer to.<sup>61</sup>

This dissertation will however show that although there is no express prohibition for a trial in absentia in the laws of various nations other than the Rome Statute,<sup>62</sup> it aims at challenging the validity of a trial in absentia for one, failing under specificity for when accused persons can be tried in their absentia and two, it is not acceptable in an open democratic society because it violates the accused rights to a fair trial, justifiable in an open and democratic society based upon freedom and equality and shall not negate the essential content of the right in question<sup>63</sup>

The test of proportionality should provide clear guidelines that provide for the limitation of a right that is accorded to individuals such that it strikes a clear balance between the individual right and public interest while not negating the essential content of the right at stake.<sup>64</sup>

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<sup>57</sup> Crosby v Unites States, 1993

<sup>58</sup> Federal Rule of Criminal Procedure 43, United States, 2017

<sup>59</sup> Article 37, International Criminal Court Draft Statute, 1994

<sup>60</sup> Brown D, the International Criminal Court and Trial in Absentia, 24, *Brooklyn Journal of International Law*, (1999)

<sup>61</sup> Brown D, the International Criminal Court and Trial in Absentia, 24, *Brooklyn Journal of International Law*, (1999)

<sup>62</sup> Article 63, Rome Statute of the International Criminal Court 1998.

<sup>63</sup> Stuart Woolman, Limitation.

<sup>64</sup> Shlomit S, In Search of "Red Lines" in the ECtHR's Jurisprudence on Fair Trial Rights, 1

Article 6 of the European Convention of Human Rights guarantees defendants the right to be present during trials and this is one of the essential requirements of a fair trial as stated by Shlomit Stein in his article “ In search of ‘Red Lines’ in the ECtHR’s Jurisprudence on Fair Trial Rights.”<sup>65</sup>

This means that a defendant who is under trial has a right to be to be present during his trial provided that his conduct does not disrupt the trial. This however does not mean that proceeding carried out in the absence of the accused in contrast to Article 6 of the ECtHR. Rather the court states that if it is not established whether an accused waived his right to be tried in his presence and subsequently a judgment is entered to this effect and he is convicted in his absentia, if he is unable to appeal the conviction, this will be considered as a denial of justice.<sup>66</sup>

Therefore when an accused decided to waive his right to be present during trial he should be advice on the importance of the right and consequence of the waiver.<sup>67</sup>

Stein states although a defendant waives his right it be present during his trial, it does not mean the accused has subsequently lost the right to effective legal representation. The right to representation is one of the essential features of a fair trial which may not be subject to limitations noting the fact that it must discourage unjustified absence. Thus denial of legal representation as a penalty for an accused absence in the proceedings is as inappropriate sanction.<sup>68</sup> This is a hefty punishment which also violates the accused right to a fair trial. The court should be proportional in implementing such a harsh punishment for accused who are absent from court, a lesser punishment should be given one that does not limit the right of the accused therefore balancing individual rights and public interest in the delivery of just.<sup>69</sup>

### **The test of necessity.**<sup>70</sup>

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<sup>65</sup> Shlomit S, In Search of “Red Lines “in the ECtHR’s Jurisprudence on Fair Trial Rights, 1.

<sup>66</sup> Shlomit S, In Search of “Red Lines “in the ECtHR’s Jurisprudence on Fair Trial Rights, 27

<sup>67</sup> Shlomit S, In Search of “Red Lines “in the ECtHR’s Jurisprudence on Fair Trial Rights, 27.

<sup>68</sup> Shlomit S, In Search of “Red Lines “in the ECtHR’s Jurisprudence on Fair Trial Rights, 27

<sup>69</sup> Shlomit S, In Search of “Red Lines “in the ECtHR’s Jurisprudence on Fair Trial Rights, 28.

<sup>70</sup> Stuart Woolman, Limitation.

This principle of limitation states that the limitation pursue a legitimate objective and be reasonable, necessary and proportionate, meaning that the limitation must be necessary to achieve a legitimate objective, adopt a means that is rationally connected with the objective, the means adopted must be the least restrictive means to achieve the purpose of the limitation. It is important for every legal system to balance the individual right and public interest to prevent the arbitrary application of a trial in absentia. <sup>71</sup>

It is an important requirement for every legal system in its quest for justice to decided cases quickly. The main purpose of law is to promote order in the society and to punish law breakers and this can only be achieved through a trial. It is a legitimate interest for the society that justice must not be delayed and this can be avoided by a trial in absentia as stated by Lucas Tassara in his article “Trial in Absentia: Rescuing the ‘Public Necessity’ Requirement to Proceed With a Trial in The Defendants Absence,” which he states that will prevent defendant’s from manipulating the judicial system from having to conclude trial with the criteria of their presence. Furthermore, he goes ahead and gives cases where the defendants had been tried and subsequently convicted in their absence such as *Diaz V United States, 223 U.S. 442 (1912)* where the defendant voluntarily absented himself from trial and the court stated that it was his voluntary decision and it had it decided differently, the conviction of the defendant would depend upon his entire willingness to be present during trial. <sup>72</sup>

The aspect of public necessity was determined in the case of *United States v Tortora, 464 F.2d 1202(2dar 1972)*, where the defendant was absent from the beginning offering no explanation for absence. This case acted as jurisprudence in the case of *United States v Peterson* which involves six defendants and one was absent. The court stated that they could not wait to secure his presence because this would lead to a delay of justice and an opportunity to abscond trial and this outweighed his individual right. <sup>73</sup>

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<sup>71</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant’s Absence, 12, *Barry Law Review*, (2009).

<sup>72</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant’s Absence, 12, *Barry Law Review*, (2009).

<sup>73</sup>Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant’s Absence, 12, *Barry Law Review*, (2009).

From the above authors, it is to be taken that the presence of the accused in his trial is an important aspect with is his also his fundamental rights to a fair trial which is guaranteed but not absolute thus can be limited when an accused conduct makes it hard for the for the trial to proceed, when he is of ill health and when and when it is of public interest in the quick delivery of justice.<sup>74</sup>

However, this dissertation's main theme is to prove that a trial in absentia is unjust and that an accused right to present in court should not be limited whether on the grounds of ill health or the quick delivery of justice unless when read with the consequences of his waiver and he consents to it.<sup>75</sup>

### **1.5.5. What is the importance of the right to a fair trial as a non-derogable right?**

One of the most important reasons for a fair trial is that is in accordance with the rule of law also known as the concept of *prééminence du droit*.<sup>76</sup> The rule of law play an important role in the right to a fair trial and this dissertation shows the following reasons below.

Dr. Showkar Ahmad Bhat, in his article a fair trial in criminal proceedings states that the sole aim of the rule of law is to make sure that the trial will be carried out in accordance to the law and to lead to a just outcome. Which are the requirements for of justice thus denial of a fair trial is denial of justice. He also states that incase an accused person is of the perception that his trial will not be fair, then it is the duty of the court to show that the trial will be carried out in a fair manner. He states that a fair trial encompasses various components such as the presumption of innocence until proven guilty, that the trial judge is independent, impartial and competent thus free from any pressure from deciding the case, the trial will be in

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<sup>74</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>75</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>76</sup> Melkonyan D, Concept of the Rule of Law in the Case-Law of the European Court of Human Rights, 339.

the presence of the accused, and so on. This will be addressed in the later chapters of this dissertation.<sup>77</sup>

Davit Melkonyan states that the concept of the rule of law in interpretation of the right to a fair trial is made referred to in the preamble of the convention. European Judges have developed various substantive guarantees which include the principle of legality or foreseeability, the principle of legal certainty, equality of individuals before the law, control of the executive when whenever public freedom is at stake, remedy before the court and the right to a fair trial all aimed at protecting the accused from arbitrariness.<sup>78</sup>

The right to a fair trial is a cornerstone of a criminal justice system and a requirement under the rule of law. This right is to protect accused from being innocently convicted of crimes. It also protects the dignity, liberty and reputation of the accused person. The concept of fairness of a trial shows integrity and moral legitimacy of the process. The rule of law regulates the practice of a fair trial.<sup>79</sup>

In conclusion, it is seen that the right to a fair trial is linked to the rule of law whose main aim is to regulate the trial process making sure it is in line with the principles of a fair trial and also to curb against arbitrariness.

This dissertation will show that by virtue of the importance of the right to a fair trial, the presence of the accused is mandatory and should not be limited under any circumstances apart from those stated under the Article 63(2) of Rome statute for example when the accused presence makes it difficult to hold a trial in his presence, however still that courts should still find a way to have the accused available during trial.

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<sup>77</sup> Dr. Ahmad SB, Fair Trial in Criminal Procedure, Department of Law, University of Kashmir, Jammu & Kashmir, 2394-5044, *The World Journal on Juristic Policy*, (2017).

<sup>78</sup> Melkonyan D, Concept of the Rule of Law in the Case-Law of the European Court of Human Rights, 400.

<sup>79</sup> 276 traditional Rights and Freedoms\_ Encroachments by Commonwealth Laws.

## 1.6. Theoretical Framework

In theoretical framework, the dissertation looks at different philosophical concepts of different legal scholars and relate them to this dissertation and show how the different theories inform this dissertation and show how they bring out the importance of the concept of a fair trial and how accused should be present during their trial.

This research is underpinned under the theories of justice, liberties, rights and human rights. The terms right, liberties and justice are philosophical concept and definitions which will be discussed below:

In “A theory of Justice”, John Rawls states that justice is the first virtue of social institutions as how truth is arrived at through the system of thought and laws and institutions must be just and if they are unjust must be reformed. The natural law theorists states what is just is that which is in accordance with nature and reason and that unjust laws are not laws. However, the society is always in conflict and dispute of that is just and unjust. <sup>80</sup>For example the international human rights instruments claim that trial in absentia is unjust for it is a limitation of the accused person’s right but it goes ahead and states when the right can be limited. There is also an ongoing debate of whether the right to a fair trial should be included under the non-derogable rights in Article 4(2) of the ICCPR. <sup>81</sup>

According to John Rawls, there are two principles of justice, one is that each person is to have an equal right to the most extensive scheme of equal basic liberties with a similar scheme of liberties that is in relating it to this article is that the basic human right that is the right of a fair trial is inherent in all men by virtue of them being human, innocent or guilty and this right does not discriminate.

Two, the social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone’s advantage for example the right to a fair trial guaranteeing accused persons a fair trial and attached to positions and offices open to all.

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<sup>80</sup> John Rawls, *A Theory of Justice* (1972)

<sup>81</sup> John Rawls, *A Theory of Justice* (1972)

John Rawls states that injustice is inequalities that do not benefit all for example when the social virtues such as liberty and opportunities are distributed unequally.

Isaiah Berlin state that there are two concepts of liberty, first the political sense of liberty which he calls the negative freedom where does someone's freedom begin and the second one is the positive sense which is who is the source of control that can determine what someone to does or becomes? This article will focus on the positive freedom which is derived from the wish of an individual to be his own master. That is if he wishes to waive his right to a fair trial will judgment entered in his absence or will the court be put the trial at a standstill until he wishes for it to continue in his presence or will he be compelled to appear in court.

Emmanuel Kant states that rights were entailed in their various judicial consequences, so that someone's possession of a right was conclusive of the existence of certain permissibility's and inviolabilities meaning that the right to a fair trial by nature of its pronouncement by statues is not to be violated and has consequences for its violation<sup>82</sup>.

Human rights theory focus on the theory of life and human dignity. The most important characteristics of human rights is that there are universal in nature thus applicable to all and inalienable in nature. There for the right to a fair trial should not be limited so as the right to a fair trial because it concerns the treatment of accused persons and there is the general presumption of innocent until proven guilty. Therefore states should see to it that they protect, respect and comply with all human right principles<sup>83</sup>

In conclusion, the theory of Emanuel Kant on the strict adherence to judicial proclamations on rights that should be followed and that their violation would lead to a consequence should be adopted.

John Rawls states that unjust laws should be reformed. Therefore in relation to this dissertation, a trial in absentia as it is shown in the dissertation is unjust therefore if a law provides for the accused to be absent in trials other than those that are stated in the Rome

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<sup>82</sup> Simmonds NE, *Central Issues in Jurisprudence* (3<sup>rd</sup> edn Sweet & Maxwell 2008).

<sup>83</sup> Kipkoech BJ, 'Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of Constitution of Kenya' University of Nairobi Unpublished LMM Thesis, University of Nairobi.

Statute they should be amended so as to make it that the accused presence is mandatory during the trial.

Further, the law should provide for remedies where the accused right to a fair trial has been violated whether in form of damages, reduction of sentences or a re-trial.

According to John Rawls principles of justice which provides that each person is to have an equal right to the most extensive scheme of equal basic liberties with a similar scheme of liberties is the same as the principle of equality of arms which all call for the universal application of the right of a fair trial to all regardless of the gravity of the crime.

### **1.7. Hypothesis**

This dissertation theoretical framework show how legal scholars analyzed rights, liberties, rights and human rights, this therefore shows the importance of the right to a fair trial and the right of the accused to be present in his or her own trial. Therefore this research shows that a trial in absentia is a violation of the accused right to a fair trial.

### **1.8. Assumption**

This dissertation takes the assumption that a trial in absentia is a violation of the right to a fair trial of the accused person and that it is an absolute right that can also be limited by the courts, and that accused persons can waive their right to be present in a trial in certain circumstances.

### **1.9. Research design and methodology**

This research is based on qualitative research. The study will rely on both primary and secondary sources of data.

Primary sources of data include, legislations, case law, policy papers and reports made by the various credible organizations that have conducted a search in the areas of fair trial and trial in absentia. This will look at different legislations and conventions that various nations have for the right of an accused person to be present during his or her trial linked to the concept of fairness in the delivery of justice.

Secondary sources of data include, articles, journals, research papers and dissertation, books and information from the internet regarding the right of a fair trial and trial in absentia. This is mainly based on understanding authors on their different perspectives on the topic of a trial in absentia as related to the right of a fair trial analyzing their take on the issue and merging their different perspectives to come to one conclusion.

#### **1.10. Limitations**

Failure to come to a concrete definition of the right to a fair trial and the review of all the review of all the material on both the concept of a fair trial and trial in absentia.

#### **1.11. Chapter break down**

This study has four main chapters:

Chapter one introduces the research topic under the microscope. It gives a background on the topic and its history drawing back to the ancient times, the justification of the topic, and objectives of the study, the research methodology which will mainly be based on statutes, conventions, treaties, and constitutions of various countries. It will also review different articles or journals of authors who have focused on the concept of a trial in absentia. The theoretical frame work of this dissertation is traced to legal scholars and philosophers and how they viewed the concept of human rights and justice. Research hypothesis which grounds the importance of a fair trial and the presence of the accused in court, assumption which is my general take of a trial in absentia and that it is a violation of the accused right to a fair trial. Research design and methodology, the dissertation is based on qualitative research divided in primary sources of data and secondary sources of data.

Chapter one deals with the definition of a fair trial and trial in absentia and their foundations in law. It introduces the topic and case law that argues for a fair trial as a right and case law against trial in absentia because it violates guarantees to a fair trial as of right.

Chapter three will with the aid of case law examine and evaluate why accused persons have been sentenced in absentia and give an independent opinion on the same. It also discusses on when the accused person has waived his right to be present during trial.

Chapter four assesses the importance of the right to a fair trial as a non-derogable right and the role of the rule of law in the right of a fair trial and give case law to this effect.

Chapter five will give an independent opinion on the importance of the right to a fair trial and the importance for an accused to be present in court during trial and whether the right to a fair trial should be limited. It will also give any recommendation and reforms as to how the law should address trial in absentia when an accused absconds trial and on the limitation of the right to a fair trial.

## **CHAPTER TWO: Definition of a fair trial and in absentia trials**

### **2.1. What is a fair trial?**

A fair trial is a trial conducted by an impartial court or tribunal and accords each parties to the criminal trial the due process rights that are prescribed in law and ensures that the defendant's constitutional rights are respected.<sup>84</sup>

The rights to a fair trial consists of certain rights that guarantee an individual minimum and effective protection. The concept of a fair trial prescribe judicial conduct and trial processes and set a bar for the court to operate within the boundaries of effectiveness and fairness in order to come to a just outcome. The right shows the importance of a fair trial which is to deliver justice to an individual and without which the process is prone to abuse and manipulation to suppress individual liberties because these rights are basic to fairness in criminal proceedings and are fundamental to the protection of human dignity.

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<sup>84</sup> <https://www.yourdictionary.com/fair-trial> on 24 February 2019.

Fair trial rights of an accused person in a criminal proceeding has its origin in the Anglo Saxon common law traditions of due process and rule of law which are traced back to the Magna Carta Libertatum of 1215.<sup>85</sup>

## **2.2.The right to a fair trial under national and international law**

### **2.2.1. National**

Most states have the right of a fair trial under their constitutions enshrined in the Bill of Rights for example Article 50 of the Constitution of Kenya which states that all persons have a right to have disputes decided in a fair and public hearing before an independent and impartial tribunal<sup>86</sup> and Article 50(2) prescribes rights of the accused which include to be present when being tried.<sup>87</sup> The Sixth Amendment of the United States Constitution which states that the accused person in a criminal proceeding shall enjoy the right to a speedy and public trial by an impartial jury.<sup>88</sup>

### **2.2.2. International law**

The right to a fair trial has universal recognition and is enshrined in international conventions such as;

Article 10 of the Universal Declaration of Human Rights states that every person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in determination of his rights and obligations and of any criminal charge against him.<sup>89</sup>

Article 6 of the European Convention of Human Rights which voices the same view of Article 10 of the UDHR and Article 1 of the ECHR which imposes obligations on the contracting parties to the convention to secure everyone within their jurisdictions the rights and freedoms defined in section 1 which include the right to a fair trial.

In the case of *Ninn-hansen v Denmark*, the court noted that article 6(1) of the ECHR requires that the court be not only independent from the executive and the parties but also independent from the legislator that is the parliament.<sup>90</sup>

<sup>85</sup> Nowak, M., U.N Covenant on Civil and Political Rights: CCPR Commentary, N.P. Engel, (1993) at page 236

<sup>86</sup> Article 50, Constitution of Kenya, 2010.

<sup>87</sup> Article 50(2), Constitution of Kenya, 2010.

<sup>88</sup> Sixth Amendment, United States Constitution, 1787.

<sup>89</sup> Article 10, Universal declaration on Human Rights, 1948.

<sup>90</sup> *Ninn-hansen v Denmark*, application no. 28972/95, European Convention on Human Rights, decision, page 20.

In the case of *Kyprianou v Cyprus*, the court noted that impartiality is of fundamental importance in a democratic society through this the court inspires confidence in the public and in the accused in criminal proceedings. Impartiality denotes the absence of prejudice or bias and its existence or otherwise.<sup>91</sup>

In the Case of *Gregačević V. Croatia*, the court noted that the key principle governing the application of article 6 is fairness and the right holds a prominent place in a democratic society that there can be no justification for interpreting the guarantees of article 6 of the convention restrictively. The court notes that a procedural situation which that does not place a party at any advantages over his or her opponents is a violation of the right if the party did not have an opportunity to have knowledge of and comment on all evidence adduced or observations filled with a view to influence the court's decision.<sup>92</sup>

Article 14 of the International Convention for Civil and Political Rights (ICCPR) which calls for equality of all persons in law and the right to a fair and public hearings by a competent, impartial and independent tribunal in criminal proceedings.<sup>93</sup>

The right to a fair trial are mainly divided into two main categories; procedural rights during the trial process and rights in relation to the general administration of justice by states. The rights are prescribed for under Article 14 of the ICCPR under the right to a fair trial and Article 15 on prohibition of retro-active criminal laws.<sup>94</sup> The rights are under the classification of;

Article 14 (1) of the International Convention on Civil and Political Rights general rights of procedural fairness which include a public hearing before a competent, independent and impartial tribunal.<sup>95</sup>

Article 14(2) of the ICCPR, the presumption of innocence of an accused in a criminal proceeding.<sup>96</sup>

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<sup>91</sup> *Kyprianou v Cyprus*, application no. 73797/01, judgement para, 118.

<sup>92</sup> *Gregačević v. Croatia* application no. 58331/09, judgement, Para 49.

<sup>93</sup> Article 14, International Convention on Civil and Political Rights, 1966.

<sup>94</sup> Sharul M, the Right to a Fair Trial: Analyzing the Jurisprudence of Member States of the ICCPR, (2005).

<sup>95</sup> Article 14(1), International Convention on Civil and Political Rights, 1966.

<sup>96</sup> Article 14(2), International Convention on Civil and Political Rights, 1966.

Article 14(3), gives the accused minimum guarantees which are the rights that an accused person is entitled to and include among others the right to be tried without undue delay, to be informed of the criminal charge against him and the right to be tried in his presence.<sup>97</sup>

In *Murtazaliyeva v Russia*, the court notes that Article 6 of the ECHR guarantees the right of an accused to participate effectively in a criminal trial and this includes not only the right to be present but also the right to follow and hear the proceedings. The right to an adversarial trial means that in criminal proceedings both the prosecution and the defence must be given adequate opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.<sup>98</sup>

Article 14(3), the right to be free from any retrospective criminal laws, Article 14(5) the right to appeal, Article 14(6) the right of compensation for wrongful conviction and article 14(7) the right not to be tried and punished for the same offence.

In relation to the topic of a fair trial, this dissertation will focus on Article 14(1) on the right to be tried by a competent and an independent and impartial tribunal and Article 14(3) (d) on the right of an accused person to be tried in his presence and to defend himself in person. The rationale behind these two articles is that Article 14(1) deals with fairness and justice of the criminal justice system and Article 14(3) (d) deals with curbing against judicial arbitrariness and surprising the individual freedom.

Article 14(1) ensures that the accused person is equal before the courts and that the law is applied without discrimination by the judiciary and Article 14(3) discusses the principle of equity of arms, this principle stresses in the importance of ensuring that both parties to a criminal trial are equally competent and have equal opportunities to defend their case. The principle is violated when for example, the defendant is excluded from his or her own hearing while the prosecutor is present.<sup>99</sup>

In the case of *Foucher v France*, the issue in this case was whether the fact that Mr. Foucher being denied access to his criminal file and prevented him from obtaining a copy of the documents constituted a violation of article 6(3) of the ECHR. The court notes that according to the principle of equality of arms, a feature of a fair trial, each party must be afforded a reasonable opportunity

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<sup>97</sup> Article 14(3), International Convention on Civil and Political Rights, 1966.

<sup>98</sup> *Murtazaliyeva v Russia* (2018), application no. 36658/05 judgement, para 91.

<sup>99</sup> Sharul M, *The Right to a Fair Trial: Analyzing the Jurisprudence of Member States of the ICCPR*, (2005).

to present his case in conditions that do not place him and a disadvantage over his opponent, the main aim of the principle is fair balance be struck but the parties and applies to criminal cases.<sup>100</sup>

### 2.3. What is a trial in Absentia?

The term a trial in absentia is used in reference to a judgement or conviction against a person who did not attend trial proceedings.<sup>101</sup>

The term in Absentia is of Latin origin meaning in absence of and the use of the term dates back to the early 1800's.

Trials in absentia can be categorized into two cases, where the defendant is not at any time present during the trial (*ninquam praesens*) because he is a fugitive or detained and cannot be extradited and secondly in cases where the defendant only appears at first instance during the trial and is absent throughout the remainder of the trial (*semel praesens*).<sup>102</sup>

### 2.4. Trials in absentia in international law

It is to be noted that the right of an accused to be present in his or her own trial has acquired universal recognition and has its establishment under international law.

Fair trial guarantees such as the right of an individual to be present during his or her own trial constitute the elementary level of protection during criminal proceedings found in the different international conventions named above.

Article 63(1) of the Rome Statute explicitly states that the accused should be present during trial. Further, Article 63(2) allows for the court to remove the accused from the trial if the presence of the accused continues to disrupt the trial proceeding. However, the Trial Chamber needs to make provision for the accused person to observe the trial and instruct counsel from outside the courtroom.<sup>103</sup>

<sup>100</sup> *Foucher v France* (1997), application no. 22209/95 judgment.

<sup>101</sup> <http://www.duhaime.org/LegalDictionary/I/InAbsentia.aspx>

<sup>102</sup> Schwarz A, the legacy of the Kenyatta case: Trials in absentia at the international Criminal Court and their compatibility with human rights, *African Human Rights law Journal* (2016).

<sup>103</sup> Article 63, Rome Statute, 1998.

In absentia proceedings are not permitted under Article 14(3) (d) of the ICCPR and from the general wording of the article it can be concluded that in absentia trials are not permissible under the convention.

In *Mbenge v Zaire* the Human Rights Committee demonstrated that in certain exceptional cases, trials in absentia are permitted under the ICCPR for example the committee points out that trials in absentia are permissible in the interest of justice and provided if the accused person has waived his right to be present during a trial.

## 2.5. Waiver of the right to be present during trial.

Waiver of the right to be present during a trial means to explicitly abandon the right to be present in the criminal trial process as an accused. According to the HRC, the waiver is only permissible if the court has fulfilled its obligations to be in particular, with regards to the procedure for summoning and informing the defendants and if the court is able to demonstrate that it indeed in fact reach out to the accused. Failure to do so constitutes a violation of Article 14 of the ICCPR.

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Article 6 of the ECHR assumes the presence of the accused as an integral part of a fair trial, this is because Article 6 of the convention guarantees the accused in article 6(3) constitutive elements of a fair trial principle in Article 6(1) of the convention.<sup>105</sup>

*Colozza v Italy*, the court stated that the object and purpose of Article 6(1) of the convention is to show that the a person charged with a criminal offence is entitled to take part in the hearing and guarantee that everyone charged with a criminal offence the right to defend himself in person, to examine or have examined witnesses and to have free assistance of an interpreter if he cannot understand or speak the language used in court and this right cannot be exercised unless in the presence of the accused.<sup>106</sup>

In the case of *Pelladoah v Netherlands*, the court noted that trials in absentia are not generally prohibited under the convention and are recognized by European Court Jurisprudence. However, the court noted that trials in absentia must entail minimum safeguards in order to ensure that

<sup>104</sup> *Maleki v Italy* application no. 699/1966 27 July 1999, UN-Doc CCPR/C/66/D/699/1996 9.4.

<sup>105</sup> Article 6, European Convention on Human Rights, 1953.

<sup>106</sup> *Colozza v Italy* (1985), application no. 9024/80 judgement, para 27

fundamental human rights are not violated <sup>107</sup>and these were set out in the case of *Crozzola v Netherlands* and they include; the accused being fully aware of the proceedings and the charges against him, the accused expressly and in an unequivocal manner waived his right to be present, the right of the accused to be represented by a counsel during the absence of the accused remains unaffected, the right of the accused to be present cannot be forfeited and he or she has the opportunity to return to the proceedings at any time. <sup>108</sup>

In the case of *Ekbatani v Sweden*, the court held that if a trial in absentia is conducted in breach of the four conditions, the accused is entitled to a retrial and proceedings in his absence constitute a violation of the right to a fair trial. <sup>109</sup>

## 2.6. Why trials should not be conducted in the absence of the accused.

The arguments against trials in absentia are based on human rights theory. This is because the theory states that the right to be present at a trial plays an important role in the right to defend one's self and if an accused person is not present during a trial, he or she is unable to give evidence or challenge the evidence adduced by the prosecution whether by examining the witness or pleading mitigating circumstances. <sup>110</sup>

The second reason why trials should not be conducted in the absence of the accused is that if the defendant is absent and unrepresented by counsel the conviction will be unjust owing to the fact that the accused did not have a chance to examine the prosecution witnesses and rebut the evidence adduced by the prosecution. Therefore the trial process becomes prone to error and abuse. <sup>111</sup>

There is a presumption that the right to be present at one's own trial is directly linked to the guarantee to be presumed innocent until proven guilty by a court of law. This is because, if an

<sup>107</sup> *Pelladoah v Netherlands* (1994), application no. 16737/90, judgment.

<sup>108</sup> *Colozza v Italy*, application no. 9024/80 judgement (1985)

<sup>109</sup> Schwarz A, the legacy of the Kenyatta case: Trials in absentia at the international Criminal Court and their compatibility with human rights, *African Human Rights Law Journal* (2016).

<sup>110</sup> Starygin S and Selth J, Cambodia and the Right to be present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies* (2005), age 170-188.

<sup>111</sup> Starygin S and Selth J, Cambodia and the Right to be present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies* (2005), age 170-188.

accused is sentenced in absentia, his right to be presumed innocent until proven guilty may prejudice a later conviction.<sup>112</sup>

In some jurisdictions, for the purposes of public condemnation, the courts have issued judgments in absentia in political case. However, this has been argued that such trials diminish the courts authority and creates an image of a powerless institution delivering hollow judgements and a sign of judicial weakness. In addition there is no point of having trials in absentia because no punishment can be imposed unless the accused is apprehended.<sup>113</sup>

Lastly, trials in absentia leads to laxity of the police to apprehend the accused person and police may not focus on arresting the absconded accused because their priority shifts to the next case mainly due to limited resources.<sup>114</sup>

## **2.7. Conclusion.**

In conclusion, there isn't any specific definition of a fair trial, however, there are specific elements of a fair trial that are enshrined in both national and international law, for example the existence of a competent, independent and impartial criminal tribunal.

The right to a fair trial is a constitutional and human right and guarantees the accused individual minimum guarantees and effective protection from violation of the right. The right ensures that the trial is conducted within the prescribed legal standards and with fairness to come to a just judgement.

In national law, the right to a fair trial is enshrined in the Bill of Rights of the different states constitutions and in international law, there are different international human rights Conventions that recognize the right to a fair trial as a human right of accused persons. These conventions such as the International Convention on Civil and Political Rights prescribe minimum guarantees and they include among others the right of an accused to be present during their trial. Article 63 of the Rome Statute also requires the same and prohibits a trial in the absence of an accused person.

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<sup>112</sup> Starygin S and Selth J, Cambodia and the Right to be present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies* (2005), age 170-188.

<sup>113</sup> Starygin S and Selth J, Cambodia and the Right to be present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies* (2005), age 170-188.

<sup>114</sup> Starygin S and Selth J, Cambodia and the Right to be present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies* (2005), age 170-188.

However, it should be noted that courts can still conduct a trial in the absence of an accused for example if the behavior of the accused makes it difficult for the trial to proceed in his or her own presence. The court can in this instance is allowed to remove the accused from the courtroom but the court needs see to it that the accused is able to observe the trial from outside the courtroom or instruct his legal counsel.

The provisions requiring the accused to be present during his or her own trial do not prohibit the accused from waiving the right to be present during the trial. The accused is allowed to waive the right to be present during the trial but under certain circumstances where the court needs to prove that the accused being fully aware of the proceedings and the charges against him, the accused expressly and in an unequivocal manner waived his right to be present, the right of the accused to be represented by a counsel during the absence of the accused remains unaffected, the right of the accused to be present cannot be forfeited and he or she has the opportunity to return to the proceedings at any time failure of which will result to a violation of the right to a fair trial under the European Convention on Human Rights.

Trials should however not be conducted in the absence of the accused for one important reason which is the right to be present at a trial is plays an important role in the right to defend one's self and if an accused person is not present during a trial, he or she is unable to give evidence or challenge the evidence adduced by the prosecution whether by examining the witness or pleading mitigating circumstances and therefore the judgment and sentence will be unjust.

## CHAPTER THREE: CONCEPTUALIZATION OF A TRIAL IN ANSENTIA

### 3.1. Introduction

A trial in absentia is when an accused is not present at his or her trial. However, according to Anne Klerks, there are two concepts of a trial in absentia. The first one is when the accused is present during the arraignment and indictment but then after voluntarily he or she does not attend trial. The second instance is when the accused has never appeared at any point in court during their trial process.<sup>115</sup>

The right of an accused to be present during his or her trial has been emphasised major international instruments such as Article 64(2) of the Rome Statute and the International Convention for Civil and Political Rights under Article 14 to ensure a smooth running of the trial process and the rights of the accused person majorly the right to a fair trial and various case law which will be discussed in this chapter.

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<sup>115</sup> Klerks A, 'Trials in absentia in International Criminal law', Tilburg University, LLM International and European Public Law-thesis June (2008).

### 3.2. Rome Statute and a trial in absentia

Article 64(2) of the Rome Statute states that the Trial Chamber shall ensure that the trial is fair and expeditious and is conducted with full respect of the rights of the accused and due regard for the protection of victims and witnesses.<sup>116</sup>

A fair trial means that the trial process serves the truth-finding function of a trial and also assurance that the final judgment will be concrete.<sup>117</sup> James Stewart in his article, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium states that this is one of the intrinsic values of a fair trial and are essential to the sane application of international criminal law and the administration of domestic justice and that the outcome of a fair trial has credibility and enhances the respect for the rule of law.<sup>118</sup>

He states that the International Criminal Court was established to put an end to impunity for the most serious crimes of international concern through their effective prosecution, meaning that the trial process even for the most serious crimes will be prosecuted through a fair trial including according the accused the right to be present during their trial.<sup>119</sup> This is achieved through the independence, impartiality and fair administration of justice in the International Criminal Court which enhances the Court's credibility and improves its ability to deter mass atrocities.<sup>120</sup>

Article 63(1) of the Rome statute states that the accused shall be present during the trial<sup>121</sup> while Article 63(2) states that the accused shall only be absent from court if his presence in court disrupts the trial, however, the court shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom,<sup>122</sup> this can only be put into effect

<sup>116</sup> Article 64(2), Rome Statute of the International Criminal Court, 1998

<sup>117</sup> Stewart KJ, Deputy Prosecutor, ICC, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium-Arusha, Tanzania, (2014).

<sup>118</sup> Stewart KJ, Deputy Prosecutor, ICC, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium-Arusha, Tanzania, (2014).

<sup>119</sup> Stewart K.J, Deputy Prosecutor, ICC, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium-Arusha, Tanzania, (2014).

<sup>120</sup> Stewart KJ, Deputy Prosecutor, ICC, Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium-Arusha, Tanzania, (2014).

<sup>121</sup> Article 63 (1), Rome Statute of the International Criminal Court, 1998

<sup>122</sup> Article 63 (2), Rome Statute of the International Criminal Court, 1998

in exceptional circumstances after all other reasonable alternatives have been proved inadequate.<sup>123</sup>

### 3.3. ICCPR and a trial in absentia.

Article 14 (3) (d) of the ICCPR provides guarantees to accused persons with a criminal charge which include to be tried in his presence and to defend himself in person or through legal assistance of his own choosing.<sup>124</sup>

The ICCPR strictly provides for the presence of an accused during his trial but the case of *Mbenge V Zaire*<sup>125</sup>, provided for exceptional circumstances where a trial would take place in the absence of the accused. For example if the accused was properly informed of the proceedings in advance and failed or declined to exercise his right to be present and necessary steps should be taken to inform the accused prior about the proceedings against him. However, in this case it was concluded that the accused Article 14 rights of the ICCPR were violated by the conviction in absentia because the notice given to the accused was inadequate.

In the case of *Maleki v Italy*<sup>126</sup> it was held that a trial in absentia would be held only if the accused had been informed of the proceedings or by guaranteeing him a retrial upon capture if he was not informed.

In this case Ali Maleki was tried and sentenced in absentia by an Italian court for drug trafficking and was arrested by Italian authorities in Rome.

However, the accused was neither informed nor had the right to a retrial and it was held that his Article 14 rights of the ICCPR were violated. The Human Rights Committee noted that the Italian court ought to have verified that Maleki had been informed of the

<sup>123</sup> Klerks A, 'Trials in absentia in International Criminal law', Tilburg University, LLM International and European Public Law-thesis June (2008).

<sup>124</sup> Article 14 (3) (d), International Convention on Civil and Political Rights, 1966.

<sup>125</sup> *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990).

<sup>126</sup> U.N. Human Rights Comm., *Maleki v. Italy*, Comm. No. 699/2996, 1 2.1., U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999).

proceedings before the court could hold proceedings in absentia and the Human Rights Committee noted that such violation could be remedied by the court guaranteeing a retrial.

### 3.4. Concept of a trial in absentia.

The term trial in absentia is a concept a concept used to describe where an accused person is tried and sentenced by a court of law in their absence. According to Evert F Stamhuis in his article *In absentia trial and the right to defend*, he states that whether a trial is held in absence of the defendant, the court is still under the obligation to see to it that the prosecution has proved its case beyond reasonable doubt before it gets to its judgment and such a trial can only take place when certain formalities have been observed.<sup>127</sup>

He states that according to the Dutch criminal system, statutory notification procedure is the most important formality to be taken into account. During the commencement of the trial, the court has an obligation to make sure that the prosecution have followed the correct procedure in seeing to it that the defendant is notified of the charges against him, where the trial will take place and the date of the trial. This can be done by leaving the information at the registered address of the defendant or the defendant's residence known by the responsible officers.<sup>128</sup>

Evert Stamhuis further states that the presence of the accused is required for serious offence whose punishment attracts a death penalty or a life imprisonment but for the less serious offences the presence of the accused person was necessary rather than mandatory.<sup>129</sup>

In the case of *Lala v Netherlands 1994 ECHR application no. 14861/89*<sup>130</sup>, Mr. Lala was sentenced to pay a fine by the Hague Regional Court failure for which will amount a term to a detention. He was later convicted after a trial in absentia for the offence of forgery. He had concealed an income from work while enjoying social security benefits and was

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<sup>127</sup> Stamhuis EF, *In Absentia Trial and the Right to Defend: the Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System*.

<sup>128</sup> Stamhuis EF, *In Absentia Trial and the Right to Defend: the Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System*.

<sup>129</sup> Stamhuis EF, *In Absentia Trial and the Right to Defend: the Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System*.

<sup>130</sup> *Lala v The Netherlands* (1994) European Court of Human Rights, App. No. 14861/89, Judgment.

sentenced to four weeks imprisonment. He then filed an appeal and was summoned to the hearing but he did not appear. The court of appeal in their judgment overturned the decision of the Regional Court. However, it convicted Mr. Lala but reduced his sentence to two weeks imprisonment. He then filed an appeal through his lawyer on points of law to the Supreme Court.

The European Court commentary on a trial in absentia, when an accused can be sentenced in his absence and when accused need to be present in court according to relevant domestic law and practice under the Code of Criminal Procedure.<sup>131</sup>

In the judgment, the court stated that if the accused is not a juvenile, he or she is not under an obligation to appear in court. This is as enshrined in section 500 h of the Code of Criminal Procedure<sup>132</sup>.

The court is to examine the validity of the summons *suo motu* as stated under section 384 of the Code of Criminal Procedure. The court is to establish if the accused was properly summoned, if the accused did not appear in court and was properly summoned, the court will try the case as if the accused were present in court which is the general rule even if the accused gives prior notice of his absence and requests for an adjournment regardless of if his absence is blamed on unavoidable circumstances.<sup>133</sup>

An accused who is aggrieved with the conviction or a judgment in absentia may file an objection in relation to section 399 of the Code of Criminal Procedure which objection (section 403 of the Code of Criminal Procedure) gives the accused a right to a full retrial of the case by the same court that convicted him or her.<sup>134</sup>

Section 339(1) of the Code of Criminal Procedure limit accused person from filing an objection against a default judgment on appeal.<sup>135</sup> According to the relevant domestic law and practice in the Netherlands, an accused who has been convicted in his absence by the first instance court may file an objection as a remedy in Netherlands entitling the accused

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<sup>131</sup> Lala v The Netherlands (1994) European Court of Human Rights, App. No. 14861/89, Judgment.

<sup>132</sup> Lala v The Netherlands (1994) European Court of Human Rights, App. No. 14861/89, Judgment.

<sup>133</sup> Lala v The Netherlands (1994) European Court of Human Rights, App. No. 14861/89, Judgment.

<sup>134</sup> Lala v The Netherlands, ECtHR, Judgment, 1994.

<sup>135</sup> Lala v The Netherlands, ECtHR, Judgment, 1994.

to a full retrial by the same court according to section 403 of the Code of Criminal procedure of Netherlands.<sup>136</sup>

However, an objection may not filed by an accused who has or has had the opportunity to appeal to a higher court with jurisdiction as to both fact and law. Thus an objection is limited to cases where the sentence is not more than a small fine or where the offence has been dealt with in the Regional Court and in Mr. Lala's case he was sentenced to pay a fine by the Hague Regional Court and his matter was already dealt with in the Regional Court thus he could not object to the judgement given on appeal.<sup>137</sup>

### **3.5.The right to defense by counsel in absentia**

The trial court has the discretion to allow counsel to defend an accused in court in his absence and if the court allows the counsel to defend the accused in his absence, the Supreme Court maintains the rule that the counsel is granted all rights available to defense.

In principle the Supreme Court upheld the rule that an accused in absence is not entitled to defense by a counsel but in the case of *Pelladoah v the Netherlands [1994], ECHR, App.No.16737/90*,<sup>138</sup> Mr. Pelladoah was arrested at Schiphol Airport for possession of twenty kilograms of heroin in his suitcase. The penalty of the crime of carried with it a sentence of twelve years imprisonment for carrying with intent and six months for carrying without intent. However, he was charged with or without intent. He was tried by the Haarlem Regional Court and he was acquitted of bringing heroine into the country with criminal intent but found him guilty of bringing heroine into the country without criminal intent and was sentenced to six months detention and by the same judgment his release was ordered since he had already spent some time in detention. Both the prosecution and the defense appealed against the judgment to the Amsterdam Court of Appeal and Mr. Pelladoah was expelled from the country before the appeal was heard and the Amsterdam Court of Appeal tried the case in his absence but his counsel asked the court if he would be allowed to appear in place of his client.<sup>139</sup>

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<sup>136</sup> *Lala v The Netherlands*, ECtHR, Judgment, 1994.

<sup>137</sup> *Lala v The Netherlands*, ECtHR, Judgment, 1994.

<sup>138</sup> *Pelladoah v The Netherlands*, ECtHR, Judgment, 1994.

<sup>139</sup> *Pelladoah v The Netherlands*, ECtHR, Judgment, 1994.

However, his request denied by the Court of Appeal on grounds of no compelling reason had been given to the court but the Court of Appeal held that the case had not been fully examined and ordered for a retrial. He was sentenced to nine years imprisonment with criminal intent.<sup>140</sup>

Mr. Pelladoah alleged a violation of article 6(1) and Article 6(3) of the European Convention of Human Rights which provide an accused person to the right to fair hearing and the right to defend himself in person or through a legal assistance. However, the government rejected his submission but the commission accepted it. The commission stated that the right of a defendant to defend himself through a legal counsel can only be invoked by defendants who are physically present in the trial. Therefore, an accused who does not attend trial loses the right to defend himself through a counsel. Mr. Pelladoah pointed out that there is no provision in Netherlands law that prevented counsel from conducting the defense in the absence of the defendant.<sup>141</sup>

The commission was of the view that the fact the defendant failed to attend trial and with and failed to give compelling reasons for doing so does not justify depriving him the right to defense through his counsel thus a violation of article 6(3) of the Convention.<sup>142</sup>

### **3.6. Waiver of the right to be present in a trial.**

Rule 43, Defendant's Presence under the Federal Rules of Criminal Procedure provides for conditions of an accused waiving their presence in a trial.

In general, defendant who was initially present at a trial, pleaded guilty waives the right to be present under the following circumstances;

When a defendant voluntarily absents himself from the trial after its commencement regardless of whether the court informed the defendant of his obligation to remain during trial. This was illustrated in the case of *Lewis v United States (1892)*, *146 U.S 370, 13 S.Ct.*

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<sup>140</sup> *Pelladoah v The Netherlands*, ECtHR, Judgment, 1994.

<sup>141</sup> *Pelladoah v The Netherlands*, ECtHR, Judgment, 1994.

<sup>142</sup> *Pelladoah v The Netherlands*, ECtHR, Judgment, 1994.

136, 36 L.Ed. 1011. The case established the leading principle that after indictment is found, nothing shall be done in the absence of the accused. However, the court also stated that to exclude an accused from his trial proceedings is a violation of his human rights.

In noncapital cases the trial when the defendant voluntarily absents himself during, this brought out in the case of *Diaz v United States*, 223 U.S 442 (1912)<sup>143</sup> which was a non-capital case. The Supreme Court in this case addressed the claim of a trial in absentia. In this case, the accused voluntarily absented himself from trial on two occasions when two witnesses were giving their testimony. The defendant consented to having his trial proceeding in his absence but in the presence of his counsel. The court concluded that in non-capital offences if the accused is absent from the trial voluntarily after it began in his presence, this is seen as a waiver of his right to be present making the court free to give a judgement in his absence.

In *Taylor v United States*, 414 U.S. 17 (1973)<sup>144</sup>, in this case the defendant was present in the morning session of the trial and was absent for the afternoon session of the trial, he was consequently tried and convicted in his absence. Taylor claimed that his voluntary absence from trial did not mean that he had waived his right to be present during trial unless the court can demonstrate that he knew or had of the effect of his absence from his trial.

The defendant is removed from court for the disruption of the trial process, *Illinois v Allen*, 397 U.S. 337 (1970),<sup>145</sup> here the accused was removed from court before of misconduct but after he had been warned by the trial judge and was later convicted. He later raised a claim of the violation of his right to be present in his trial. The court stated that the removal of the accused from court was justified because the accused behavior disrupted the court process and a judge has the discretion to remove the accused from the trial or physically restrain the accused. It was concluded that under such circumstances the defendant lost his

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<sup>143</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>144</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>145</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

right guaranteed by the Sixth and Fourteenth Amendment <sup>146</sup>which gave an accused the right to be present during his trial. <sup>147</sup>

### 3.7. Elements of waiver of fundamental constitutional rights

The case of *Johnson v Zerbst*, 304 U.S. 458 (1938) <sup>148</sup>demonstrated the elements that constitute a waiver of the right of an accused to be present during his trial which include intention of relinquishing or to abandon the right or knowing that you as a defendant has the right or privilege. <sup>149</sup>

In this case a marine was convicted without the aid of a counsel of the charge of uttering checks. The Supreme Court was addressing the issue of waiver of the right to counsel. The court stated that depriving an accused of his right to be represented by counsel were not sufficient to make the trial void but the irregularities could be corrected on appeal. <sup>150</sup>

However, if an accused isn't represented by counsel and has not completely and intelligently waived his constitutional right, the Sixth Amendment acts as a jurisdictional bar to valid conviction and sentence depriving him of his life or his liberty. <sup>151</sup>

### 3.8. Conclusion

In conclusion, term trial in absentia is concept that describes when an accused person is not present during his trial either voluntarily when he waives his right to be present in court which is both a constitutional right to accused persons and also emphasized in international instruments Article 63 Rome Statute and article 14 of International Convention for Civil and Political Rights (ICCPR) under the right to a fair trial or when accused persons are arbitrarily denied the right to be present in court by the judicial system or when they abscond trial. From the above case law on a trial in absentia it is seen that a trial in absentia

<sup>146</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>147</sup> Tassara L, Trial in Absentia: Rescuing the Public Necessity Requirement to proceed with a Trial in the Defendant's Absence, 12, *Barry Law Review*, (2009).

<sup>148</sup> [https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson\\_v\\_Zerbst.html](https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson_v_Zerbst.html) on 28 November, 2018.

<sup>149</sup> [https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson\\_v\\_Zerbst.html](https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson_v_Zerbst.html) on 28 November, 2018.

<sup>150</sup> [https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson\\_v\\_Zerbst.html](https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson_v_Zerbst.html) on 28 November 2018.

<sup>151</sup> [https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson\\_v\\_Zerbst.html](https://www.lawpipe.com/U.S.%20Supreme%20Court/Johnson_v_Zerbst.html) on 28 November, 2018.

is a violation of the right to a fair trial accorded to accused persons during the trial process and to protect them from the unlawful and arbitrary deprivation of their basic rights and freedoms. For example in non-capital offences accused are at liberty to waive their right to be present during their trial and in capital offenses where the penalties are graves for instance attract a death penalty or a long life sentence, the accused is required to be present in court during their trial.

However, it is to be noted that there are instances where the court is allowed to enter a judgement in default in the absence of the accused which is mostly in cases where the accused absconds trial or when the crime is not a serious offence, and when the trial is preceded when adequate notice is given to the accused and the guarantee of a retrial upon the capture of the accused.

## **CHAPTER FOUR: IMPORTANCE OF A FAIR TRIAL AND ROLE OF LAW IN THE RIGHT TO A FAIR TRIAL.**

### **4.1. Introduction**

### **4.2. What is a fair trial?**

The right to a fair trial plays a very fundamental role in a criminal proceeding which is to ensure that the trial process runs as smoothly as possible and that the due process of the trial is followed to ensure a just outcome of the trial.<sup>152</sup>

As earlier mentioned, a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary deprivation of their basic human rights and freedoms with the right to life and liberty of the person being the most important aspect.<sup>153</sup>

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<sup>152</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

<sup>153</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

Article 14 of the International Convention on Civil and Political rights states that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>154</sup>

This chapter will examine fundamental rights that come with the right to a fair trial in a criminal proceeding of the accused person and the purpose the rule of law play in ensuring the trial process is flawless and the importance of the right to a fair trial and making a conclusion if he right to a fair trial, in particular the right of an accused to be present in court should be waived.

It is important to note that every accused person has the right to a fair trial both in civil and criminal cases and the effective protection and guarantee of all human rights including the right to a fair trial and this depends on the courts competence, independence and impartiality throughout the trial process.<sup>155</sup>

Article 26 of the International Convent of Civil and Political Rights guarantees equality of all persons before the law and the equal protection of all persons of law. This protection extends to victims, witnesses and accused in a criminal case without any discrimination. Thus a fair trial should not be bias or should not be prejudicial toward the victims, witnesses or accused, the nature of the case is also eliminated hence the principle of equality under the right to a fair trial.<sup>156</sup>

The principle of equality is associated with the common human right meaning of non-discrimination based on gender, sex, religion, race, and so on and secondly, non-discrimination based on the nature of the crime. Whether it is a minor offence or a serious crime in the course of the trial or in the way the law if applied.<sup>157</sup>

### 4.3. What is the rule of law?

*“The rule of law is more than the formal use of the legal instruments, it is also the rule of justice of protection for all members of the society against excessive government power.”*

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<sup>154</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

<sup>155</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

<sup>156</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

<sup>157</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

*International Commission of jurists.*

The phrase Rule of Law is derived from the French phrase '*la principe de legalite*' meaning the principle of legality which refers to a government based on principles and not of men. This principle is grounded on the concept of justice, fairness and inclusiveness as stated by Aristotle and has its foundations in the rules of war, the Ten Commandments and historical documents such as the Magna Carter.<sup>158</sup>

The rule of law is founded on various principles which include: the principle of legality, certainty, equality of all individuals before the law and good governance and most importantly right to a fair trial, all these principles strive to protect the individual from state arbitrariness.<sup>159</sup>

In the *Prager and Oberschlick v Austria, Application No.15974/90*, the court stated that the judiciary has a special role in the society in regard to the rule of law. It is the guarantor of justice which is a fundamental value in a state governed by law and therefore, the judiciary must ensure public confidence in the execution of its duties if it is to be successful in carrying out its duties and pointed out the role of lawyers in maintaining public confidence in the judiciary.<sup>160</sup>

Today the rule of law is founded on the principle of good governance which requires adherence to the constitutional supremacy, recognition that the sovereign and the citizens are equal before the law, recognition that the government itself is limited by the law and thus cannot act arbitrary to its powers and final that individuals have certain inalienable rights that cannot be denied even is legislated by law in this case the right of a fair trial.<sup>161</sup>

This was affirmed in the case of *Malone v The United Kingdom application No. 869/79* the court sated in paragraph 55 that any interference of a right should be pre-determined by substantive law, so that its nature, extent and manner are reasonable foreseeable and there is adequate safeguard against its abuse and that it is not enough that the interference is merely lawful in the sense that it is not forbidden. The individual must with reasonable certainty from the law be able to ascertain in what circumstances a public authority may interfere with the protected rights.<sup>162</sup>

<sup>158</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Chapter 6, The Right to a Fair Trial: Part 1- From investigation to Trial.

<sup>159</sup> Melkonyan D, Concept of the Rule of Law in the Case-Law of the European Court of Human rights.

<sup>160</sup> Melkonyan D, Concept of the Rule of Law in the Case-Law of the European Court of Human rights.

<sup>161</sup> Kumar Yadav Alok, Rule of Law, 4, *International Journal of law and Legal Jurisprudence studies*.

<sup>162</sup> *Malone v The United Kingdom application*, ECtHR, Judgement, Paragraph 55

There is no concrete definition of the rule of law however, the definition of the rule of law ought to encompass the following principles;<sup>163</sup>

Firstly, power must not be exercised arbitrarily, it requires that the power man possesses should be restrained and that laws should be accessible clear and prospective meaning that the law should not act retrospectively. <sup>164</sup>

This principle can be best explained using an example of arbitrary detention as a violation of fair trial rights. This related to the non-observance in procedure according to international norms of the right to a fair trial under Article 9 of Universal Declaration of Human Rights which prohibits arbitrary arrest or detention. Deprivation of liberty is not a human rights violation, it acquires this character when the arrest or detention is with no legal justification or in violation of the right to a fair trial. <sup>165</sup>

Vivek Ranjan in his article Rule of Law and modern administrative law stated that Dicey defined rule of law as the absolute supremacy or the predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of prerogatives or even a wide discretionary power on the part of the government. He further states that where there is discretion, there is room for arbitrariness which leads to legal insecurity.<sup>166</sup>

This principle requires that government be subject to the law and not that the law be subject to the government, this principle does not leave room for power to be in the hands of the government but rather that the government should follow the law as it is and apply it accordingly subjecting both the government and the ordinary citizen to the law thus meaning that no one should be and is above the law, the principle also advocates for checks and balance within the different arms of government and that power should not be concentrated on one arm of government and measures to ensure that power is regulated between different arms of government should be put in place for

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<sup>163</sup> Gosalbo BR, the Significance of the Rule of Law and its Implications for the European Union and the United States.

<sup>164</sup> Gosalbo BR, the Significance of the Rule of Law and its Implications for the European Union and the United States.

<sup>165</sup> Mitchell B, the United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence, Scholarship Repository University of Minnesota Law School, (2016).

<sup>166</sup> Ranjan V, Rule of Law and Modern Administrative Law, An Analysis, IIT, (2012).

instance accountability and transparency by each arm of government in order to maintain public confidence.<sup>167</sup>

Secondly, the principle of supremacy and independence of the law, this principle requires the application of separation of powers and the idea that the law applies to all including the sovereign and the independence of the judiciary to apply the law to specific cases, this principle aims to keep each branch within its sphere of powers thus no interference by any arm of government within the judiciary.<sup>168</sup> In *Stafford v The United Kingdom, Application No. 16295/99*, the ECtHR in paragraph 78 stated that there is a growing importance in case law on the notion of separation of powers between the executive and the judiciary.<sup>169</sup>

The judiciary plays an important role in the society for example protection of human rights such as the right of a fair trial is dependent on an independent and impartial tribunal and based on the facts of law to come to a just outcome most importantly the judiciary has a role in upholding the rule of law.<sup>170</sup>

In this principle, laws should not be made in respect to a particular person thus laws of a trial should not only be made in respect to person who has filed a complaint against an accused person but rather the law should apply equally to both the aggrieved person and the accused giving the accused the right to a fair trial regardless of the case against the accused<sup>171</sup> and offer equal protection to all without discrimination based on gender, sex, financial status and should not be prejudiced and biased towards the victims, accused and witnesses.<sup>172</sup>

The rule of law provides that the law must be predictable without the identity of the parties, meaning that the laws apply equally to all parties including the government. Article 10 of the

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<sup>167</sup> Ranjan V, Rule of Law and Modern Administrative Law, An Analysis, IIT, (2012).

<sup>168</sup> Gosalbo BR, the Significance of the Rule of Law and its Implications for the European Union and the United States.

<sup>169</sup> *Stafford v The United Kingdom, Application*, ECtHR, Judgement of 28/May, 2002 Para 78.

<sup>170</sup> Prefontaine CD, & Lee J, "The Rule of Law and the Independence of the Judiciary", World Conference on the Universal Declaration of Human Rights Montreal, (1998).

<sup>171</sup> Kumar AY, Rule of Law, 4, *International Journal and Legal Studies*.

<sup>172</sup> Gosalbo BR, the Significance of the Rule of Law and its Implications for the European Union and the United States.

Universal Declaration on Human Rights established that all persons are entitled to full equity to a fair and public hearing by an independent tribunal when faced with criminal charges.<sup>173</sup>

In *Re Provisional Court Judges (1997) 3 S.C.R.3*, the Chief Justice of Canada explained the importance of judicial independence as judicial independence sets societal goals one of which is to maintain public confidence in the impartiality of the judiciary which leads to effectiveness of the court system. This is because independence contributes to the notion that justice will be done in individual cases and most notably in the maintenance of the rule of law.<sup>174</sup>

Vivek Ranjan in his article Rule of Law and modern administrative law states that one of Dicey's aspects of Rule of law is equality before the law or equal subjection of ordinary law to all class of people by ordinary court as opposed to the French *Droit Administratif* where by different tribunals deal with different matters.<sup>175</sup>

According to Alok Kumar in his article Rule of law he states that Professor Dicey states that many constitutions of countries warrant their citizens certain fundamental rights or rather basic human rights which among others include the right to a fair trial which include the right to be heard, the right to representation and the right to be present in one's trial *et cetera* and according to him, guaranteeing these rights is not enough, they need to be enforced in the courts of law.<sup>176</sup>

Modern constitutions limit state power in order to protect fundamental human rights and liberties of individuals by defining and allocating state power. These rights are embodied in the Bill of Rights of various constitutions and expressed as their civil and political rights. Therefore constitutions limit the government by establishing the rule of law, allocating different powers and functions, ensuring checks and balances and providing participatory and responsive governance based on the ideas of democracy and good governance.<sup>177</sup>

<sup>173</sup> Prefontaine CD, & Lee J, "The Rule of Law and the Independence of the Judiciary", World Conference on the Universal Declaration of Human Rights Montreal, (1998).

<sup>174</sup> Prefontaine CD, & Lee J, "The Rule of Law and the Independence of the Judiciary", World Conference on the Universal Declaration of Human Rights Montreal, (1998).

<sup>175</sup> Ranjan V, Rule of Law and Modern Administrative Law, An Analysis, IIT, (2012).

<sup>176</sup> Kumar Ay, Rule of Law, 4, *International Journal and Legal Studies*.

<sup>177</sup> Osogo AJ, 'Principles, Governance and Human Rights', in Mbondenyei MK (Ed), *Constitution, Human Rights and Constitutionalism the new constitutional law of Kenya*, 6.

#### 4.4. The Right to a fair trial as a non-derogable right.

Article 4(2) of the International Convention on Civil and Political Rights gives a list of non-derogable rights in the convention even in times of a public emergency. These rights include; Article 6 (the right to life), Article 7 (prohibition of torture or cruel and inhumane or degrading punishment, or medical or scientific experimentation without consent), Article 8, paragraph 1 and 2 (prohibition of slavery, slave-trade and servitude), Article 11 (prohibition because of failure to fulfil a contractual obligation), Article 15 (the principle of legality in the field of criminal law which requires both criminal liability and punishment being limited to clear and precise provisions in the law that was in place, except in the cases where a later law imposes a penalty), Article 16 (recognition everywhere as a person before law), Article 18 (freedom of thought, conscience and religion).<sup>178</sup>

It is seen that the right to a fair trial is not included in the list of non-derogable rights under the International Convention on Civil and Political Rights (ICCPR), however, the Human Rights Commission in its General Comment 29 has emphasized on the non-derogability of the right of a fair trial as it is essential in protecting more fundamental rights.<sup>179</sup>

The right of an accused person to be tried in his presence is with no doubt a non-derogable right.<sup>180</sup> This can be shown in all instruments contain provisions relating to the right of a fair trial. Customary International Humanitarian Law Rules refers to Additional Protocols I and II which provide that the accused has the right to be tried in their presence. However, the states that ratified the Additional Protocol made reservations that the right in regards to this provision should be subject to the judge's discretion, that is the power of the Judge to remove the accused from the courtroom in exceptional circumstances for example when the accused caused disturbance in the courtroom and makes it impossible for the trial to proceed.<sup>181</sup> It is also important to note that the Human Rights Commission and the ECtHR have expressly stated that in absentia hearings can

<sup>178</sup> *CCPR, General Comment NO. 29 State of Emergency (article 4)*, 31 August 2001.

<sup>179</sup> Tesseman FB, *A Critical Analysis of Non-derogable Rights in a State of Emergency Under The African System: The Case of Ethiopia and Mozambique*, Center for Human Rights, 31 October 2005.

<sup>180</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>181</sup> Henckaerts J & Doswald-BL, *Customary International Humanitarian Law Volume 1: Rules, Rule 100, Fair Trial Guarantees*.

only be held if the accused has been given effective notice of the hearing and the accused chooses not to appear.<sup>182</sup>

The non-derogable rule is that the accused has a right to be present in his trial but he or she can forfeit the right to be present by serious misbehavior in the courtroom or by the accused decision not to appear in his trial and that by a state derogation from the rule of trying the accused in his presence will be inconsistent with the state's other obligation in international law<sup>183</sup>.

Evelyne Schmid sites the principle of consistency as a lens that aids in identifying the non-derogable aspects of the right to a fair trial.<sup>184</sup>

The principle of consistency prevents a state party from adopting measures that violate the state's obligation under a treaty for example the United Nations Charter or a treaty under customary international law or other obligations under international law.<sup>185</sup>

Certain aspects of the right to a fair trial must be non-derogable for two reasons, firstly, the reason being based on the importance of the explicitly listed non-derogable rights for example the prohibition against torture, cruel and inhumane treatment which guarantees the accused person some procedural protection in all times of emergency because not every derogation from Article 14 of The International Convention for Civil and Political Rights can be justified.<sup>186</sup>

The principle of Siracus that asserts that respect and protection of fundamental aspects of the right to a fair trial is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.<sup>187</sup>

The government of Uruguay requested the Inter-American Court to issue an advisory opinion on the scope of prohibition of the suspension of the judicial guarantees essential for the protection of the rights mentioned in Article 27(2) of the American Convention on Human Rights. The advisory

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<sup>182</sup> *Daniel Monguya Mbenge V Zaire*, Communication no. 16/1977

<sup>183</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>184</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>185</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>186</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>187</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

opinion stated that “the principles of due process cannot be suspended in states of emergency, insofar as they are the conditions necessary for the exercise of the remedies considered by the convention as non-derogable.”<sup>188</sup>

Applying the same logic to the ICCPR, the procedural rights guaranteed in article 14 are functionally non-derogable and are necessary to ensure non-abuse by the state of the absolutely non-derogable safeguards.<sup>189</sup>

#### **4.5. Relationship between a fair trial and the Rule of Law.**

The rule of law acts as the balance of the different arms of government which include the legislature, judiciary and the executive and most importantly the different arms of government pinned to human right issues and any society that seeks to promote human rights has to have the rule of law at the back of its mind. Therefore, governments need to have the rule of law as their anchor to promote and protect human rights most especially the right to a fair trial.<sup>190</sup>

The rule of law ensures that the laws in place are made known to the public including accused persons and non-discriminatory laws. Thus, accused persons need to know that they are entitled to the right to a fair trial and that includes the right of accused persons to be present in court and tried in their presence, accused persons also need to be briefed on the importance of the right to a fair trial and to be present during the trial and the consequences of being tried in their absence.<sup>191</sup>

This is because, the rule of law protects accused persons from the arbitrariness of the acts of the public authorities with judges and prosecutors in mind. However, this can only be assured if the rights are laid down in law. Therefore, laws should be put in place and made clear of the right of the accused persons and elaborate on the same of the importance of being tried in their presence.<sup>192</sup>

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<sup>188</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>189</sup> Schmid E, *The Right to a Fair trial in States of emergencies, Non-Derogable Aspects of Article 14 of the International Convention on Civil and Political Rights*, (2008).

<sup>190</sup> International Commission of Jurists, *Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial*.

<sup>191</sup> International Commission of Jurists, *Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial*.

<sup>192</sup> International Commission of Jurists, *Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial*.

In case of *Civil Liberties Organization, Legal Defence Center, Legal Defence and Assistance project/ Nigeria 218/98*, the authors of the communication are three Non-Governmental Organizations based in Nigeria with observer status with the African Commission and they alleged that there was an unfair trial and conviction of Lt. Gen. Oladipo Diya and four other soldiers and a civilian accused person who were convicted and sentenced for an alleged coup plot to overthrow the Nigerian Military Government under Gen. Sani Abacha.<sup>193</sup>

They contended that the arrest, detention, arraignment and trial of the convicted and sentenced persons was unlawful, unfair and unjust and such violation of the provisions of the African Charter on Human and Peoples' Rights which among others include; <sup>194</sup>Article 7 (c) the right to defense including the right to be defended by counsel of his choice<sup>195</sup> and Article 26 which states that state parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present Charter.<sup>196</sup>

Article 14 (3)(d) of the International Convention on Civil and Political Rights states that in determination of any criminal charge against him, everyone shall be entitled to the minimum guarantee to be tried in his presence, and to defend him in person or through legal assistance of his own choosing; to be informed, to be informed if he does not have legal assistance of his right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him if in any case if he does not have sufficient means to pay for it.<sup>197</sup>

The Commission held that there was a violation of Article 7 of the African Commission on Human and Peoples' Rights because the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike, especially during a public emergency and that the Human Rights Committee in its General Comment No. 13 states that Article 14 of the International Convention on Civil and Political Rights applies to all courts and tribunals whether specialized or ordinary.<sup>198</sup>

<sup>193</sup> Civil Liberties case, <http://www.achpr.org/communications/decision/218.98/> on 22 January, 2019.

<sup>194</sup> Civil Liberties case, <http://www.achpr.org/communications/decision/218.98/> on 22 January, 2019.

<sup>195</sup> Article 7, African Charter on Human and Peoples' Rights, 1986.

<sup>196</sup> Article, African Charter on Human and Peoples' Rights, 1986.

<sup>197</sup> Article 14(3) (d), International Convention on Civil and Political Rights, 1976.

<sup>198</sup> Civil Liberties case, <http://www.achpr.org/communications/decision/218.98/> on 22 January, 2019

The Committee went on to note the existence of military or special courts in many jurisdictions, which, nonetheless, try civilians. It is noted that this could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures that do not comply with normal procedures. The European Commission has ruled that the purpose of requiring that courts be “established by law” is that the organization of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament. The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.<sup>199</sup>

This includes establishing institutions safeguarding the legal systems including courts, prosecutors and police which are directed by human rights guarantees as expresses in various conventions such as the International Convention on Civil and Political Rights (ICCPR), the European Convention on Human and Rights, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights.<sup>200</sup>

The importance of right of an accused to be the present during trial is illustrated by the proposal by the U.S to include it in the non-derogable rights provided for in Article 4(2) of the International Convention on Civil and Political Rights.<sup>201</sup>

In addition, the rule of law contribute human security because it guarantees that no one will be arrested and prosecuted arbitrarily and guarantees every accused person a fair court hearing before an independent and impartial tribunal. This in turn ensures that there is justice, and confidence in the court system by the citizens.<sup>202</sup>

The principle of equity before the courts is one of the fundamental principles of the rule of law. It prohibits laws that are discriminatory and the right to equal access and equality of parties in the court. This ideas comprises of the fact that all parties to a trial are treated equally before the courts

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<sup>199</sup> Civil Liberties case, <http://www.achpr.org/communications/decision/218.98/> on 22 January, 2019.

<sup>200</sup> International Commission of Jurists, Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial.

<sup>201</sup> RSt J Macdonald ‘Derogations under art 15 of the European Convention on Human Rights’ (1997) 36 *Columbia Journal of Transnational Law*225.

<sup>202</sup> International Commission of Jurists, Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial.

and are given equal opportunity to defend themselves without any prejudice regardless of one's financial status, power or if one is either the accused or defendant.<sup>203</sup>

#### **4.6. Importance of the Right to a Fair trial.**

The importance of the right to a fair trial is that it guarantees the accused person human rights that come with the right to a fair trial. The right to a fair trial also guarantees that the state will not abuse its power and the trial will be heard and concluded in a just and fair manner.<sup>204</sup> Another important aspect of the right to a fair trial is that it has been recognized internationally as a basic human right.<sup>205</sup>

The importance of the right to a fair trial can be seen under Article 14 of the International Convention on Civil and Political Rights which guarantees equality of all person before the courts or tribunals which includes the trial to be a fair and public hearing before a competent, independent and impartial trial which guarantees equality of all person before the courts or tribunals which includes the trial to be a fair and public hearing before a competent, independent and impartial tribunal established by law under Article 14(1) and the right for everyone charged with a criminal offence to be presumed innocent until proven guilty according to law, under Article 12(2) of the International Convention on Civil and Political Rights and finally Article 14(3) of the International Convention on Civil and Political Rights which provided for the minimum guarantees in full equity and they include: To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; To be tried without undue delay; To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; To have the free assistance of an interpreter

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<sup>203</sup> International Commission of Jurists, Rule of Law and Fair Trial, the Rule of Law in Democratic Societies Fair Trial- Core Element of the Rule of Law, the Elements of a Fair Trial.

<sup>204</sup> Myradova Nazik, <http://www.tm.undp.org/content/turkmenistan/en/home/our-blog/2017/3/28/UNDP-expert-explains-importance-of-fair-trial-and-the-rule-of-law.html> on 22 January, 2019.

<sup>205</sup> <https://www.fairtrials.org/right-fair-trial?the-right-to-a-fair-trial> on 22 January, 2019.

if he cannot understand or speak the language used in court; Not to be compelled to testify against himself or to confess guilt.

In conclusion the right to a fair trial is one of the most violated rights in many parts of the world. Many countries still violate the accused rights to a fair trial for example the right to be presumed innocent until proven guilty, the right to be tried by a competent, impartial tribunal because most of the times, many of the judges have already made up their own biases towards the case of the accused mainly concerning the murder cases and so on and the accused faces biases such as being denied the right to bail., shortcomings at the stage of criminal investigations may also seriously put the accused right to a fair trial in great jeopardy leading to prejudice. Recently, the Italian rules governing the retrial of convictions secured in absentia do not meet the European Convention on Human Rights standard because they do not guarantee the defendant the right to adduce new evidence and to effectively dispute the evidence gathered in his absence.<sup>206</sup>

The European Court of Human rights (ECtHR) came to a conclusion that in absentia trials do not infringe on the right to a fair trial as stated in Article 6 of the European Convention on Human Rights if some conditions are met such as the accused new of the proceeding but did not appear for trial, if he is legally presented by his counsel and the right to a retrial. This in my opinion gives leeway for the judicial officials and the government to try the accused in his absence which as has been stated above is an infringement of the right to a fair trial and is an important right to protect the accused judicial guarantees. Therefore, the right to a fair trial and the right of the accused to be present at his trial should not be violated and it should be mandatory for the accused to be present during his or her trial unless the accused purposely forfeits this right of the accused's behavior makes it impossible for the trial to proceed in his presence.

#### **4.7. Conclusion**

This chapter discusses the importance of the right to a fair trial as a non- derogable right and the role of the rule of law has in the right of a fair trial.

As seen from this dissertation, the right to a fair trial is a universally recognized fundamental human right and should not be derogated from, the rule of law plays a crucial role in the right to a

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<sup>206</sup> <https://canestrinilex.com/en/readings/italian-in-absentia-trial-violates-the-right-to-a-fair-trial/> on 22 January, 2019.

fair trial which is balancing the different arms of government from how laws are legislated, executed and implemented and all these intersect at the right of the accused person to a fair trial. This therefore prevents the arbitrariness of government officials for example arbitrary arrest of the accused person by the police and unjust and unfair sentencing of the accused person by either an incompetent tribunal that is tainted by impartiality or prejudice or the prosecutors failure in recognizing the due regard to a fair trial process of the accused.

One of the important aspects of the rule of law is the principle of supremacy of the law which applies to all individual in a non-discriminatory spectrum and this can only be achieved with the judiciary's independence and respect to the rule of law through separation of powers.

The judiciary plays an important role in the society as seen in the dissertation because it is burdened with the role of protection of human right such as the right to a fair trial which can only be exercised by the independence of the judiciary.

The right to a fair trial is important in that it guarantees the accused facing criminal charges minimum fair trial guarantees which ensure that the trial process comes to a just outcome and mostly it curbs against state arbitrariness.

As a regard, the right to a fair trial should in fact be regarded as a non-derogable rights so as to protect the rights of the accused person.

## **CHAPTER 5: Conclusion and Recommendation.**

### **5.1. Conclusion**

The right to a fair trial is a universally recognized norm that is modeled to protect and secure individual rights of accused persons from the unlawful and arbitrary deprivation of their basic rights and liberties. It mostly consists of a trial before a competent and impartial tribunal and provided the accused minimum judicial guarantees and effective protection from arbitrariness and violation of the right to a fair trial.

A fair trial in conjunction with the rule of law work hand in hand to ensure that the trial will follow the correct procedure in law from the time of arrest of the accused up to the time the accused is sentenced which among these procedures include that the accused right to be present at their own trial is not denied.

A trial in absentia exists in two contexts; firstly, when accused is present during the time of arraignment and indictment in court then after voluntarily absents him or herself from the trial process or does not trial.

Secondly, when the accused person has never appeared at any point during the trial process wither because he or she has absconded the trial process due to the consequences of the trial outcome or is not aware of any criminal charges against him or her.

In some cases it is seen that the presence of the accused is only required for serious offences whose penalty attracts a death penalty or a life imprisonment unlike for the less serious offences where the accused presence is rather desirable rather than mandatory.

Accused persons with criminal charges have a right to be present at their trial because of the nature of the punishment the penalty carries which varies from deprivation of the accused liberty and in

some circumstances the punishment may include facing the death penalty for countries that have not the death penalty. Therefore, the right to a fair trial aims at ensuring that the accused trial is carried out in a just manner by ensuring that the trial proceeding is carried out by prescribing minimum guarantees which must be respected by any criminal court in reaching a judgment, this is considered as the corner stone of a criminal justice system and is also a requirement under the rule of law which regulates the practice of a fair trial and strives to protect the individual from state arbitrariness.

The rule of law emphasizes on the separation of powers between the executive, judiciary and the legislature. The judiciary in this case plays a special role in ensuring that there is public confidence in the execution of its duties of administration of justice.

The judiciary also plays the role of protection of human rights such as the right to a fair trial and the minimum guarantees of the right to an individual facing criminal charges and this is dependent on an independent and impartial tribunal and the judicial officers.

A fair trial is also based on the principle of equality of parties both the aggrieved person and the accused person giving the accused the right to a fair trial regardless of the prejudices and the case against him or her.

Importance of a fair trial is emphasized under Article 63(2) of the Rome Statute and Article 14 of the ICCPR. The subsequent articles strictly emphasize the presence of an accused during a trial process.

As seen from this dissertation the right to a fair trial is in fact important in a democratic society which follows the rule of law. However, as much as there is need to put in law as a non-derogable right it can be limited in certain circumstance because it is not an absolute right. These circumstances are prescribed in law for example if the accused presence disrupts the trial process, only then can he be absent from his own trial, however the court is obligated to make it possible for the accused to observe the trial and instruct counsel from outside the courtroom.

In *Mbenge v Zaire*, the court stated that when an accused was properly informed of the proceedings in advance and failed or declined to exercise his right to be present, this would then be an exceptional circumstance for the trial to proceed without the accused.<sup>207</sup>

In *Maleki v Italy*, it was held that a trial will only be conducted in the absence of the accused if the accused had been properly informed of the proceedings or by guaranteeing the accused a retrial upon capture.<sup>208</sup>

In *Lala v Netherlands*, the court was of the view that if the accused did not appear in court and was properly summoned, the court will try the case as if the accused were present in court even if the accused gives prior notice of his absence regardless of unavoidable circumstances.<sup>209</sup>

It should be noted that although it is not explicitly listed that the right to a fair trial is a non-derogable right, there are certain aspects of the right that should be absolute and non-derogable such as the right of the accused to be present during his own trial to witness the trial process and be able to cross examine the aggrieved side and raise any objections which is one of the principles of due process and eliminate any aspect of arbitrariness.

## **5.2. Recommendation**

### **5.2.1. Providing a statutory definition of the right to a fair trial**

Most statutes whether international or national do not have a concrete definition of the right to a fair trial. For example in the ECHR, the provision on the right to a fair trial only states that an individual is entitled to the right to a fair trial but does not define nor state what a fair trial is. This is also the same with regards to the ICCPR, Article 14 of the convention merely assures equality before a tribunal and the right to a fair trial but not its definition. In addition to international instruments Article 50 of the Constitution of Kenya does not define but goes ahead to list what a fair trial entails in Article 50(2) (d) as the right to be present when being tried unless the accused conduct makes it impossible for the trial to proceed.

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<sup>207</sup> *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990).

<sup>208</sup> *Maleki v. Italy*, Comm. No. 699/2996, 1 2.1., U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999).

<sup>209</sup> *Lala v Netherlands* (1994), ECtHR application no. 14861/89

Both conventions and the Constitution of Kenya rather mention some of the guarantees to a fair trial but not its definition. Therefore, this provision is left to the discretion of judicial officers to interpret the statute which leads to ambiguity. Therefore, we are left with judicial precedents and academic writings as to the definition of the right to a fair trial which sometimes as mentioned maybe very ambiguous and not accurate.

### **5.2.2. Providing a statutory definition of a trial in absentia**

It is to be noted that as much as statutes require for the accused presence in court, none of them both national and international statute have come to a definition about what a trial in absentia really is for example Article 50 of the Constitution of Kenya and Article 14 (3) (d) of the ICCPR states that accused to be tried in his presence but it does not clarify whether he should be physically present to be tried or if his counsel can appear on his behalf for the trial. Once again, we are left to judicial precedents, the discretion of the judicial officer's interpretation of the meaning behind article 14(3) (d) and academic works of legal jurists.

### **5.2.3. Waiver of the right to be present**

The right of an accused to be present in court can in some circumstances be waived by the accused. The law on waiving his or her right to be tried in their presence should be clear and provide for circumstances when an accused can waive his or her right to be present during trial, the statutory meaning of waiver and the procedure in law on how and when to waive the right to be present. This helps to show the accused that the right to be present during their trial is an important right in law and it is in the interest of justice that the accused is present during their trial.

In many cases, most of the academic and judicial precedents states that the accused can waive this right in cases where the accused is facing minor charges as opposed to grave offences that attract serious penalties such as deprivation of liberties or even a death penalty.

### **5.2.4. Providing for limitations of the right of a fair trial particularly the presence of an accused in court.**

As much as this thesis advocates for the right to a fair trial to be an absolute right which is non-derogable, in the event that it is not recognized as a non-derogable right, provisions scamming to

its derogation should explicitly be stated in law and the reasons for the limitation of the right to a fair trial. The law around limitation of judicial guarantees only provides for cases during a state of emergency for example but not when there is no state emergency. Article 58(6) (a) makes it possible for rights and fundamental freedoms to be limited during a state of emergency.

In addition Article 4 of the CCPR General Comment No. 29 allows for states to derogate from their obligations during a state of emergency and such measures must be temporary in nature and calls upon states to act within their constitutional provisions.

The law should also address this in relation to an accused who absconds trial and make it clear that if an accused person absconds trial he will be tried and judged in his absence with or without the possibility of a retrial.

The Rome Statute explicitly provides for a trial in the presence of an accused unless the accused behavior makes it impossible for the trial to proceed in his or her own presence. It however does not consider the fact of an accused deliberately avoiding his presence during the trial. The question arises then, what about the aggrieved right to justice because as the saying stands justice delayed is justice denied. Will the trial come to a standstill until the accused is arraigned in court and his attendance secured.

#### **5.2.5. Provision in law as an absolute and a non-derogable right**

Lastly, given the nature of criminal charges and the strict sentences that come with being proven guilty of criminal charges, the right to a fair trial as well as the right of an accused person to be present during his or her own trial should be considered an absolute right in law including during times of emergencies. This is because of the harsh sentences that come with a guilty judgement in depriving the accused his person's freedoms and liberties and in a worst case scenario the imposition of a death penalty.

This will help curb against the arbitrariness of the criminal justice system and also gives the accused the assurance that the trial was carried out in a just and fair manner. It also shows that the right to a fair trial is an important right to both the aggrieved and the accused person which also regulates the trial process to come to a just outcome.

The law should also provide for other alternatives less harsh than limiting the right to a fair trial for example imposition of a fine or a more punitive punishment such as serving an extra sentence in the accused original sentence.

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