CHAPTER EIGHT

THE RIGHT TO BE PRESENT

8.1 INTRODUCTION

It is a fundamental principle of the law of criminal procedure in every civilised community that the trial of an accused must take place in his presence, and that the court's verdict and its imposition of sentence must also be announced in his presence.[1] Thus, an accused must be physically present at the trial so that he can participate in a meaningful and informed manner in the criminal proceedings instituted against him. The accused's other rights such as the right to put his case, the right to understand and the right to confrontation are dependant on his right to be present at the trial. Therefore, an accused's presence at the trial is fundamental to the accused effectively exercising his rights to defence.[2] The rationale for an accused's presence is that the public has an interest in the outcome of the case. The accused's presence is not only important to establish the factual circumstances of the case. It also enables the court to correctly assess the accused's personality and character. Consequently, the accused's ability to influence the court's decision on the criminal charges brought against him as a result of his presence is also important.[3] Therefore, there exists a public and individual interest rationale underlying the need for the accused's presence during the hearing or the proceedings.

The physical presence of the accused can only be meaningful if the accused is also present at mental and communicative levels. [4]This means that the accused must be able to understand what is happening to him. Thus, the right to be present is linked to

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1 Joubert (2001) *et al op cit* 78.

2 The right of a person accused of a crime to be present at his trial developed in Biblical times. It was laid down that:

> "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."

See *Acts* 25:16 (King James). Also see Childers and Hinesley III "The illness exception: the Eleventh Circuit and the right to be present at trial" 34 (1983) *Mercer Law Review* 1521.

3 Also see Smith "Criminal procedure: defendant's right to be present at trial – prosecutor's comments during summation regarding defendant's opportunity to tailor testimony to that of preceding witnesses-*Portuondo v Agard* 529 US 61(2000)" (2001) *Tennessee Law Review* 409-426, for a discussion of the case. In said case, the court found that a prosecutor may in summation, without violating the accused's constitutional rights *inter alia*, to be present, call the jury's attention to the fact that the accused had the opportunity to hear all other witnesses testify and tailor his testimony accordingly.

4 The accused must be "fit" to be tried. Please refer to ss 77-79 of the Act in this regard.

the right to understand.[5] Section 35(3)(k) of the 1996 Constitution refers to the right to an interpreter, and is linked to the communication aspect.[6] The principle contained in sections 34, 35(3)(c) and 35(3)(e) of the Constitution regarding access to court and the right to a public trial encapsulates this right to be present.[7] According to Steytler, section 35(3)(e) incorporates the right not to be tried when an accused is mentally unable to comprehend and participate in the proceedings.[8] The inference is that an accused who is unfit to stand trial, cannot participate in a meaningful and informed way in the proceedings instituted against him. Consequently, he cannot be said to be "present" at the trial. Therefore, an accused has the right to be both physically and linguistically present at his trial.[9]

This chapter will first address the accused's right to be present in terms of section 158 of the Act, the case law and the Constitution. Secondly, the exceptions to the rule will be considered. Thirdly, the amendment to section 158 and the right to be mentally present will be examined respectively. Thereafter, countries which accommodate trials *in absentia* will be examined. Principles applied in comparative law will be mentioned where relevant. Finally, the conclusion will present proposals and recommendations.

8.2 AN ACCUSED'S RIGHT TO BE TRIED IN HIS PRESENCE

8.2.1 THE RIGHT TO BE PRESENT IN TERMS OF SECTION 158 OF THE ACT

Section 158 of the Act provides that all criminal proceedings in any court will take place in the presence of the accused.[10] Thus, the presence of an accused is

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5 Similarly, in the **United States**, the right to be present at one's trial is linked to the right to understand. See *US ex rel Neevarro v Johnson* 365 F Supp 676, 681 n 3 (ED Pa 1973), where it was held that a defendant's ability to use an interpreter encompasses numerous fundamental rights. The failure to understand the proceedings may deny him his right to confront witnesses against him, his right to consult with his attorney, or his right to be present at his own trial.

6 Section 35(3)(k) provides that an accused must be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.

7 Section 34 refers to the right of access to courts, whilst s 35(3)(c) refers to the accused's right to a public trial. Section 35(3)(e) of the Constitution refers to the right of an accused person to be present when tried.

8 Steytler *Constitutional criminal procedure* 294.

9 See *US v Mosquera* 816 F Supp at 172-173 (EDNY 1993), where it was stated that:

> "If the right to be present is to have any meaning, it is imperative that every criminal defendant (accused) possesses sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."

10 That is, the accused's presence is compulsory at all criminal proceedings.

fundamental to the trial or any connected proceedings.[11] The following case discussions will illustrate the application of this principle:

The accused had a previous conviction for reckless driving in *S v Radebe*.[12] The accused could not be found, and the magistrate in the accused's absence altered the original order of suspension of 6 months to 12 months on his driver's licence. When the case came under review, the court held that as the accused was not present at the hearing, the magistrate had acted irregularly.[13]

The appellant had appealed against his conviction and sentence on a charge of culpable homicide in *S v Sibande*.[14] The issue on appeal arose whether or not the court was competent to deal with the matter, or whether it had to be remitted to the court *a quo* according to the requirement in section 158 that all criminal proceedings must be conducted in the presence of the accused. The court held that given the special circumstances, the appeal could be dealt with in terms of the competence afforded by section 322(1)(c) of the Act.

The court carried out experiments which were not conducted in open court, nor was the accused or his legal representatives present in *Rex v Makeip*.[15] The court held that if the experiments were of a more complicated nature, such as watching the reactions of chemical substances, then the trial court would not be justified in conducting such experiments in the absence of the parties. However, the court laid down, as a matter of practice that when a trial court pursues a line of investigation not

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11 To illustrate this, the accused must be present at an *inspection in loco*, or when his sentence is amended.

12 1973 (4) SA 244 (OPD). The accused had been convicted on a charge of contravening s 140(1)(a) of Ordinance 21 of 1966, and his licence had been suspended for 6 months. Therefore, the case was remitted to the magistrate's court to apply the provisions of s 147(2).

13 The court stated that according to s 156 of the Criminal Procedure Act 56 of 1955 and the practice of our courts, it is compulsory that the accused must be present at all stages of the trial. Therefore, the case should be remitted (sent back to magistrate) in order when the accused was found, to consider and apply in his presence, the provisions of s 147(2).

14 1984 (4) SA 708 (A). The appellant had requested the setting aside of the conviction and sentence and substitution thereof by a finding that in accordance with the provisions of s 78(6) of the Criminal Procedure Act 51 of 1977, he was not guilty of the offence charged as a result of mental illness. It appeared from the record that leave to appeal had been granted because of psychiatric evidence tendered in the accused's presence in subsequent proceedings, which evidence qualified against further evidence as intended in s 316(4) of the Act. The conviction and sentence was set aside and an order in terms of s 78(6) of the Act substituted.

15 1948 (1) SA 947 (A). The court had to consider a charge of murder. The accused was convicted and the court reserved certain questions as special entries in terms of s 370(1) of Act 31 of 1917. The court took a plasticine impression from a plaster cast of one of the spoors made by the police and compared it with the boots of the accused. The court found that the nail marks corresponded with the big nails on the accused's right boot. The court also found that the small nail marks also corresponded with the nails on the boot.

pursued by either party, it should, before reaching a conclusion on the merits of the case, inform the parties of the line of investigation which it proposes to pursue and make the investigation in the presence of the parties. Such a practice will avoid any suspicion on the part of the unsuccessful party that his case has not being fairly tried because the experiments were conducted in his absence. However, the court found that the experiments conducted by the court were of a simple nature and required no expert knowledge.

The appellant was charged with contravention of an offence in terms of the Insolvency Act 24 of 1936 and sentenced to 6 months' imprisonment in *S v Seedat*.[16] This was due to his failure to keep a proper record of his transactions in the English or Dutch language and/or failure to preserve such record for a period of not less than 3 years. He appealed against such sentence. It appeared that after the accused's conviction, the magistrate had called an expert witness, without the defence being consulted and the expert's opinion was founded on documents which were not tendered as exhibits in the case. The court held on appeal, that the magistrate had committed gross irregularities and consequently, the court should impose its own sentence for that imposed by the magistrate. Therefore, the whole sentence should be suspended.[17]

The court in *Seedat* also referred to *S v Harricharan and Others*[18] where it was held that it was a gross irregularity for the magistrate to have communicated with a witness without the other parties being present. The court held that a judicial officer should have no communication with any witness except in the presence of both parties lest it appear that justice is being administered in some manner other than in open court. This gross irregularity was found to amount to a failure of justice and the conviction against theft and sentence was set aside.

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16 1971(1) SA 789 (N).

17 The court also considered the comments of Broome J in *R v Maharaj* 1960 (4) SA 256 (N) at 258, where it was stated that:

> "It is a principle of justice as administered in this country that trials must occur in open court and that judicial officers must decide them solely upon evidence heard in open court in the accused's presence. If that principle is violated, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. It is elementary that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties."

In this case, the magistrate and a witness (district surgeon) consulted in private about certain evidence. This was done without the accused's knowledge. The court held that a conviction resulting from such a trial could not stand. Also see *S v Seedat supra* at 791.

18 1962 (3) SA 35 (N). In this case, the defence applied for the magistrate to recuse himself which he refused to do so. This involved an appeal from the conviction and a review of the proceedings.

The case of *S v Rousseau*[19] is also instructive in demonstrating the fundamental principle contained in section 158 of the Act. In this case, a medical practitioner gave evidence in court. Thereafter, the magistrate consulted with another medical practitioner and obtained an opinion from him concerning the testimony of the first medical practitioner. Both the accused and his legal representative were not present during this consultation. The court held that this procedure amounted to a serious irregularity and the accused's conviction and sentence was set aside.

From the above cases, it at apparent that the accused must be present at all stages of the proceedings. Similarly, a judicial officer cannot communicate with any witness in the absence of both parties. Any failure to comply with the above principles will lead to a conviction and sentence being set aside.

The accused's presence at a trial is also regarded as a fundamental component of a fair trial in international law. According to the ICCPR, an accused has the right "to be tried in his presence" in terms of section 14(3)(d).[20] This is part of the general right of confrontation of one's accusers.[21] Indeed, the European Court of Human Rights has held that an accused's right to be tried in his presence, is part of the right to a fair trial. The object and purpose of article 6 is to show that an accused is entitled to participate personally in the hearing.[22] However, according to Cheney *et al*, article 6 does not specifically provide for a hearing to be held in the accused's presence.[23] It

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19 1979 (3) SA 895 (T).

20 The International Covenant expressly provides for the right of an accused to be tried in his presence. Article 14 para 3(d) provides:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

To be tried in his presence, and to defend himself in person or through the legal assistance of his own choosing ..."

Thus, art 14(3)(d) provides, *inter alia*, that the accused has a right to be tried in his presence.

21 Steytler *Constitutional criminal procedure* 293.

22 The American Convention on Human Rights under art 8 para 2(d) also refers to "the right of the accused to defend himself personally". This wording is similar to art 6 para 3(c) of the European Convention on Human Rights which states that:

> "Everyone charged with a criminal offence has the following minimum rights:
> ... (c) to defend himself in person or through legal assistance of his own choosing ..."

Id.

23 It is important to consider Cheney's comments regarding art 6. According to Cheney *et al*, art 6 refers to the right of a fair trial and provides *inter alia*, that everyone is entitled to a fair and public hearing, to examine or have examined witnesses against him. However, the requirement of a public hearing and the accused's rights to defend oneself and to examine and cross-examine

has also been held that the right of an accused to be heard and protected under the European Convention on Human Rights 1950, did not necessarily mean that the accused had to be physically present at each hearing, provided that adequate technical means were available which allowed him an effective personal participation in the proceedings.[24]

In *Wolf v Panama*[25] the HRC established that the accused had never been heard personally in any of the proceedings against him, that he was never served a properly motivated indictment, that he was not brought properly before a judge after his arrest, and that he was all times denied access to legal counsel. The Committee held that the requirements of a fair trial are not met when the accused is not allowed to attend his trial or to give instructions to counsel. The Committee also found that the absence of a duly motivated indictment violates the principle of "equality of arms". Therefore, violations of arts 9(3), 14(1) and 14(3)(b) and (d) were found. In the case of *Perez v Uruguay*[26] an Uruguayan woman who was tried by a military court, challenged the fairness of the military procedure which allowed the accused to submit only written statements taken by a court clerk and did not allow her to be brought before the judge in person. Although the Committee decided that it could not rule on the issue, it supported the accused's right to appear in person before the court.[27]

In the **United Kingdom**, the general rule is that an accused has a right to be present at his trial. However, if the accused voluntarily waived that right, for example, by absconding whilst on bail, then the judge has a discretion to continue the proceedings in the accused's absence.[28] Therefore, where the accused absconded before his trial,

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witnesses, leads to the inference that the accused must be present at the hearing. See Cheney *et al op cit* 81.

24 This is in terms of art 6(3)(e)(c). See *Corte Costituzionale* 1342 July 22 1999 [2000] EUGR 2.

25 Communications No 289/1988 UN Doc CCPR/C/44/D/289/1988 (1992). A German citizen who was convicted on charges of cheque fraud in Panama, complained of several violations of the Covenant relating to the conduct of his case. Panama claimed that he had been tried according to proper procedure under Panamanian law.

26 Communications No 109/1981 UN Doc A/39/40 at 164 (1984).

27 The Committee also expressed concern with the procedure in Finland by which a person charged before a court with certain offences may be tried *in absentia*, if he was given due notice and his presence was unnecessary, and subsequently may be sentenced to a fine of about three months' imprisonment with no possibility for retrial after 30 days. It stated that unless the person clearly agreed to the procedure, and the court was fully informed of the accused's circumstances, this method raised questions of compatibility with arts 14(3)(d) and (e). The Committee recommended that Finland review its procedure. See Observations of the Human Rights Committee: Finland UN Doc CCPR/C/79/Add 91 (1998). Also see Weissbrodt (2001) *op cit* 134.

28 See *R v Jones* (no 2) [1972] 2 All ER 731, where the court held that the trial judge had properly exercised his discretion to continue the trial after the applicant had deliberately absented himself.

he could be convicted in his absence and without legal representation.[29] The judge's discretion to start the trial in the accused's absence was to be exercised with great caution. Although it was generally desirable that the accused should be represented, even if he had absconded, the commencement of the trial in the absence of the accused did not contravene article 6 of the European Convention.

In the **United States**, the accused (defendant) has the right in all criminal prosecutions to be present in person during the proceeding from arraignment to sentence, unless he has waived or forfeited it.[30] It has also been held that one of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.[31] Most statutes provide that the accused must be "personally present" if the prosecution is for a felony. However, a number of them authorise the accused to be represented by counsel for arraignment in a misdemeanour case, and to provide that the trial may be held in his absence.[32] A few statutes provide that if the accused escapes after any trial has commenced, the court may continue to reach a verdict.[33] An accused can also be denied his Fifth Amendment right to be present during closing argument, when his

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29 (*Anthony*) [2002] UKHL 5: [2002] 2 WLR 524, HL; [2002] 2 All ER 113. For a discussion of the case on the applicability of the concept of waiver in the context of trial in absence, see Ferguson "Trial in absence and waiver of human rights" (2002) *Criminal Law Review* 554-565.

30 Indeed, a statute denying this right would be an unconstitutional violation of due process. See Perkins and Boyce *Criminal law and procedure: cases and materials* The Foundation Press Inc (1977) 1026-1031. Also see the Sixth Amendment which guarantees the criminal defendant's right to be present at trial, and "to be confronted by the witnesses against him". It is noteworthy that the intrusion of the internet and television cameras into the courtroom has introduced the idea that a defendant's "virtual presence" can be the same as his actual, physical presence in court. See Davis "Talking heads: virtual reality and the presence of defendants in court" 26 (2001) *The Florida Bar Journal* 26-31, regarding a detailed discussion on the issue of physical versus virtual appearance in court.

31 See *Lewis v US* 146 US 370 (1892) and *Kentucky v Stincer* 482 US 730, 745 (1987). Also see Rule 43(a) of the Federal Rules of Criminal Procedure, which provides that:

"The defendant shall be present at the arraignment, at the time of plea, at every stage of the trial including the impaneling of the jury, and the return of the verdict, and at the imposition of sentence ..."

32 *Id*. A Michigan defendant (accused) waived his right to be present at the trial, when he voluntarily left the courthouse, after executing a recognisance bond and appearing with counsel. The court did not abuse its discretion in refusing to grant a continuance and in proceeding in the accused's absence. See *Samuels v State* S0 2d 1990 WL 136844 (Miss). Similarly, it has been held that a trial court had the power to deny the people's request for an adjournment and to proceed with jury selection, when the complaining witness failed to appear and could not be reached by telephone. The People had announced their readiness for trial three times. See *Hynes v George* NYS2d NE2d (1990) WL 153943 (NY).

33 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 52.

interpreter is absent.[34]

In **Australia**, it is an essential principle of the criminal law that a trial for an indictable offence be conducted in the accused's presence.[35] However, an exception to this rule will occur if the accused voluntarily waives his right to be present at his trial, and absconding whilst on bail may be regarded as constituting such a waiver.[36] An accused's presence in court may also be dispensed with as a result of illness.[37]

8.2.2 THE RIGHT TO BE PRESENT AT AN APPEAL

There is no reference to the right of an accused to be present at a trial in the Interim Constitution. However, the right of an accused to be present is included in section 35(3)(e) of the 1996 Constitution, which provides that:

> "Every person has a right to a fair trial, which includes the right –
> (e) to be present when being tried,..."

The right to an appeal was considered in *S v Pennington*,[38] where the Constitutional Court held that section 35(3)(o) did not expressly require that the appeal be made in an open court or that an appellant is entitled to be present at the appeal. The court also approved of the settled practice that leave to appeal proceedings are usually dealt with in chambers where an appellant does not have the right to a public hearing or to be present. Although it is settled practice that appeals are heard in public, it may

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34 See *People v Lun* P 2d 1991 WL 64124 (Col App). However, in view of the overwhelming evidence and the absence of any showing that the accused would have given any instructions to counsel had an interpreter been present, the error was harmless.

35 The trial refers to the whole of the proceedings, including sentence, and sentence passed for felony in the accused's absence is totally invalid.

36 *R v Cornwell* [1972] 2 NSWLR 1.

37 See, *inter alia*, *R v Abrahams* (1895) 21 VLR 343 (Aus).

38 1997 (10) BCLR 1413 (CC). It should be noted that s 35(3)(o) provides that:

> "Every accused person has a right to a fair trial, which includes the right –
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> (o) of appeal to, or review by, a higher court."

The South African Law Commission has recommended that the proposed procedure to use modern technology and "video-conferencing courts" to remand cases against persons who are in custody awaiting trial, should include appeal hearings. Such inclusion would not present constitutional problems. See *South African Law Commission Project 113* "The use of electronic equipment in court proceedings (postponement of criminal cases via audio visual link)" (July 2003) at 59 in this regard.

not be constitutionally impermissible to decide appeals on written submission alone.[39]

The question whether an appellant is entitled to be present at appeal proceedings has also been debated in international law. In *Ekbatani v Sweden*[40] the court noted that the participation of the accused is not necessary in leave-to-appeal proceedings and appeals involving only questions of law. The court held in *Monnel and Morris v UK*[41] that where an oral argument is allowed on appeal, and an accused is represented by counsel, the personal attendance of the accused can be refused. In *Kamasinski v Austria*[42] the court held that the exclusion of a prisoner from an appeal hearing did not violate the right to a fair trial enshrined in article 6 of the ECHR or the right to equality in article 14 of the ICCPR. The court held that regarding the latter requirement, technical arrangements, including security measures in bringing a prisoner to court, were objective and reasonable justifications for treating appellants in prison differently from those outside. The general view of the European courts is that a person charged with a criminal offence should be entitled to be present at the first appearance hearing. This general principle is based on the notion of a fair trial. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing. Rather, the courts should consider special features of the proceedings and the manner in which the defendant's interests were presented and protected, to decide the question whether the defendant can be excluded from the appeal hearing.[43] The above discussion demonstrates that an accused can be excluded from appeal proceedings if the circumstances dictate.

In *Gordon v Jamaica*[44] the accused complained of a violation of article 14(3)(d) of the ICCPR, because he was not present at the hearing for his appeal. However, the HRC found no such violation as the record showed that Mr Gordon was represented at the hearing by three lawyers, whose conduct of the appeal was not found to be negligent.

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39 See *S v Rens* 1996 (2) BCLR 155 (CC).

40 (1991) 13 EHRR 504.

41 (1988) 10 EHRR 275.

42 See *Kamasinski v Austria supra*.

43 See *Prinz v Austria* (2001) 31 EHRR 31, where the applicant was absent at the appeal hearing. The European court found that the interests of the applicant were safeguarded through his legal representative. Therefore no violation of art 6(1) and 6(3) was found as special features justified the applicant's absence from the appeal. However, in *Cooke v Austria* (2001) 31 EHRR 11, the Supreme Court hearing on the applicant's plea and appeal against his sentence were held in his absence. The European court found that it was essential to the fairness of the proceedings that he be present at the hearing of the appeals and that he be given the opportunity to participate together with his defence counsel. Therefore, the personal impression of the accused was found to be necessary and a violation of art 6(1) and 6(3) was found.

44 See *Gordon v Jamaica supra* at 237/1987 (1992).

Similarly, in *Henry v Jamaica*[45] the issue arose "whether the author had the right to be present during the appeal although he was represented by legal counsel, albeit by substitute counsel". The Committee considered that "once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing and not to arrange for the author to be present, cannot be attributed to the state party but instead lies with the author's responsibility; therefore the latter cannot claim that the fact that he was absent during the hearing of the appeal, constituted a violation of the Covenant".[46] Therefore, the Committee concluded that article 14(3)(d) had not been violated. The above cases demonstrate that states will not be in violation if the accused is represented adequately by attorneys, even if the accused is not present during the appeal hearings or at the trial.

8.2.3 THE QUESTION OF WAIVER

The question also arises whether or not the accused can waive his right to be present at the hearing. However, the accused's presence cannot be waived by either himself or his legal representative. It has been held in *S v Roman*[47] that accused persons cannot consent to be tried in their absence or to be represented by someone else. The presence of an accused is regarded as an important component of a fair trial, and the failure to comply with this rule leads to the proceedings being set aside.[48] The case of *R v Price*[49] involved an appeal as to whether the crown had wrongly and irregularly ordered the proceedings to continue after the death of one of the assessors because there was no properly constituted court after his death. The court held that the appellant was not precluded because of the request made on his behalf by his legal representative at the trial, from contending that the court which had convicted him was not a properly constituted court. If the court was not properly constituted, then its verdict and consequently also its sentence are irregularities that cannot be waived by an accused person. Therefore, the court found that the lower

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45 Communications No 230/1987 UN Doc CCPR/C/43/D/230/1987 (1991). The accused who was convicted of murder, did not wish to be represented before the Court of Appeal by a court-appointed lawyer, but by counsel of his own choice whose services he could secure. He also insisted upon attending the hearing of the appeal.

46 Weissbrodt (2001) *op cit* 134.

47 1994 (1) SACR 436 (A).

48 See *S v Eyden* 1982 (4) SA 141 (T) and *S v Roman supra* at 443.

49 1955 (1) SA 219 (A). The appellant had pleaded not guilty to charges relating to breach of price control regulations, and at the end of the crown case, the defence had closed its case without calling evidence. After hearing argument, the court adjourned to consider its verdict. During the adjournment and before determination of verdict, one of the assessors died. The judge ordered that the trial continue after a request by the defence with the concurrence of the crown (state). At a later sitting, the order was made that the case proceed before a properly constituted court. This led to the conviction of the appellant.

court which had convicted the appellant had not been properly constituted.

The question also arises whether or not the accused can waive his right to be present at the hearing in comparative law. Several states which accommodate a trial *in absentia* consider this to be a pre-condition for such a trial.[50] To illustrate this, under **Canadian law**, the accused is deemed to waive his right to be present if he absconds during the course of the trial.[51] Although the accused's trial *in absentia* would as a general rule be found to violate the requirement of a fair hearing, the courts have declined to allow the Charter's guarantee of a right to be abused by an accused who has himself by his conduct brought about the situation of which he subsequently complains. Therefore, the accused cannot be heard to complain that he has been deprived of his constitutional rights if his own course of conduct results in his non-appearance at a summary conviction trial which the court then proceeds with in his absence pursuant to section 738(3) of the Criminal Code.[52] The trial of a person accused of a felony cannot proceed in his absence unless in the case of a misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of the court.[53] An accused or his counsel may waive the accused's right to be present during the whole or any part of his trial, but this basic right of an accused may not be interfered with unless the accused himself has expressly authorised it; a waiver without such authority vitiates the whole trial.[54]

It has also been accepted by the European Commission that the accused's right to be present at the hearing can be waived by his counsel without prior authorisation.[55] This has been criticised because the right to be present should be regarded as a personal right and waiver must come from the accused himself.[56] Thus, a legal representative

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50 A trial *in absentia* refers to a trial held in the accused's absence.

51 See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14. Also see *R v Meidel* 148 CCC (3d) 2001, where the issue arose whether an accused was properly tried *in absentia* on the basis that he had absconded during the course of the trial. The accused sought extension of time to appeal against his conviction and sentence on narcotics offences. The court held that the practical necessity of having some finality in the criminal process, weighed against granting the application (application to appeal made three years after conviction) because it was not in the interests of justice.

52 See *R v Tarrant* (1984) 13 CCC (3d) 219 (BCCA).

53 See *R v McDougall* (1904) 8 OLR 30; 24 CLT 324; 3 OWR 750.

54 See s 557(1) of the Criminal Code of 1953-54. Also see *R v Page* (1968) 64 WWR 637 [1969] 1 CCC 90.

55 *Austria v Italy* App No 788/60.

56 See Marauhn "The right of an accused to be tried in his or her presence" in Weissbrodt and Wolfrum (1998) *op cit* 772.

is not a sufficient substitute for the accused's presence.[57] The European Commission has tendered to accept implicit waiver in cases where the accused failed to request that a procedural right should be observed. However, the court has held that waiver of a right must be established in an unequivocal manner.[58] It has also been held that where the state alleges that there was a waiver of the right to be present, it should be established in an unequivocal manner and it should be accompanied by minimum standards commensurate with the importance of an accused's presence.[59] The question arises whether the actions of an accused will influence his ability to attend the hearing for example, in cases where the accused has absconded, feigned unfitness to attend or intentionally reduced himself to a state of inability to attend. The case law of the European Convention is instructive in this regard.[60] Thus, the European case law demonstrates that the state can only take positive measures intended to neutralise the accused's tactics.

In the **United States**, the accused's absence from the trial may violate his due process rights.[61] An accused's right to be present cannot be waived by his counsel, in the absence of any consultation between the accused and his counsel.[62] Similarly, an accused's delayed arrival because of transportation problems does not abrogate his

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57 See *FCB v Italy* (1991) 14 EHRR 909. This view conforms with the finding in *S v Roman supra* and *S v Price supra*. However, a different view was taken in *Poitrimol v France* (1993) 18 EHRR 130, and *Lala v The Netherlands* 22 Sept 1994 Series A no 297-A.

58 *Barberá, Messegué and Jabardo v Spain* (1988) 11 EHRR 360. It has also been held by the European Court that any waiver of a defendant's right to appear and to be represented at his trial "must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance." See *Poitrimol v France supra* at para 31.

59 See *Colozza v Italy* (1985) 7 EHRR 516 *supra* and *Poitrimol v France supra*.

60 For example, see *Enslin v Federal Republic of Germany* DR 14 67, where some accused persons embarked on a hunger strike. They were fit only to attend certain parts of the trial. The Commission held that the accused persons had brought themselves to a state precluding their attendance at the hearing. Therefore, they implicitly waived their right to be present by their actions.

61 See *Larson v Tansy* F 2d 1990 (WL 114256 C A 10-N M), where the accused's absence from the instruction of the jury, closing arguments and the rendering of verdict was found to have violated his due process rights. The accused's absence precluded him from providing any assistance to his attorney, and from exerting any psychological influence on the jury.

62 The accused's silent acquiescence to his removal also did not waive his right to be present. *Id*. Also see *People v Aguilar* NY S2d 1992 WL 54724 (NYAD), where it was held that the accused's right to be present was not waived by defence counsel's consent to proceed. Also see *Faretta v California* 422 US 806, 819-20 (1975).

constitutional right to be present.[63] On the other hand, sentencing an accused who was not physically present in the courtroom, but who could see and hear and be seen and be heard through audio and video devices, was permissible.[64]

8.2.4 THE RIGHTS OF AN INDIGENT ACCUSED

The question also arises whether the state has a duty to assist the indigent accused to be and to remain present in court. It sometimes occurs that the indigent accused who is not in custody has to appear in court quite far from home. This is very pertinent to South Africa, where many indigent people live in isolated and far flung rural areas. Thus, travel and subsistence costs may hinder the accused's presence in court. The present position is that there is no duty on the state to provide such costs. This duty only applies to state and defence witnesses. This question arose in *S v Maki and Others*[65] where the court had to entertain an application that subsistence allowance be provided for an accused who was a potential witness for his co-accused. Although the court dismissed the application, it remarked that it is unfair that an indigent accused should be expected to proceed to a centre far from his home in order to stand trial without the state being obliged in some way to provide him with subsistence and accommodation. The court recommended that the matter should receive legislative attention. It was also contended in *Pennington* that the effective exercise of the right to be present at trial imposes a positive constitutional duty on the state in these circumstances to provide such accused with an adequate subsistence and travel allowance.[66] Weissbrodt appears to support this proposal. According to Weissbrodt, as far as the detained accused is concerned, the positive obligation on the state may include an offer to transport the accused to the court.[67]

The above discussion demonstrates that an accused has a fundamental right to be

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63 See *US v Mackey* F 2d 1990 WL 136767 (CA 2 NY), where an accused was denied his right to be present throughout his trial, when the court proceeded in his absence, causing him to miss the impanelling of the jury and the questioning of key government witnesses. The accused's delayed arrival was found to fall short of knowing, voluntary absence.

64 See *Williams v State* So 2d 1991 WL 65953 (Fla App), where the accused had waived in writing any right to be "personally" present in open court. The video or audio hook up also allowed the accused to speak privately with his attorney.

65 (2) 1994 (2) SACR 643 (E). It appeared that the accused was required to attend court a long distance from home. The court found that it was not empowered by s 191(2) of the Criminal Procedure Act 51 of 1977, to order that the accused be paid subsistence and other allowances provided for in s 191(2). The accused was not regarded as "a witness for the accused" as intended by s 191(2) merely by virtue of being a potential witness for his co-accused.

66 See *S v Pennington supra*.

67 See Marauhn "The right of the accused" in Weissbrodt and Wolfrum (1998) *cit* 767.

tried in his presence. This right applies to all stages of the proceedings.[68] An accused cannot generally waive his right to be present by himself or his legal representative.[69] Nevertheless, if an accused absconds whilst on bail, this is regarded as a voluntary waiver. The possibility also exists that the state should furnish the accused with travel and subsistence costs. However, this would depend on whether the state has adequate funds for this purpose.

8.3 EXCEPTIONS TO THE RULE

The Act also prescribes a number of exceptions to the general principle that an accused must be present at all stages of the proceedings. To illustrate this, the proceedings may continue in the following instances:

(1) in the absence of an accused who misbehaves (s 159(1));
(2) where an accused cannot attend the trial on account of his own physical condition or illness or death of a member of his family (s 159(2));
(3) or where an accused is convicted on an admission of guilt without appearing in court (s 57).

8.3.1 TRIAL IN THE ABSENCE OF THE ACCUSED ON ACCOUNT OF MISBEHAVIOUR

The accused can make it impossible for the court to proceed with the trial in his presence as a result of his behaviour during the trial. Where an accused makes the continuation of the proceedings impracticable by his behaviour, the court may direct that he be removed and that the proceedings be conducted in his absence.[70] However, the court will only use its powers under this section as a last resort and only if it cannot avoid doing so. The court would prefer to postpone the matter and grant a temporary adjournment and then continue the case at a later stage in the accused's presence.[71] If the court does use its powers in terms of section 159(1), it ought first to warn the accused and note its warning.[72] However, the court found in *Mokoa*, that the

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68 However, an accused may be excluded from an appeal proceeding. See, *inter alia S v Pennington supra*.

69 However, in international law, an unequivocal waiver is required from the accused himself.

70 See s 159(1) of the Act.

71 Joubert (2001) *et al op cit* 80.

72 See *S v Mokoa* 1985 (1) SA 350 (O), where the court had to consider the power of the courts conferred in terms of s 159(1) of the Act, to remove an accused and proceed to the trial in his absence. The court held that it should first inform the accused of its power and the grounds for removable before exercising that power. The power conferred in terms of s 159(1) must also be exercised with caution or circumspection. A warning must if possible, first be given to the accused that if he should disrupt the proceedings, the magistrate would be obliged to complete the trial in his absence. The warning may influence an accused to change his attitude and state his case.

appellant had not been warned that if he disrupts the proceedings, it is competent for the magistrate to conduct the trial in his absence. Therefore, no proper trial took place.[73] It is advisable to give the accused a further warning after he has been removed from court, and to have him brought before the court after the leading of evidence has been completed and to ask him whether he wishes to give any evidence.[74] From the above, it is apparent that caution and circumspection must be exercised before the accused can be excluded from the proceedings.

The court held in *S v Cotty*[75] that a prison authority can easily compel an accused, who is in custody, to appear before a court held at a prison and thereafter to decide whether the trial should occur in his absence in terms of section 159 of the Act. However, it must be proved that the accused's absence was due his fault before section 58(3) of the Prisons Act 8 of 1959 can be relied upon.[76] The court found that no admissible evidence was led that the accused was aware of the changed trial date or that he refused to appear in court. Therefore, it found no reason why the trial took place in the accused's absence. The court consequently found that there was a gross irregularity, and set aside the conviction and sentence.

Similar limitations apply to an accused's right to be present in other countries. In the early cases in the **United States**, the accused's right to be present at trial was considered to be so sacred that it could not be waived.[77] However, this strict

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[73] It was also apparent that the appellant had no questions for cross-examination, did not give evidence and was absent from the court for most of the time. This led to an irregularity in the proceedings. Therefore, the appeal against the conviction (robbery) and sentence was set aside. The court also referred to s 158 of Criminal Procedure Act which provides that the accused must be present during trial. The court referred to, *inter alia*, *R v Blackbeard* 1925 TPD 965 at 969, where that court stipulated that the provisions are made not in the interests of the accused or the complainant but in the interests of public generally and for the due administration of justice. The court also referred to *S v Motlatla* 1975 (1) SA 514 (T) at 815 E-F, where that court considered the effect of s 158. The court in *Motlatla* made the following pertinent comments regarding s 158:

> "That is a very important provision in our criminal law and it means more than that an accused person must know what the state witnesses are saying or have said about him. It means even more than that he shall be able to hear them saying it. There must be confrontation; he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused."

[74] See, *inter alia*, *S v Mpofu supra* at 162 and *S v Mokoa supra*.

[75] 1979 (1) SA 912 (N).

[76] Section 58(3) provides that "failure of the accused to attend the hearing, either personally or through his legal adviser, shall not invalidate the proceedings".

[77] See *Lewis v United States supra* at 372 (1892). Under United States Federal Law, the sentencing and commencement of the trial is only possible if the accused is present at the trial. See Marauhn "The right of an accused" in Weissbrodt and Wolfrum (1998) *op cit* 768.

interpretation of the right to be present has not been followed in modern times, where the courts assume that a voluntary and knowing waiver will be valid and binding.[78] An accused can be excluded from the hearing in the case of disruptive conduct on his behalf. Thus, the constitutional right to be present can be forfeited or waived if the accused persists in disrupting the orderly progress of the trial despite continuous warnings by the judge.[79] It has also been held that "the right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance".[80] Similarly, the right can be forfeited or waived if the accused absconds during a mid-trial recess.[81] However, once lost, the right to be present can be reclaimed as soon as the accused is willing to conduct himself consistently with decorum and respect inherent in the concept of courts and judicial proceedings.[82] The court should also endeavour to mitigate the disadvantages of the accused's expulsion as far as technologically possible in the circumstances.[83] However, the Eleventh Circuit created a new exception to the general rule in *Dasher v Stripling*,[84] where it

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78 See, *inter alia*, *Diaz v United States* 223 US 442 (1912).

79 *Illinois v Allen* 397 US 337 (1970). The accused Allen, who was on trial for armed robbery, engaged in speech so noisy, disorderly and disruptive that it was impossible to carry on with the trial. After several warnings, that he would be released from the courtroom if such tactics were continued, he was removed and was not present during much of the trial. It was held that proceedings in the accused's absence in these circumstances is necessary for the effective functioning of any court and should be regarded as a justifiable limitation. For a further discussion on cases involving disruptive accused, see Cook and Marcus *Criminal procedure* 2nd ed Matthew Bender and Co Incorporated (1988) at 859-861.

80 See *United States v Davis* 25 Fed Cas 773, 774 (No 14, 923)(CCSDNY 1869). It has also been stated that "if a prisoner so misconducts himself as to make it impossible to try him with decency, the court, it seems may order him to be removed and proceed in his absence".

81 *Taylor v US* 414 US 17 (1973). An accused can also waive his right to be present personally at his trial by voluntarily absenting himself during the trial. See *Warren v State* 537 P 2d 443 (Okl 1975). Also see *People v Swan* 394 Mich 451, 231 NW 2d 651 (1975), where the accused who was out on a bond, did not reappear after a mid-trial recess. The trial was continued in his absence and he was found guilty. The court found that this was in order because he waived his right to be present by his voluntary absence. The trial had been delayed several hours and then adjourned. It was after the accused had not reappeared four days later that the trial was continued in his absence.

82 See *Illinois v Allen supra*.

83 The court should make reasonable efforts to enable the accused to communicate with his attorney and, if possible, to keep him apprised of the progress of his trial. See Justice Brennan's comments in *Illinois v Allen supra*, in this regard, which are commendable. *Id*.

84 685 F 2d 385 (11th Cir 1982). Also see Childers and Hinesley *op cit* 1521, where the learned writers discuss both the inappropriateness of that exception and the paucity of relevant authority to support the court's finding.

held that the trial *in absentia* of a critically ill accused is proper unless the accused can show that he was prejudiced by his absence.

Similar limitations apply under Canadian law and in the United Kingdom respectively. The position under **Canadian law** is that the accused has the right to be present at the trial as long as he does not interfere with the proceedings.[85] The accused is deemed to have waived the right to be present if he absconds during the course of the trial.[86] The trial can then be conducted in the accused's absence. However, adverse inferences will be drawn from the accused's absence.[87]

The House of Lords has held at common law that it is unacceptable to hold a trial in the accused's absence.[88] A person charged with a criminal offence should be entitled to be present at the trial. However, this right may be waived and sometimes a trial *in absentia* , is permitted where the state has acted diligently to ensure the presence of the accused.[89] In **English law**, the court has found that the removal from the courtroom only applies if the behaviour of the accused is so unruly as to make it impracticable for the trial to continue.[90] In *Colozza v Italy*[91] the European Court stated that "the absence of the accused may be justified by the attitude he himself adopts at the hearing". Similar principles apply when witnesses fear intimidation on the part of the accused.[92] It has recently been argued in respect of the European Convention that a "real necessity and proportionality" must be shown before stipulating that the public interest in securing unreserved statements or orderly proceedings could only be achieved by excluding the accused from the courtroom.[93] This implies that there is

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85 See s 650 of the Criminal Code.

86 See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14.

87 *Id*.

88 Trials *in absentia* occur where the accused has absconded, created a disturbance or is absent as a result of illness. Also see *R v Preston* [1994] 2 AC 130.

89 See *Colozza and Rubinat v Italy supra*, where there was a breach of art 6 on the facts of the case.

90 See *Reg v Lee Kun supra* at 337.

91 See *Colozza v Italy supra* at para 27.

92 App No 8395/78.

93 See Marauhn "The right of the accused" in Weissbrodt and Wolfrum (1998) *op cit* 769.

a general restriction on limiting the accused's exclusion from the trial.

In **Australia**, a disruptive accused can also be removed from the court. The right of an accused to be present at trial, is said to be paramount but not unqualified.[94] It has also been held that where an accused is voluntarily absent, the court has a discretion to continue with the trial. The court may also proceed with the trial in the absence of an accused who has indicated that he waives the right to be present.[95] Committal proceedings are also conducted in the accused's presence, unless his behaviour requires his removal.[96] Nevertheless, there are provisions in some jurisdictions for the hearing to be conducted in the defendant's absence.[97]

Therefore, the international law experience tends to conform with South African law, in that an accused may lose his constitutional right to be present at his trial, if he continually misbehaves and interrupts the court proceedings.

8.3.2 ABSENCE OF AN ACCUSED WHERE THERE IS MORE THAN ONE ACCUSED

Section 159(2) provides that where the co-accused is absent as a result of *inter alia*, ill-health or illness or death of a family member, a court may authorise the continuation of the trial in the person's absence.[98] The court may also direct that the proceedings may be proceeded with in the absence of the accused, where any of the

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94 See *Eastman v The Queen* (1997) 158 ALR 107 (Fed Ct of Aust FC). During his trial for murder, the appellant was very disruptive in the courtroom. Notwithstanding repeated warnings from the judge (including warnings that the disruptions were not in the appellant's best interests), that he would be removed to a room, between which and the court there was a two-way television link, the appellant continued to disrupt the trial. The judge revoked bail and ordered removal of the appellant from the courtroom. The court held that the removal of the appellant to the room did not deny him a fair trial.

95 See *R v Jones* (1998) 72 SASR 281; 104 A Crim R 399 (SA Ct of Cr App), where the court held that an accused will be taken to have waived the right to be present where, without excuse, they absent themselves from the proceedings. However, the discretion to proceed in the absence of the accused ought to be exercised sparingly.

96 See, *inter alia*, s 255 Magistrates' Court Act 1930 (ACT), where the defendant can be excluded if he wilfully interrupts proceedings. Similarly, s 25 of the Justices Act 1959 (TAS), states that a defendant can be excluded because of his behaviour.

97 See *inter alia*, s 105 of the Summary Procedure Act 1921 (SA), where the court can excuse the defendant or proceed in his absence, if he has absconded or there is other good reason to do so. Also see Sch 5 clause 8 of the Magistrates' Court Act (VIC), where during committal proceedings, the defendant can be excused or if he absconds, and the court can continue the proceedings. However, Sch 5 clause 9 states that the proceedings can be postponed if the defendant is absent at the close of the prosecution case.

98 The American and Australian experience illustrates that an accused's presence may be dispensed with as a result of illness. See *Dasher v Stripling supra* and *R v Abrahams supra*.

accused is absent from the proceedings, whether as a result of his removal in terms of section 159(1) or with or without leave of the court. This may be done where the proceedings can't be
postponed without "undue prejudice, embarrassment or inconvenience" to the prosecutor, the other accused or a witness.[99] The courts have emphasised that these cases regarding the exceptions, should be approached with caution.[100] To illustrate this, it is desirable in section 159(2) that the accused should be given the opportunity to determine whether he is prepared to co-operate. The court can also direct upon application by the prosecution, that proceedings in respect of the absent accused be kept separate from the proceedings in respect of the accused who is present. Section 159(3) provides that when such accused appears in court again, the proceedings against him will continue from the stage at which he became absent and the court shall not be required to be constituted differently. If the pleadings continue in the accused's absence, he may if he later attends the proceedings again and has not been legally represented during his absence, examine a witness who testified during his absence and inspect the record of the proceedings.[101] This limitation on an accused's right to be present is said to be reasonable and justifiable when this is viewed against the co-accused's rights to a speedy trial.[102]

8.3.3 PAYMENT OF FINE WITHOUT APPEARANCE IN COURT

As far as trivial offences are concerned for example, traffic fines, a so-called admission of guilt fine may be paid which will result in the accused being convicted in his absence.[103] However, an admission of guilt fine amounts to a previous conviction for the purposes of all offences.[104] One needs to assess limitations of the right as

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99 See s 159(2) of the Act. Also see *S v Thoka* 1990 (1) SACR 553 (T), where the court's comments regarding s 159(2) and s 160(3)(b) of the Act are instructive. It held that a direction in terms of s 160(3)(b) together with a direction under s 159(2) or s 159(3) is not possible until the accused who are present at trial have closed their cases.

100 *S v Pauline* 1928 TPD 643.

101 See provisions 160(1)-(3). Section 160(1) of the Act provides that where such an accused is present again in court, he may, unless legally represented during the absence, examine any witness who testified during the absence and inspect the record of the proceedings. Thus, the proceedings in respect of the absent accused may only be concluded after his reappearance and after he has been given the opportunity of leading evidence and closing his case. Section 160 is similar to the American experience where "absent accused" may learn about the evidence tendered in their absence, by means of the verbatim transcript provided during trial proceedings. See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53.

102 See s 35(3)(d) of the Constitution.

103 See s 57(1) and s 57(A) of the Act.

104 A distinction must be drawn between an admission of guilt and compounding of minor offences in terms of s 341.

provided for in the Act to ascertain whether the accused's absence would detract from the fairness of the trial.[105]

8.4 AMENDMENT TO SECTION 158

Section 158 of the Act provides that an accused's physical presence in the courtroom may be dispensed with when evidence is given.[106] Section 158(2)(a) provides that the court may on its own initiative or on application by the prosecutor, order that a witness or accused gives evidence by means of closed-circuit television or similar electronic media, provided that the witness or accused consents to this.[107] A court may make such order only if facilities are readily available or obtainable and there are sound reasons for doing so.[108]

Section 158(4) of the Act provides that a court may impose the necessary conditions provided that "the prosecutor and the accused have the right by means of that procedure, to question a witness and to observe the reaction of the witness". This

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105 Also see *Kentucky v Stincer supra* at 745.

106 It was amended by s 7 Criminal Procedure Amendment Act 86 of 1996.

107 An accused or witness may also apply for such an order in terms of s 158(2)(b) of the Act. A recent proposal by role-players in the criminal justice system recommends the use of modern technology such as audio-visual links and the creation of "video-conference courts" to remand criminal cases against awaiting-trial prisoners. In terms of this proposal, audio-visual link will have to be installed at courts and prisons. Although the South African Law Commission is convinced of the major advantages of the procedure, it recommends that it be introduced for limited purposes initially. However, the procedure can be expanded later. For a detailed discussion about this innovative proposal, see the *South African Law Commission Project 113 supra* at 57.

108 Section 158(3) sets out the reasons as follows:

"If it appears to the court that to do so would

(a) prevent unreasonable delay;
(b) save costs;
(c) be convenient;
(d) be in the interests of the security of the state or of public safety or in the interests of justice or the public; or
(e) prevent the likelihood that prejudice or harm might result to any party if he or she testifies or is present at such proceedings."

In *S v F* 1999 (1) SACR 571 (C), it was held that the provisions of s 158(3) required a party making an application for an order in terms of s 158 to satisfy the court that all the requirements in paras (a)-(e) of subsection (3) were met. However, see *S v Staggie and Another* 2003 (1) BCLR 43 (C) and *Domingo v S* 2003 (2) BCLR 213 (C), where both courts had to consider evidence given by means of closed-circuit television in terms of s 158(3) of the Act. The requirements in paras (a)-(e) had to be read disjunctively. The court must take account of all the circumstances and then determine if one or more of the criteria set out in those paragraphs are present. Thus, *S v F* was found to have been wrongly decided and not followed.

discretion must be exercised with the purpose of ensuring a "fair and just trial". According to Steytler, this amendment does not appear to be inconsistent with the accused's right to be present.[109] A trial by electronic means occurs only with the accused's consent and on the trial court's order.

This amendment favours a common sense approach as suggested by Schwikkard.[110] The magistrate held in *Jurgens*, that the right to be present could not be waived by the accused and that to uphold such waiver would amount to an irregularity.[111] Schwikkard distinguishes *Motlatla* from *Jurgens*, in that she maintains that there is a difference in the position of the accused in *Motlatla's* case and a child witness giving evidence by means of closed-circuit television.[112] Schwikkard also maintains that the assertion that it is an inalienable right of an accused to be seen by the witness in court is inconsistent with section 171 of the Act, which permits evidence to be taken on commission in public circumstances, and does not require that the accused be present when such evidence is recorded.[113] However, the accused still has a right of cross-examination through a legal representative. The above cases illustrate that the courts are prepared to deny the accused direct usual contact with the witness provided the right to cross-examine is not compromised.[114]

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109 Steytler *Constitutional criminal procedure* 295. It should be noted that I agree with Steytler in that the accused can still monitor the proceedings through TV or electronic media. This amendment is commendable in that it protects child witnesses from untold mental stress and suffering.

110 See Schwikkard "The child witness: assessment of a practical proposal" 4 (1991) *South African Journal of Criminal Justice* 44, where she discusses the case of *S v Jurgens* R 653/90 23 November 1990 (then unreported). This case involved an application by the prosecution requesting that a seven-year-old girl (victim of an alleged kidnapping) be permitted to testify from a room adjoining the court, by means of closed-circuit TV. The magistrate refused the application because the proposed method would lead to evidence being taken in a separate room and the requirements of s 158 of the Act would not be complied with. Schwikkard favours a common sense approach and not a technical approach as evidenced in *Jurgens*.

111 The presiding officer referred favourably to *S v Motlatla supra* at 514, which involved an appeal from a conviction in the magistrate's court. In the course of lower court's proceedings, it appeared that the complainant had given evidence in the absence of one of the accused. The court noted that there must be confrontation between the witness and the accused, and the witness must give their evidence in the "face of a present accused".

112 In the former case, the accused is denied the opportunity of cross-examination whereas in the latter case, this right is not denied and there is no delay in the transmission of the testimony. In the *Jurgens* case, the accused was in a position where he could monitor the proceedings in exactly the same way if the child was present in the same room and his right to cross-examination was not impeded in any way. See Schwikkard (*SACJ*) *op cit* 46.

113 *Ibid* at 47. Please refer to chapter 9 on "The Right to Confrontation" for a more detailed discussion about s 171 of the Act.

114 *Id*.

According to Müller and Tait, the amendment to section 158 is commendable in that it not only improves the procedure used to take evidence on commission in terms of section 171 of the Act, but it also presents a potential alternative to section 170A of the Act.[115] They propose that section 158 can be used in the interim to allow child witnesses to testify via closed-circuit television in those instances where intermediaries are not required, or are not available or to avoid the problems inherent in section 170A.[116] Section 158 is regarded as advantageous in that it can be used to prevent children who are victims of sexual offences from testifying in the accused's presence. This is important where the child is older and does not require the assistance of an intermediary. Similarly, the witness herself can bring the application to give evidence by closed-circuit television, if she wishes to use this provision.

Thus, section 158 of the Act reinforces the right to be present when tried, by providing that all criminal proceedings shall take place in the presence of the accused.[117] However, there are exceptions to the rules such as, section 159(1) of the Act, which recognises an exception to the right where the accused has made the continuation of proceedings in his presence impracticable. However, provision is made in terms of section 160 of the Act for re-examination of witnesses, and an examination of the record on the return of an absentee accused.

8.5 THE NEED TO BE MENTALLY PRESENT

An accused person's incapacity to understand the proceedings will impact on his right to participate in the proceedings. This will lead to him not being present at the mental level. If at any time after commencement of any trial it appears or is alleged that the accused is not of sound mind, he must be dealt with in the manner provided by the Act regarding mental disorder.[118] The court should grant an adjournment for a

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115 Müller and Tait "Section 158 of the Criminal Procedure Act 51 of 1977: a potential weapon in the battle to protect child witnesses" (1999) *South African Journal of Criminal Justice* 57. It should be noted that s 170A enables child witnesses to give evidence with the aid of an intermediary via closed-circuit television. Please refer to the chapter "The Right to Confrontation" for a more detailed discussion about s 170A of the Act.

116 It should be noted that the following problems are inherent in s 170A: one needs to amend s 170A to enable the evidence of a child to be given from outside the courtroom without the use of an intermediary, where the latter is not required; s 170A also proposes a stringent test which must be complied with before the section can be applied: the court must be of the opinion that the child will experience "undue mental stress or suffering" by testifying in court. It is submitted that this requirement is vague and difficult to define. *Ibid* at 60-61.

117 This refers to s 158 as amended by s 7 of Act 86 of 1996.

118 See ss 77-79 of the Act which were previously discussed in the chapter "The Right to Understand". Section 77(1) provides that if it appears to a court that an accused is by reason of a mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, it must direct that the accused be examined at a mental hospital. Section 77(6) provides that if after such examination the court finds that the accused is not fit to stand trial, the court must stop proceedings and direct that the accused be detained as a patient pending a judge's decision. Section 79 and s 79(2)(b) of the Act provide that where accused person's capacity to understand the proceedings is doubtful or in respect of whom the defence of insanity

medical examination. The accused should be referred to an institution for observation if it is necessary.[119] It was held in *S v Ebrahim*[120] that the question of whether an accused was fit to stand trial can be raised for the first time even after conviction and sentence. There is no onus on the accused to prove his mental defect. The position in **Canadian law** is that an accused will be found to be unfit to stand trial, if he cannot understand the nature and object of the proceedings, their possible consequences, or communicate with counsel because of a mental disorder.[121] If a person who is unfit to stand trial is detained, the prosecutor will have to prove its case against the accused.[122] Thus, Canadian law links the right to be present with the right to understand.[123]

The question has also been raised that the court or prosecutor may raise the issue of triability (fitness for trial), prompting a committal for examination.[124] The question arises whether a party other than the accused can raise the issue of triability. Although an accused can waive the right by not asserting it, the court and the prosecution would fail in their duty of ensuring a fair trial if they did not raise the matter when there are reasonable grounds. This question was considered by Kruger, who referred to the Canadian case of *R v Swain*[125] for guidance. Kruger argues that

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has been raised, he or she is sent to mental hospital for observation. The first 30 day period of committal may be extended by a court for a further 30 days in the accused's absence unless the accused or his legal representative requests otherwise. Therefore, the accused has an opportunity to assert the right to be present. However, the ability of an undefended accused whose sanity is in issue, to exercise this right from the confines of a mental hospital is questionable. According to Steytler, this provision is constitutionally suspect unless the court appoints a lawyer for the indigent accused sent for observation. Also see Steytler *Constitutional criminal procedure* 296.

119 See *S v Manupo* 1991 (2) SACR 447 (C); *S v Mokie* 1992 (1) SACR 430 (T); *S v Mphela* 1994 (1) SACR 488 (A).

120 1973 (1) SA 868 (A). It is noteworthy that the Australian case of *Kesavarajah v R supra* dealt with the law on fitness to be tried. The majority restated the test governing fitness to stand trial, which was taken from the judgment of Smith J in *R v Presser supra*. Please refer to the chapter "The Right to Understand" for a discussion about this test.

121 See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14.

122 *Id*. For a perspective on the British position, see Wood and Guly "Unfit to plead to murder: three case reports" 31 (1991) *Medicine, Science and the Law* 55.

123 A similar position is followed in the United States. See *US ex rel Neevarro v Johnson supra*.

124 *S v Morake* 1979 (1) SA 121 (B).

125 (1991) 63 CCC (3d) 481 (SCC).

no one other than the accused may raise the issue of triability.[126] Steytler criticises this position because it is based on a wrong interpretation of *Swain*.[127] Thus, the position on the issue of triability is not absolute.[128]

If it appears during the trial, that the accused is a person such as is described in section 21(1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, the trial may be stopped and an enquiry held in terms of section 255 of the Act.[129] Thus, a drug addict may well be described as someone whose mental processes is so impaired that he is unable to understand the proceedings. Therefore, he is unable to participate fully and meaningfully in the proceedings.

From the above, it is apparent that an accused must be both physically and mentally present at all stages of the trial in order to participate meaningfully and fully in the trial.

8.6 TRIALS *IN ABSENTIA*

A trial *in absentia* occurs where there is a valid waiver, or the state has diligently but unsuccessfully sought to give an accused notice of the hearing.[130] Most states, for example, South Africa, do not allow trials *in absentia*.[131] Trials *in absentia* tend to undermine the reputation of the administration of justice.[132] Those states that allow

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126 See Kruger "The insanity defence raised by the state, minister's decision patients and a bill of rights" 6 (1993) *South African Journal of Criminal Justice* 148.

127 The court in *Swain* held that the prosecution may not raise the defence of insanity where the accused fails to do so, arguing that in an adversarial trial, the accused's autonomy is to be respected and thus the choice of defence. However, the prosecution may raise the issue after the conclusion of the defence case to ensure that an innocent person is not convicted. See Steytler *Constitutional criminal procedure* 297.

128 It is noteworthy that the majority in *Kesavarajah v R supra* at 474, restated the Commonwealth position that fitness to plead and to be tried is a question which must be determined by the jury.

129 See *in Re Vorster* 1997 (1) SACR 269 (O), where it was held that if the charge against the accused is withdrawn, the conversion of the proceedings becomes impossible as it can only be converted during a trial.

130 Steytler *Constitutional criminal procedure* 293.

131 No provision exists in either the Constitution or the Criminal Procedure Act for a trial to be held *in absentia*.

132 For example, if court orders cannot be executed because the accused persons reside outside the court's jurisdiction.

trials *in absentia* make it subject to other conditions.[133] The right to be present imposes a negative duty on the state not to arbitrarily exclude the accused from the hearing. The state also has a positive obligation towards the accused to ensure that he is given sufficient notice of the date of the hearing. The positive obligation imposed on the state may also include the obligation to adjourn the trial.[134] However, in those countries which do not provide for trials *in absentia*, the possibility arises that the accused can be excluded from the hearing if he makes the continuation of proceedings impracticable by their behaviour.[135] This limitation is imposed on the accused's right to be present.

8.6.1 COUNTRIES ACCOMMODATING TRIALS *IN ABSENTIA*

The most common reason for trials *in absentia* occurs where an accused is deliberately absent or is a fugitive. Several cases have been declared inadmissible under the ECHR where the fugitive applicants complained under article 6 of the Convention that they had been tried in their absence.[136] The European Court on Human Rights has held recently that indirect knowledge of the trial date does not meet the strict requirements for the state's diligence under article 6, paragraphs 1 and 3(c) of the Convention.[137] The Human Rights Committee has also held that a trial *in absentia* can only occur when the accused is summoned in a timely manner and informed of the proceedings against him:

> "The effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him ... judgment *in absentia* requires that all due notification has been made to inform him of the date and place of his trial and to request his attendance."[138]

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133 For example, that the accused is properly summoned or that a right of appeal exists. For a discussion about states accommodating trials *in absentia,* see 8.6.1 below.

134 This applies if the accused is physically unfit to attend the hearing.

135 See s 159(1) of the Act.

136 See Marauhn "The right of the accused" in Weissbrodt and Wolfrum (1998) *op cit* 770.

137 *FCB v Italy supra*.

138 See *Mbenge v Zaire supra* at 134, para 14.1. The case concerned a Zairian citizen living in Belgium as a political refugee, who was sentenced to death for murder in two separate trials made known to him only through the press. The Committee held that the right to a public trial does not prevent all proceedings *in absentia*. Proceedings *in absentia*, may be permissible in the proper administration of justice, for example, when the accused person has been informed of the proceedings sufficiently in advance and declines to exercise the right to be present. The Committee found that the purpose of the notice was to allow the accused an opportunity to exercise his rights under art 14 effectively. Therefore, the notice must inform the accused of the date and place of trial, and must request his attendance. The Committee acknowledged that,

The European Committee has also noted that strict observance of these rights is particularly required in the exceptional cases where trials *in absentia* are required. In the case of *Conteris v Uruguay*[139] the accused was denied any opportunity to appear before a judge, and was subsequently convicted by a military tribunal *in absentia*. On appeal, he was not brought before members of the military tribunal reviewing his case. Instead, he was brought before a "junior functionary" who read him the sentence, and asked him for his signature. The Committee found that both trial and appeal denied his right to a public trial in violation of article 14(1). The above cases illustrate the positive obligations imposed on the state as a result of the accused's right to be present. Therefore, care and caution must be exercised in informing the accused sufficiently of the proceedings against him.

The question arises whether the right to be present applies also to other administrative proceedings or only to serious offences. The **United Kingdom** is a case in point. In the United Kingdom, normally the person will be tried in the court sitting for the area, where the offence was committed. However, a magistrate or judge can order the venue to be changed if this is in the interests of justice.[140] A trial *in absentia* usually occurs in the case of minor offences where the accused pleads guilty by post. Where the minor offences involve no threat of imprisonment, it may be in the interest of the accused to be tried summarily in his absence.[141] Otherwise, the accused must be present in court to hear the prosecution's case. However, if a person escapes from custody pending trial or is too ill to attend, or has behaved in a very unruly manner in court, the trial can proceed and sentencing can occur in his or her absence.[142] Thus, the judge has a discretion to continue with the trial if the accused absconds during the trial. Legal representatives must also be present in cases where the accused is personally absent.[143] This ensures that the accused's rights are protected.

However, few countries do provide for trials *in absentia*, for example, the **United States**. The right to be present is not explicitly mentioned in the United States

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although there are certain limits on the efforts authorities may be expected to make in contacting the accused, Zaire had not reached those limits in this case. Judicial authorities has issued summonses only three days before the trial, and did not attempt to send them to the accused even though his address was known. The Committee held that this violated the accused's right under art 14(3)(d).

139 Communications No 139/1983, UN Doc A/40/40 at 196 (1985). The accused was charged with subverting the constitution, "criminal and political association", illegal entry, and kidnapping.

140 For example, because of local outrage at the crime which might lead to a biased jury.

141 See Marauhn "The right of the accused" in Weissbrodt and Wolfrum (1998) *op cit* 768.

142 *Ibid* at 769.

143 *Ibid* at 773.

Constitution. However, the courts have deduced it from the right to adduce and challenge evidence. The United States Supreme Court has recognised this right with regard to the accused's Sixth amendment right "to be confronted with the witnesses against him."[144] However, trials *in absentia* are not commonly used. The accused (defendant) is said to have a constitutional right to be present at all pre-trial, trial, and sentencing proceedings at which his presence has a "reasonably substantial" relation to his opportunity to defend against the charge.[145] Some lower state and federal courts have also confirmed convictions obtained when the accused fled before the trial commenced. Such cases appear to have stricter standards than those applicable when the defendant flees during the trial.[146]

Trials *in absentia* are also limited by state and federal rules of procedure.[147] The federal rules are strict in that they prevent both the commencement of trial and sentencing to occur in the accused's absence.[148] However, some state rules and case law allow trial and sentencing to occur in the accused's absence for less serious charges.[149] When a trial *in absentia* is allowed, the accused's lawyer must be given the opportunity to be heard unless the accused has made a "knowing, intelligent and voluntary" waiver of his right to counsel.[150] Accused who were absent during the trial, may learn about trial evidence and decisions through their lawyer's observations, as well as from the verbatim transcript which is made available at most trial proceedings. However, normal rules of appeal tend to apply at such trials.[151]

A trial held in the absence of the accused is not allowed in **Germany**. If the accused fails to appear at the beginning of the trial without an excuse, he is ordered to be brought to the court.[152] The accused cannot leave during the trial. However, there are certain exceptional cases, where a trial may continue in the absence of the accused if

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144 See *US v Graynor* 470 US 592 (1985).

145 *Id*.

146 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 52.

147 Minn Rule Cr Proc 26.03, Subd 1; Rule 43 of the Federal Rules of Criminal Procedure.

148 *Crosby v US* 506 US 255 (1933).

149 Minn Rule CR Proc 26.03, subd 1(3).

150 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53.

151 *Id*.

152 See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 523.

he or she was already interrogated about the charges and the court does not consider his further presence to be necessary.[153] The accused is informed of important evidence tendered in his absence as soon as he has returned to stand trial. The position of the unrepresented accused is that the defence lawyer should be appointed as soon as a trial *in absentia* commences. If the accused intentionally fails to appear at trial or leaves the trial without authorisation, a trial *in absentia* without the presence of the defence lawyer may be considered.[154] A trial *in absentia* is regarded as an "absolute reason for review" unless the defendant left or failed to appear without authorisation.[155]

Islamic law also regards the accused's presence to be important at the trial. It is a fundamental principle of Islamic law that opponents should confront one another. This means that no procedures such as the leading of evidence, confession or denial of evidence should be heard without the parties or their lawyers being present.[156] Thus, the trial is said to be invalidated by their absence. However, it is permissible to continue the proceedings if the accused refuses to attend the proceedings or to send his attorney. This can also be done in the case of an absent accused.[157] According to the Hanafi school, it is not permissible to hear the case without the presence of the parties. According to jurists of the other schools, the sentence can be issued without the presence of the absent party. The "absent" party has the right to defend himself when he returns to court to give evidence. Islamic jurists make it legal to issue the sentence during the defendant's absence to protect the plaintiff's right if his opponent was deliberately absent. As a result of the importance of the principle of confrontation of opponents, Islamic jurists agree that the opposing party should be informed about the case and if he does not attend, the judge sends a messenger to inform him about

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153 These cases are as follows:

(1) if the defendant leaves the trial or fails to return without authorisation;
(2) if the defendant deliberately, culpably causes his inability to stand trial;
(3) in cases of disorderly behaviour;
(4) cases of authorised absence for individual accused if several accused are at trial;
(5) if accused fails to appear in spite of an orderly summons including the notification that a trial *in absentia* is possible if a minor sentence is expected that does not include imprisonment;
(6) in cases of authorised absence responding to the defendant's application if a minor sentence is expected that may include imprisonment up to 6 months.

Id. These exceptions are similar to s 159 of the Act. Also see s 231(a) and s 231(b) of the StPO.

154 *Id*.

155 *Id*.

156 See Attia "Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 354.

157 *Id*.

the case. If he still refuses to attend the hearing, he is brought by force.[158] If the sentence is given in the absence of the accused, and he returns with new acceptable evidence, the judge can set aside the sentence. However, if the accused presents no real evidence to the court, the judge asks the plaintiff (accuser) to confirm the facts on oath.[159] If the plaintiff complies with this order, the sentence becomes valid. If he does not, the judge cancels the sentence which was granted and announces the accused's acquittal.[160] This means that the accused has the same rights as the plaintiff (accuser) to study the documents and the witnesses' statements.[161]

8.6.2 PROTECTING THE RIGHTS OF THE ACCUSED

The rights of an accused are also protected in a trial *in absentia*. These safeguards include legal representation by counsel, access to all relevant evidence and the right to challenge a decision. Many countries which allow a trial *in absentia* require representation by counsel.[162] Under **United States** law, legal representatives must be given the opportunity to be heard, unless there is a separate waiver of the right to counsel.[163] The **European Convention** stipulates that an accused who is tried *in absentia* must have an adequate defence, and if his lawyer wishes to attend the trial, he must be allowed to do so not merely as a theoretical option but in practice.[164] The court must inform the accused of his right to counsel in terms of the Covenant.[165] Therefore, the accused's right to legal representation is regarded as being important.

It has also been held, that "when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary".[166] Under **Islamic law**, all evidence should be known to the accused or his counsel. In

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158 *Ibid* at 355. This may well be construed as being unconstitutional in other jurisdictions.

159 *Id*.

160 *Id*.

161 *Id*.

162 This applies under Islamic law. *Ibid* at 354.

163 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53.

164 See Leigh "ECHR" in Weissbrodt and Wolfrum (1998) *op cit* 658.

165 *Ibid* at 773.

166 This includes access to evidence. See the Human Rights Committee's General Comment 13/21 of 12 April 1984 on Procedural Guarantees in Civil and Criminal Trials. *Ibid* at 774.

the **United States**, accused who were absent during the trial may learn about the evidence considered by means of the verbatim transcript provided during trial proceedings.[167] It is an important element of the notion of a fair trial that if a trial *in absentia* is allowed, then the accused should be entitled to challenge, review and appeal the decision. However, the right to challenge a decision is subject to certain conditions.[168]

8.6.3 ALTERNATIVES TO TRIALS *IN ABSENTIA*

There are alternatives to trials *in absentia*. A trial *in absentia* may only be justified with reference to a public policy argument.[169] This demonstrates the state's intention to prosecute and penalise certain offences. However, a trial *in absentia* does not necessarily contribute to the proper administration of justice since the presence of the accused must be considered to be in the public interest with a view to a correct determination of the case. The accused is the main subject of adjudication. The right to challenge a decision is important from a human rights perspective in that a need may arise for a new trial if the accused returns to court.[170] However, the state can demonstrate its intention to prosecute for certain offences by issuing a warrant. If this is ineffective, it must publicly announce that an indictment or summons is going to be served against a certain suspect. There can also be reciprocal disclosure of proof of an accused's guilt and of any defence plea.[171] However, the need arises for a special procedure to preserve evidence and to perpetuate testimony.[172]

The issue of whether or not an accused may be tried *in absentia* was debated regarding the establishment of the International Tribunal for former Yugoslavia and also by the International Law Commission (ILC) on its draft statute for an International Criminal Tribunal.[173] The report of the UN Secretary on the establishment of the

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167 This is similar to s 160 of the Act. See Frase "USA" in Weissbrodt and Wolfrum (1998)*op cit* 53.

168 For example, that the accused makes it probable that his non-appearance was excusable.*Id*.

169 This excludes cases when the accused is removed from court as a result of disruptive behaviour. See Marauhn "The right of an accused" in Weissbrodt and Wolfrum (1998) *op cit* 775.

170 *Id*.

171 See Rule 67 of Rules of Procedure and Evidence of the Tribunal on the former Yugoslavia. *Id*.

172 For example, a fully accepted alternative to trial *in absentia* is required. A balance between the public and the individual interests involved in a case is required. *Id*.

173 The Tribunal held that trials *in absentia* are excluded before a trial chamber. The ILC's Draft Statute held that its art 44 para 1(h) allows trials *in absentia* without including guarantees to safeguard the rights of the defence in such a case. It is important to consider arguments identified at the discussions on the Tribunal for the former Yugoslavia: proceedings against the defendants in their absence were considered by some as a solution "clearly dictated by realism".

Tribunal for the former Yugoslavia provides a clear reference to the International Covenant: "A trial should not commence until the accused is physically present before the International Tribunal".[174] There is a widespread perception that trials *in absentia* should not be included in the statute as this would be inconsistent with article 14 of the ICCPR, which provides that the accused shall be entitled to be tried in his presence.[175] The above report indicates a clear shift towards excluding trials *in absentia*.

8.7 CONCLUSION

The above discussion illustrates that an accused's right to be present during the trial, is regarded as a fundamental component of a right to a fair trial in most jurisdictions. However, the right to be present encompasses more than simply requiring that both the trial and the court's decision should take place in the accused's presence. The accused should also be able to confront their accusers and observe their demeanour. Therefore, both the accused's right to confront the witnesses against him and his right to cross-examine presupposes the accused's presence at the trial.[176] However, the accused cannot waive his right to be present either by himself or his legal representative.[177] The right to be present also means that a judicial officer cannot consult with a witness in the absence of both parties.[178] The right to be present also includes the fact that the accused must be informed of the charges against him or her, and the date, time and place where the matter or case will be heard.[179] However, an accused can be excluded from an appeal hearing.[180] Indigent accused should be

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Others argued that trials *in absentia* were "undesirable from both a policy and a political point of view ...". This would undermine the legitimacy of the tribunal or court. However, these arguments relate to public policy rather than the rights and interests of the individual. *Ibid* at 765.

174 *Ibid* at 763-766.

175 *Id*.

176 Also see *Dowdell v United States supra* at 330.

177 See, *inter alia*, *S v Roman supra*.

178 See, *inter alia*, *S v Rousseau supra*.

179 See *Mbenge v Zaire supra*, where the HRC held that a valid judgment *in absentia* requires that steps be taken to inform the accused beforehand about the proceedings against him or her, especially the requirements of art 14(3)(a).

180 See *S v Pennington supra*. A similar position is followed in international law. See, *inter alia*, *Kamasinski v Austria supra* and *Prinz v Austria supra*. However, the presence of the applicant was found to be necessary in *Cooke v Austria supra*. The European court has laid emphasis on the special features of the proceedings and the manner in which the defendant's interests were presented and protected. On the other hand, the decisions of the HRC demonstrate that states

provided with subsistence and travel costs, provided the state has the necessary funds.[181]

However, the general rule requiring the accused's presence during the trial, is not absolute. An accused's presence can be dispensed with during exceptional circumstances where, for example, he disrupts the court's proceedings by his unruly behaviour,[182] or by voluntary waiver.[183] Otherwise, the right to be present at one's trial is assumed to be absolute.[184] However, the courts must exercise due care and caution in excluding the accused from the proceedings. A warning to the effect that if he should disrupt the proceedings, it would be competent for the judicial officer to complete the trial in his absence, must if possible, be given to the accused as it might influence the accused to change his attitude and state his case.[185] An accused is also entitled to be mentally present at the trial. This will enable him to participate meaningfully in the trial.[186]

Similarly, the accused's right to be present at his trial is considered to be fundamental to a fair trial in other countries.[187] An accused is entitled to be present at all stages of the court proceedings.[188] Nevertheless, there are exceptions to the general rule such

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will not be in violation of art 14(3)(d) if the accused is adequately represented at the appeal by legal representatives. See *inter alia*, *Gordon v Jamaica supra*.

181 See *S v Maki and Others supra*.

182 See for example, s 159(1) of the Act, which provides that if the accused's refusal to plead is accompanied by such improper behaviour that it obstructs the conduct of the court proceedings, the court may order him to be removed and may direct the trial to proceed in his absence. Also see *Illinois v Allen supra*, where the accused lost his right as a result of improper conduct at trial. Similarly, in Germany, a trial may proceed without the accused if he disturbs the proceedings by his unruly behaviour. See s 231a and s 231b StPO. Please refer to subsection 8.3.1 for a detailed discussion about s 159(1) of the Act.

183 See *Diaz v United States supra*.

184 See *Lewis v United States supra*.

185 See *S v Mokoa supra*.

186 See ss 77-79 of the Act. Canadian law also links the right to be present with the right to understand. See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14.

187 See, *inter alia*, *R v Jones supra*, which firmly roots consideration of the exercise of the trial court's discretion for trials in absence, in the context of securing the defendant's Convention right to a fair trial.

188 See, *inter alia, Lewis v US supra* and Rule 43(a) of the Federal Rules of Criminal Procedure.

as voluntary waiver or improper conduct at the trial.[189] The accused's right to be heard in his own defence also assumes his presence at the trial, and not merely that of his counsel since an attorney can never be a witness for his client.[190] However, the state will not be in violation if the accused is adequately represented by his attorney at the hearing or the trial.[191] Similarly, the accused or his counsel may waive his right to be present during the trial, but the accused must expressly authorise it.[192]

Those countries which accommodate trials *in absentia*, impose positive obligations on the state to exercise diligence and care during such trials. These obligations include steps taken to inform the accused beforehand about the proceedings to be instituted against him,[193] safeguarding the accused's right to legal representation,[194] and access to evidence.[195] Thus, it is an important element of a fair trial that if trials *in absentia* are to be allowed, then the rights of the accused must be protected.[196] Thilo Marauhn's suggestions regarding the right to be present are commendable.[197]

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189 See, *inter alia*, *Diaz v United States supra* and *Illinois v Allen supra*.

190 See *Faretta v California supra* at 819-820, and *Dasher v Stripling supra* at 389. This conforms with the finding in *S v Roman supra*.

191 See *Gordon v Jamaica supra*.

192 This was held in the Canadian case of *R v Page supra*. According to the European Court of Human Rights, the waiver from the accused must be unequivocal. See *Poitrimol v France supra*.

193 See *Mbenge v Zaire supra*.

194 Islamic law adheres to this principle. See Attia "Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 354.

195 See the view of the Human Rights Committee. See Marauhn "The right of an accused" in Weissbrodt and Wolfrum (1998) *op cit* 765.

196 However, there is a shift towards excluding trials *in absentia*. See the report of the UN secretary on the establishment of an International Tribunal for the former Yugoslavia in this regard. *Id*.

197 He makes the following suggestions:

(1) A clear distinction should exist between the exclusion of the accused from the hearing such as, where there is disruptive behaviour on the accused's part and a trial *in absentia*. Trials *in absentia* should occur in minor cases where there is no threat of imprisonment.

(2) The presence of the accused is required under all circumstances from the beginning of the trial until the judgment is rendered. This will avoid the situation where the accused is being secretly detained by the police and he is tried in his absence.

(3) The right to be present includes the right to be duly summoned.

I agree that trials *in absentia* can be held for minor offences where there is no threat of imprisonment. In those instances, where trials in *absentia* are allowed, the accused's rights must be safeguarded. When trials are held in the accused's absence, the "absent accused" should be provided with a transcript of the proceedings. Similarly, legal representation should be provided for such accused, and there must be a right to challenge such decisions in a court of law. However, trials *in absentia* should be the exception and not the norm. One of the "immutable principles of justice" is the idea that "no man shall be condemned in his person without an opportunity of being heard in his defence".[198] Therefore, the accused's presence and personal participation in the trial, is fundamental to a "just and fair" trial. The accused's presence at the trial ensures that he is able to confront his accusers face-to-face and observe their demeanour at close quarters. In this way, he can adequately challenge the opposing evidence and participate in the trial. The next chapter will discuss the accused's right to confrontation in the criminal proceedings.

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(4) A special procedure should exist for the preservation of evidence and the perpetuation of testimony if the accused's presence cannot be achieved.

Ibid at 776.

198 See *Holden v Hardy* 169 US 366, 389 (1898).