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The American University in Cairo

School of Humanities and Social Sciences

**THE RIGHT TO APPEAL OF A PERSON SENTENCED FOR A
CRIMINAL OFFENSE - THE CURRENT EGYPTIAN ORDINARY
LEGAL SYSTEM AND ITS DEGREE OF COMPLIANCE WITH
INTERNATIONALLY RECOGNIZED STANDARDS**

A Thesis Submitted to the

Department of Law

**In partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Mohamed El Ghannam

May 2006

The American University in Cairo

School of Humanities and Social Sciences

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in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law
has been approved by

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ABSTRACT

University name: American University in Cairo.

Thesis title: The right to appeal of a person sentenced for a criminal offense - The
current Egyptian ordinary legal system and its degree of compliance with
internationally recognized standards.

Student full name: Mohamed El Ghannam

Name of advisor: Dr. Enid Hill.

Brief summary:

Several standards are used to judge about the fairness of a certain trial. This kind of evaluation is always directed at making an effort to determine whether the procedures in a specific case are consistent with the laws of the country where the trial is held, and whether those laws and case procedures agree with international principles, cited in treaties to which the state is a party.

One of the main parts of consideration of the right to a fair trial is the right of the person convicted of a criminal offense to submit an appeal to a higher court or tribunal and to have the sentence reviewed according to law. This right helps in protecting the accused person against any percentage of human error that may occur in the course of studying a case by any court.

The first part of this dissertation discusses the concept and historical development of the right to appeal. It also includes the explanation of the importance of appeal in any legal system and the description of different appeal standards. The right of appeal under the international human rights law is analyzed in the second part of this dissertation in which the author describes the applicable standards of appeal under the United Nations system and different tribunals, the European system of human rights with an emphasis on the European Court of Human Rights, the Inter-American system of human rights, and the African system of human rights. The third and final part of the dissertation focuses on the right to appeal under the Egyptian laws and the execution of this right before the Egyptian ordinary courts. It also describes the different tiers of ordinary courts and the exceptions to the implementation of the right to appeal before these courts.

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INTRODUCTION

The right to a fair trial is one of the most fundamental human rights. When a person is suspected of committing a crime, fair trial is an extremely important safeguard protecting the accused from being wrongly convicted, imprisoned, or even executed. In addition, this right is indispensable for the protection of further human rights such as the right to life, arbitrary detention, the prohibition of torture and inhumane treatment. It also helps guard the accused person from the abuse of criminal procedures and increases trust in the trial process and the rule of law.

This right is one of the internationally applicable standards declared in the Universal Declaration of Human Rights,¹ and has become legally binding on all states as a principle of customary international law. Also, the International Covenant of Civil and Political Rights, adopted by the U.N. General Assembly in 1960, confirmed this right in its article 14.² Moreover, the fair trial right is stated in several international and regional treaties of human rights and fundamental freedoms, including the American Convention on Human Rights,³ the African Charter on Human and Peoples' Rights,⁴ Arab Charter on Human Rights,⁵ and Cairo Declaration of Human Rights in Islam.⁶

1 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), article 1 states Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

2 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

3 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

4 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

5 Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 Hum. Rts. L.J. 151 (1997).

6 Cairo Declaration on Human Rights in Islam, the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31 July to 5 August 1990).

Several standards are used to judge about the fairness of a certain trial. This kind of evaluation is always directed at making an effort to determine whether the procedures in a specific case are consistent with the laws of the country where the trial is held, and whether those laws and case procedures agree with international principles, cited in treaties to which the state is a party.

One of the main parts of consideration of the right to a fair trial is the right of the person convicted of a criminal offense to submit an appeal to a higher court or tribunal and to have the sentence reviewed according to law. This right helps in protecting the accused person against any percentage of human error that may occur in the course of studying a case by any court. Judges are human beings, they can make mistakes, but their mistakes can have a profound impact on the life of an innocent person. Judges' mistakes can occur for different reasons including excessive work, insufficient experience or even some ignorance of law. This can be prevented by the review of a higher court that will correct any errors committed by the first instance court, which its verdict is being appealed. In addition, the higher court will evaluate the adequacy of the issued judgment in proportion to the gravity of the committed crime, which would include the capability to decrease the sentence to the amount adequate to the committed crime according to the superior court viewpoint.

Adopting this right will result in reducing the percentage of error in inferior courts' decisions. Inferior judges usually feel uncomfortable, and maybe ashamed, that their verdicts can be appealed by a higher court due to any error, which will help in more concrete judgments. In addition, the justice system will gain citizens' credibility since they will feel satisfied that the judgments are issued by a group of judges and that they are just as they are reviewed by the highest court possible.

Also, when a higher tribunal reviews the appealed verdict, this will assure the evaluation by more experienced judges that will lead to a more effective judicial system.

This appeal should be comprised of two main elements, it should be genuine, and by a higher court. A higher court will be constituted of more experienced judges who will be more capable of evaluating the case and discovering any errors committed by the inferior court. Moreover, a genuine review should not only be limited to reviewing the matters of law of the case (procedures and implementation of the correct law), but also extends to review the entire case including its facts and different circumstances. In some judicial systems, a convicted person can be tried according to law and within the correct procedures, convicted of the alleged crime, and sentenced to prison. When he/she appeals to the higher court and the appeal is being limited only to matters of law, the higher court is being prevented from reviewing the case facts and circumstances, which can lead to different opinion of the case by the higher court. These facts should be reviewed by the higher court, which should have access to all the procedures and circumstance of the case while being delegated by the inferior court, which may result in finding the person innocent.

The principle of appeal is situated in several international and regional human rights instruments including the International Covenant of Civil and Political Rights,⁷ the American Convention,⁸ and the second article of the seventh protocol to the European Convention.⁹

⁷ See *supra* note 2 article 14(5) states

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law

⁸ See *supra* note 3 article 8(2) (h) states

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

Moreover, the United Nations affirmed this right in its courts. It provided it in article 25 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia¹⁰ and article 24 of the Statute of the International Tribunal for Rwanda.¹¹

The United Nations also adopted the right to appeal the judgment issued by the newly initiated International Criminal Court and detailed it in three articles of the Rome Statute.¹²

What elements of the proceedings can be appealed, and how that can be done varies throughout the legal systems. Some allow reversal of the law, others of both the facts and the law. Some systems allow interlocutory appeals of non-final judicial rulings; others demand that the judgment should be final to permit submitting an

... (h) The right to appeal the judgment to a higher court

9 Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, entered into force Nov. 1, 1988, article 2 states

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

10 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), article 25 states

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

- (a) An error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers

11 Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) article 24 states

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12 Rome statute of the International Criminal Court U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002, articles 81, 82, and 83.

appeal asking for a review. The review or appeal process may be one or two tiered (i.e. an appellate court and a supreme court). An appeal is considered a continuation of the criminal justice process and as such implicated some other human rights such as the right to an impartial and independent tribunal, procedures established by law, speedy trial, public hearing, equality of arms, and assistance of counsel. However, constitutional guarantees to appeal in some countries do not always provide for the same rights to appeal as are available at the trial. On the other hand, at least forty-five national constitutions contain guarantees which are tantamount to a right to appeal a criminal conviction to a higher court.¹³

In Egypt, the right to appeal is preserved to the accused person in almost all types of crimes and before the majority of the ordinary courts. However, this rule has some exceptions. For example, the convicted person in felonies, who is punished with different sentences, including death penalty, is allowed only to submit an appeal before the Court of Cassation that only examines the matters of law (due process through legal procedures) and does not access to review the facts of the case. This violates the fundamental human right of a convicted person of his/her right to appeal due to the fact that the review of the Court of Cassation is not adequate, since it does not extend to review the facts of the case. A person can be prosecuted before the Egyptian Courts of Felonies, which abided by the issued measures of the criminal procedural law, but did not look through all the case facts due to any reason. This will lead to the conviction of that person in accordance to the procedures accurately implemented, but in contradiction to the facts. Afterwards, the highest Egyptian Court, the Court of Cassation, will only accept appeals to felonies due to reasons of errors of law and violations of due process. The court's scope while reviewing these

¹³ M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (1993).

appeals is restricted only to matters of law and cannot expand its review to the case facts. As a result, this will lead to the conviction of some innocents.

For that reason, some civil law countries (i.e. France, Kuwait, and United Arab Emirates), that used to adopt the same Egyptian style of appeals in felonies, amended their criminal procedural law into a two tier system, and allowing genuine review by a higher court.

The first part of this dissertation will be dedicated to the concept and historical development of the right to appeal. This will also include the explanation of the importance of appeal in any legal system and the description of different appeal standards. The right of appeal under the international human rights law will be analyzed in the second part of this dissertation in which the author will describe the applicable standards of appeal under the United Nations system and different tribunals, the European system of human rights with an emphasis on the European Court of Human Rights, the Inter-American system of human rights, and the African system of human rights. The third and final part of the dissertation will focus on the right to appeal under the Egyptian laws and the execution of this right before the Egyptian ordinary courts. It will describe the different tiers of ordinary courts and the exceptions to the implementation of the right to appeal before these courts.

I. The Concept and Historical Development of the Right to Appeal

The right to appeal a decision issued by a court of first instance or an intermediate court is a basic individual right in most constitutional systems, both nationally and internationally. All modern states established a judicial system and hierarchy through which appeals of inferior court verdicts may be submitted to superior courts.

The word “appeal” (brought into the English language from the French legal term “*appel*” that means to appeal the decision of a lower court to a higher tribunal) means having a verdict of a lower court reassessed by a higher court or tribunal with the power to annul or at least modify of the inferior court’s decision in favour of the applicant.¹⁴ The purpose of establishing an appellate court is to hear cases submitted to it against an issued verdict or sentence by an inferior court, was it a trial court or a lower-level appellate court. When this decision, verdict, or sentence is not accepted by at least one party to the case the right of appeal allows the unsatisfied party to challenge it by asking a higher court to change it on the basis of legal arguments. The arguments will often be the same ones offered in the lower court, but they are repeated because the aggrieved party does not agree with the way the lower court decide them originally. A party who submits an appeal is called an ‘appellant’, and the other party is an ‘appellee’ or, in some jurisdictions, a ‘respondent’.

The right to appeal has a long history. It has been an important component of dispute-resolutions with the governments, for at least 6000 years.¹⁵ Egypt has been central to its development. Ancient Egypt (circa 4000 B.C.) is one of the first known civilizations to establish some form of an appellate process. The Egyptians provided

¹⁴ Black’s Law dictionary (8th Edition) 2004.

¹⁵ J. Clarke Kelso, *Special Report on California Appellate Justice: A Report on the California Appellate System*, 45 Hastings L.J. 433 (1994).

appeal for some forms of criminal accusations concerning the majority of offences. They also issued formal verdicts, in which the person was either freed or found guilty and punished.¹⁶

We know this because ancient Egyptian monuments that were completed through the reign of the third dynasty showed that an accusation was made by person called *Unah* who was trusted and empowered by the king. The extent of the powers that were given to this person allowed him to prosecute even the queen, but not the king.

We know that on one occasion the *Unah* was chosen by the king to be the applicant against the king's wife, queen *Ani*, and the king summoned him to hear her defence in camera; no prince, chief, senior official or judge was present.¹⁷

Ancient Egyptians knew different levels of courts. There were inferior courts, which settled the less important lawsuits, and superior courts that were formed for the more important ones. They also initiated an appellate system, which gave the right to appeal to the person sentenced in front of an inferior court to submit an appeal before the superior one. The *Wazier* (Minister) court was the Country's Supreme Court, where the Minister was called the judge of judges and he was the superior of all the courts held in Egypt.¹⁸ No change occurred to this system of appeal during the period that followed the fall of Pharaoh's last dynasty. The Pharaoh's systems generally remained in tact during the days of the Ptolemies, who represented the Greeks in Egypt from 332 to 33 B.C. The appellate system did not have any significant changes

¹⁶ HASSAN NASHAAT, *ADELAT AL ITHBAT AL GENA-IYYA (INTERPRETATION OF CRIMINAL INVESTIGATION)* 210 (5th ed. 1921).

¹⁷ *See id* at 211.

¹⁸ MAHMOUD SALLAM ZANATI, *HOQUQ AL INSAN FI MASR AL FAR'ONIYYA (HUMAN RIGHTS IN PHARAOH EGYPT)* 219 (2003).

from the post Ptolemaic period during the reign of the Romans from 33 B.B. to the Islamic conquest in the seventh century A.D.¹⁹

In ancient Greece (circa 450 B.C.), some of the Greek courts used to consist of citizens, ranging from 200 to a few thousands. These courts were both the trial and appellate. There was no appeal from the tribunal's judgement due to the position of the citizens as the highest authority in the country, and when the jury of several hundred renders its decision; then the people had spoken.²⁰

In Rome, a reasonable system of criminal law was approached around 200 B.C., the period from which contemporary evidence scholars – Plautus, Cato, and others – survived. In 17 B.C., Emperor Augustus initiated the system of the *questiones perpetuae*, by which the majority of the courts abided, and the ones that did not, were concerned as extraordinary initiated courts. In these courts, no appeal was possible against a verdict or sentence. On the other hand, it was more likely that *tribunician intercessio* could be used against the preliminary stages of accusation, in which the presiding magistrate was acting by his free will. In addition, a parliamentary decree, issued by the parliament that represented the Roman people, could give a convicted person his/her freedom.²¹

After the *constitutio Antononiana*, which was established in 212, appeal was permitted following the sentence rather than the arrest. Appeal against arrest evolved from the nature of the Republican appeal to *tribunician intercessio*, which could veto any act by a magistrate. Appeal against sentences was a development of the understanding of due process, when virtually all free inhabitants of the Empire became Roman citizens; appeal was normally available to any free person because all

¹⁹ See *id* at 123-133.

²⁰ See *supra* note 15.

²¹ O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 222 (1995).

were citizens. However, if the charge against the person was treason, then appeals were restricted, in the interest of speedier justice.²²

In addition, by the time of Justinian, Roman law developed an appellate system in which the appeal was a rehearing that permitted the case parties to submit new evidence before the court of appeal. A very famous example to this nature of appeal was mentioned in the Bible, which describes Paul's journey from Jerusalem to Rome. When it appeared that the Romans will send Paul back from Caesarea to Jerusalem, Paul said "I appeal to Caesar." Festus and the council accepted Paul's appeal and sent him to Rome.²³

As a legal device, the Roman appeal eventually combined with the church procedures. By the eleventh century, Pope George VII declared that the pope stood supreme above all others. Although the pope therefore had to listen to all complaints, Gregory emphasized the system of appeal to permit the delegation of cases while maintaining papal judicial supremacy. By the end of the twelfth century, the church and its legal administrators had constructed a transitional hierarchy of tribunals, which had the Pope at its top.²⁴

Islamic law had no system of appeal in view of the fact that the Islamic judiciary was kept in separation from the hierarchy of the political authorities centered in Baghdad, and that there was no central religious hierarchy. The lack of appeals process did not mean that judicial decisions were un-reviewable. On the contrary, the decision of a "*Qadi*" (judge) could be changed or annulled by several persons. First, the issuing judge could reform his issued verdict. Second, the 'appealed' verdict could be modified by another judge who succeeded the issuer one in his position. Finally,

²² *Id.*

²³ *Id.*

²⁴ Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 *Hastings L.J.* 913 (July 1997).

the judgement could also be modified by another judge who was a contemporary of the issuing judge.²⁵ Moreover, there was always appeal to the Khalifa who would often review the whole case and rehear the parties.

However, Islamic judicial procedure was always troubled of the interference that could be made by the political authorities to the judges' verdicts for any purpose. As a result, in no case could a decision be reformed for error of fact, nor could the review be performed by a higher court constituted as an appellate court.²⁶

In common law, the system of appeal was initiated around the nineteenth century. However, in the twelfth century, the Canon law knew a system of appeal went from archdeacon to bishop to archbishop to pope, but this system was not adopted by the king's courts.²⁷

There were two remedies available to appeal from bad verdicts. As result, a verdict could be changed through the process of attain, and a new trial could be awarded the certificate of assize. The first is a trial of a false verdict by a grand jury consisting of twenty-four and the second was a retrial by the jury that gave the first verdict.²⁸

In addition, a mistake of law could have been corrected by a writ of error, which means that an error had been made in the various writs and pleas of the case. Writ of error was only limited to be submitted due to mistakes written in the trial record, therefore, it was very limited use of the appeal right. The parties of the case were not allowed to bring in new evidence. In addition, the parties could only argue about the facts that should demonstrate that the verdict was not to be issued in the first place as to prove that the defendant had been a minor or a woman. Review was, in

²⁵ John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C.L. Rev. 1635 (June 1999).

²⁶ *Id.*

²⁷ See *supra* note 24.

²⁸ *Id.*

essence, limited to errors of law. Even the inquiry concerning the errors of law was limited because they had to be in the record and the record usually contained only the writ, the pleadings and the issue, the jury process and verdict, and the judgement. The accused person had to find justice by ‘proof of technical error (verbal or procedural) in the previous trial.’²⁹

By its beginnings, the Roman Republic adopted the civil law system. The Roman law, particularly the written works of the legal experts, had an important influence on the history of civil law. For example, the Roman written law had evolved from *Respona* written by legal scholars, to the legal dissertations prepared by the jurists, or *juris consults*.³⁰

The civil law developed further in the later decades of the Roman Empire, which resulted in a comprehensive statement of private law prepared by *Gaius*, the famous Roman legal expert, in the second half of the second century A.D. *Gaius* gathered in his law a variety of legal values and regulations that covered different aspects of life including rights of citizenship and the freedom of slaves to the protection of estates.³¹

Subsequently, the Roman law was developed under Emperor Justinian who ordered the preparation of an even more inclusive manuscript covering all aspects of Roman law. This manuscript was described by some commentators to include not only the enhancements that occurred to *Gaius’ Institutes*, but also contained the codes of the early imperial legislations, the writings of classical legal jurists, and the Justinian legislation.³² Moreover, the Roman law developed the judicial process of appeal by allowing some kind of a rehearing to the appealed case. This development

²⁹ *Id.*

³⁰ JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 433 (1995).

³¹ *Id.*

³² *See supra* note 30 at 6.

occurred under Emperor Justinian, which allowed the case parties to submit new evidence backing up their appeal.

The Roman civil law was adopted by many European legal systems in the fourteenth and fifteenth centuries especially France and Germany. This civil law system was mainly depending on codified and written laws in different aspects. These were supplemented by scholarly commentary in the form of doctrinal treatises on legal principles.

In France the adoption of civil law system resulted in codification of a civil law due to the direct orders of Napoleon, which was considered the most significant of his achievements.³³ During his exile on St. Helena Napoleon remarked that the codification of the Napoleonic codes will remain the most important memory of his era; more important than the winning of forty battles.³⁴

In 1800, four senior practitioners of law were appointed by Napoleon to develop a comprehensive legal code. These four practitioners were legal experts who had studied Grotius, Pufendorf, and the other great writers of the natural law school.³⁵ It took the commission 102 sessions to finish the law during the period of four years. The code was completed in the second half of 1801 but not published until 21 March 1804. This code held a mixture of liberalism and conservatism. It also contained the rights stressed by the French revolution, including freedom of religion, equality before the law, and the abolition of feudalism. It also affirmed the Property rights, including the rights of the purchasers of the '*biens nationaux*'.³⁶

This civil code stated for the right to appeal in civil matters for the first time in article 54 of its first book that stated

³³ *Id.*

³⁴ JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 225 (1998).

³⁵ *Id.*

³⁶ *Id.*

In all cases where a tribunal of first instance shall take cognizance of acts relating to the civil courts, the parties interested may appeal against the judgment³⁷

A Code of Civil Procedure followed the Napoleonic Civil Code in 1806, a Commercial Code in 1807, a Criminal Code and Code of Criminal Procedures in 1808 and a Penal Code in 1810. The 1808 Criminal Procedures Code “*Code d’instruction criminelle*” became the ruler of the French Procedure until 1958. This code has set the right to appeal “*double degree de jurisdiction*” during the French criminal proceedings for the first time. This code stated that most non-minor offences “*delits*” are to be heard by a panel of three career magistrates and major offences “*crimes*” by a panel of three professional judges and a jury of nine in the first degree, or thirteen jury members in the second degree.³⁸

A. Why is appeal necessary in legal systems?

Before shifting to talk about different methods of appeal, one must think about the importance of appeal in the judicial life. Why do we have appeals in the first place? Why is appeal important? What are the reasons behind maintaining an appellate system?

The answer of these questions gives the impression that it is so easy. The main reason of initiating an appellate system of law is to give the accused person a second chance for his/her case to be reviewed by another court of law. This vague idea was defended by the majority of legal experts and they developed a set of arguments to support their views. The legal experts who supported the appeal idea gave different reasons:

1. To correct errors committed by the court that issued the appealed verdict.

These errors can be committed by the judges themselves due to several

³⁷ *Id.*

³⁸ *Id.*

reasons including overloaded work, and unawareness of some parts of applicable law.³⁹

2. To assure the public's demand for justice, this includes a demand that important accusations be heard and determined by the highest possible government authority, which will lead to a more reliable justice system.⁴⁰
3. Due to the nature of common law of depending upon precedents, the appeal will settle an agreement between courts of defining the law, its applicability, and what similar cases in the future to be applied to. This will help in combining the jurisprudential principles especially in similar cases.⁴¹
4. The appellate courts judges will be necessarily experienced more than judges' of first stage courts, which will make their judgments more correct.⁴²
5. The first stage judge will examine the case more carefully knowing that their judgments are reviewable by a higher tribunal.⁴³The development of legal systems evolved the idea of initiating more than one stage of trial. This enforcement has two advantages the first protecting which concludes in maintaining justice to convicted persons by giving them a second stage trial, will force the first stage judges to take care in their work and abide by justice, especially when their verdicts comes to the field of holding the persons freedom or even affecting his life. This returns to the psychological feelings of

³⁹ See *supra* note 15.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² MOHAMED FATHY NAGUIB, AL TANZYM AL QADA'I AL MASRI (THE EGYPTIAN JUDICIAL SYSTEM) 77 (2002).

⁴³ *Id.*

the judge that he/she will never like his/her verdicts to be cancelled or even modified by the higher court or judge.⁴⁴

6. The judge is a human being and he can commit an error. The appeal system will help the judge of preventing to commit this error by the second stage courts, which will fix the errors committed by the first stage judge and keep this human right to the convicted person.⁴⁵

These advantages of appeal system were faced by other criticisms from other commentators who supported their criticism with some reasons that can lead to the defects of appeal system

1. If these reasons were right, then there would be endless stages of trial to force the second stage judges also to pay attention to their verdicts.⁴⁶
2. If we gave a case opponent who was sentenced by the first stage court the chance to appeal to a second stage court, then it would be justice, if the other opponent was sentenced by the latter court, to give him also the chance to appeal in front of a third stage court.⁴⁷
3. If the enforcement of this right is due to justice needs, then the delay of trial will cause the parties to spend more expenses without any assurance that the second stage court will issue a different verdict than the first stage one.⁴⁸
4. If the reason of forcing a second stage court is to bring the case before a court that possesses more guarantees of fairness, then why the cases are not

44 KHAYRY AHMAD AL KABBASH, AL HEMAYA AL GENA'IYYA LHQUOQ AL INSAN (THE CRIMINAL PROTECTION TO HUMAN RIGHTS) 668-680 (2002).

45 IBRAHYM NAGUIB SAAD, AL QANOWN AL KADA'Y AL KHAAS (THE PRIVATE JUDICIAL LAW) 223-224 (3rd ed. 1974).

46 *Id.*

47 *Id.*

48 ABDELRA'OUF AL MAHDY, SHARH AL QWA'ED AL A-MA LEL EGRA'AT AL GENA'YA (THE EXPLANATION OF THE GENERAL RULES OF THE EGYPTIAN CRIMINAL PROCEDURAL LAW) 1477-1553 (2003).

submitted before these courts from the first instance, which will lead to reducing expenses and lost time?

5. If the enforcement of this right is because we want to find a court more reliable in declaring the facts of the case and applying the proper law, so why did some legislators limit the appeal according to the case value and not the gravity of the case or even the importance of some cases, or the more complicated cases.⁴⁹
6. Will make the first stage judges lose credibility in front of the people and will decrease the level of trust between the people and the judge.⁵⁰
7. The delegation of the case from the judge who experienced it well and reviewed its details and may be made investigations to a second-degree court, which its only task is only to review the case, is a transformation of the case from a judge who knows the case details to an alien judge. Who will not make investigations, but just will issue a verdict based on the review of the case.⁵¹
8. The appellate court consists of at least three judges and it issues the verdicts after the approval of the majority of the judges, this will presume that one of the appellate court judges could agree on the verdict issued by the first stage judge, and added to the opposing panel judge, they will be equal in votes with the approving judges. In this case, it would be better to support the side that includes the first stage judge, as he is the one who took more time in reviewing the case.⁵²

⁴⁹ See *supra* note 42.

⁵⁰ See *supra* note 48.

⁵¹ *Id.*

⁵² AHMAD FATHY SROUR, AL WASYT FI QANOUN AL EGRA'T AL GENA'YA (THE MEDIATOR ABOUT THE EGYPTIAN CRIMINAL PROCEDURAL LAW) 922-980 (7th ed. 1993).

9. There are no guarantees that the appellate court does not make the same mistakes done by the first stage court or even cause new ones.⁵³

These criticisms made some legislators cancel the appeal stage at all; other made some modifications limiting some parts of its aspects. However, these disadvantages were answered by some jurists who supported the idea of appeal:

1. The advantage of review by the second stage judges because not only their experience, qualifications, or that they are more in number, but also because the case will be reviewed for the second time by a court that will benefit of the procedures and negotiations and delegations occurred before the first stage court. The review for the second time decreases the percentage of error and declares the conflict points between the case parties, which help the second stage courts in completing any deficiencies committed by the first stage courts in their verdict.⁵⁴
2. The initiation of more than two stages of trial will lead to severe delay to the dispute settlement, which will lead to a delay of the person to have a judicial security.
3. The appeal by the value of the case due to that the less valued cases will not tolerate more expenses to be spent, and the principle of appealing a case due to its gravity, importance, or more complicated is very vague, unpredicted, unreliable, and very hard to depend upon.
4. The core of the judicial process is finding the truth; this will be assured by the guarantees given to the people that it will be reading the truth.⁵⁵

⁵³ ALA' MOHAMAD AL SAWY SALLAM, HAQ AL MOTAHAM FI MOHAKAMA A·DELA (THE DEFENDANT'S RIGHT TO FAIR TRIAL) 749-805 (2001).

⁵⁴ See *Supra* note 42.

⁵⁵ *Id.*

5. The credibility of the judges will be more affected by keeping the defected verdict as it is more than its modification and it will affect the people's trust more in the judicial system.
6. The law permits the second court judges to do any investigations they see to be needed for the benefit for the case procedures.⁵⁶

Moreover, some law experts viewed the right to appeal from its relation to the judge's personality by differentiating them into three categories: benchwarmers, bench climbers, and bench builders.⁵⁷

The writer defined the first category, the bench warmers, as someone who would never thought to become a judge, and for that s/he is very appreciative to the one who gave him/her the bench. S/he is only a part of a team, and is convinced that his/her only job is to process cases.

On the contrary, the writer describes the second category of judges, named to be, the bench climber, to be a very ambitious character. His/her only dream is to sit on the Supreme Court. To achieve this part, the bench climber must not annoy anyone, and taking sides with any body. S/he does not mind committing a few mistakes as long as it is not in purpose and helps to be a non-biased character to anybody.

The third category is the 'bench builder'. This category was defined to be devoted to acquire justice through the verdicts, and by taking his/her role quite seriously, who believes that in most cases justice is achieved, if at all, in the court of first resort. This judge's ambition is to work hard and to acquire justice in his/her court, bold, creative, and fair.

This writer then moves to analyzing the effect of appeal on every category. He declares that the first type judge would not dare, even without the threat of his/her

⁵⁶ *Id.*

⁵⁷ Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62 (November 1985).

verdict to be appealed, to refuse to comply or avoid the judgments of the appellate court. The ‘bench climbers’, from the writer’s view, can play for both teams depending on what would be more beneficial for his/her career. S/he will not only abide by the Superior’s Court decisions but also will try to anticipate the shift in the decision making. The ‘bench builder’ is the most of the three who would be annoyed by the appeal of his/her verdicts. Although giving enough time for issuing the verdict, s/he feels that the appellate judges do not feel the problems s/he had to face through issuing this verdict. However, this person is the most committed to the idea that s/he is part of the justice system.⁵⁸

B. The Contemporary Meaning of Appeal

The right to have a conviction and sentence reviewed by a higher tribunal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness of the crime. This review or appeal should be composed of two major elements. First, that the review by the higher court must be a genuine review of the issues in the case. This means that the second stage judge or court should have a full access to the complete elements of the appealed case including both facts and questions of law.⁵⁹ The higher court should review the law implemented by the inferior court in a “*de novo*” principle. This means that reviews on appeals must be more than “formal verifications of procedural requirements.”⁶⁰

The second element of an appeal is the review by a higher tribunal. The review of the appealed case and sentence must take place before a higher tribunal and according to law. This means that the government should ensure at least two tiers of judicial examination of a case, the second of which is by a higher court than the first.

⁵⁸ *Id.*

⁵⁹ AMNESTY INTERNATIONAL, FAIR TRIALS MANUAL *available at* <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>.

⁶⁰ *Id.*

However, this does not require the states to provide for more than one stage of appeal, but if provided, the convicted person should be given effective access to each of these stages of appeal.⁶¹

C. Standards of Appeal

A review standard is the measure of deference an appellate court gives to the verdicts of a lower court. A case is dealt with before the inferior court that issues its judgement, which a losing part is confronting through the process of appealing to a higher tribunal. The appellate court must then decide how to deal with this appeal and how far to go in reassessing the lower court's judgement.

Will the appellate court review the whole facts and procedures dealt with by the inferior court and review the whole case from the beginning, or it can respect the issued verdict by the inferior court and limit its review to any extraordinary mistakes could be committed during the first phase trial.

The range of an appellate court's review is decided by the applicable standard of review. while making an evaluation to any allegations of error, appellate courts implement a standard of appellate review suitable for the type of court from which appeal is being taken, the kind of proceedings held in that tribunal, the type of issue being raised on appeal, and the capabilities of the appellate tribunal. The most common standards of review are: independent (*de novo*) review, substantial evidence review; and abuse of discretion review.⁶²

1. De Novo Review

⁶¹ *Id.*

⁶² Burton M. Atkins, *Alternative Models of Appeal Mobilization in Judicial Hierarchies*, 37 *American Journal of Political Science* 780 (1993).

The appellate court applies this standard by waiving the findings of the first degree court from which the appeal comes from. The appellate court starts a new process and procedures to decide the issue or issues submitted for deliberation.

However, the independent standard of review does not necessitate the appellate tribunal to get rid of or ignore the issued verdict of the inferior court. The good work of the inferior court is often of great assistance to the appellate court. This is noticeable from the number of verdicts affirmed, which are based on the same reasons issued by the inferior courts.

However, independent standard of review does mean that the appellate court is not obliged to give the inferior court's verdict any particular weigh. If the appellate court believes the inferior court made a mistake, it need find nothing more, conditional on the only requirement that the mistake be prejudicial. The appellate court does not need to find, for example, that the error is apparent or obvious. It is sufficient that the appellate tribunal disagrees with the lower tribunal's conclusion, and the appellate court is therefore free to annul or modify the judgment of the inferior tribunal.⁶³

This standard is the most common used one to review the inferior tribunal's decision of legal issues. As a result, there is a common knowledge that the appellate court has an important advantage over the inferior court that reviews its judgments, which is justified by ignoring the verdict of the inferior court completely.

2. The review of substantial evidence

Under the standard of substantial evidence, an appellate court will not reverse the findings of the inferior court, so long as there is substantial evidence in the record to support the finding. The substantial evidence standard is not satisfied by the

⁶³ Richard Nobles & David Schiff, *The Right to Appeal and Workable Systems of Justice*, 65 MOD. L. REV. 676 (September 2002).

existence of any evidence in support of the finding, but the evidence must be of considerable legal significance, reasonable in nature, credible, and of solid value. Even if there is substantial evidence to support a reversal, the appellate court must affirm as long as there is substantial evidence to support the lower court's judgment. The substantial evidence standard is used primarily in the review of factual determinations and those mixed questions of law and fact in which factual elements predominate.

However, because the substantial evidence standard is so deferential to the lower tribunal's verdicts, it is to be expected that there will be few cases in which a court of appeal will reverse on the ground of no substantial evidence to support the trial court's findings.⁶⁴

Some law experts compared between the standard of independent (*De Novo*) review and the Substantial Evidence Review given that the small number of cases in which substantial evidence review produces a reversal. They considered whether the costs of factual review by appellate courts are worth the benefit, especially when the appellate court's expertise lies in reviewing legal rather than factual questions.⁶⁵

3. Review of the abuse of discretion

An appellate court will reverse a lower court's exercise of discretion only upon a showing of 'clear abuse of discretion.'⁶⁶ A trial court abuses its judgment if it acts opposing to law or if there is no substantial evidence to support the factual determinations on which the discretion was implemented. In this way, the abuse of discretion standard incorporates both the independent review and substantial evidence standards. Therefore, as long as the trial court has substantial evidence to support its

⁶⁴ See *supra* note 15.

⁶⁵ *Id.*

⁶⁶ See *supra* note 24.

factual determinations, and it has not committed an error of law, the appellate court will not substitute its judgment for that of the inferior tribunal. A clear abuse exists only if the tribunal ‘exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’⁶⁷ The tribunal must have went beyond the bounds of reason, taking into account all of the circumstances before it.

⁶⁷ *Id.*

II. THE RIGHT TO APPEAL UNDER INTERNATIONAL HUMAN RIGHTS

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The right to a fair trial is one of the basic human rights that have been always recognized by the United Nations. As a result, this right has been stated in almost all the key treaties all around the world, which will reach the conclusion that it became as part of the international customary law. The fair trial right also acts as a safeguard to other human rights and has a direct effect on them. For example, it can be a guarantee against the torture, mistreatment, and even threat to the detained person's life.

This right was one of the most significant human rights that were stated in the Universal Declaration of Human Rights.⁶⁸ In addition, it was stated in the fourteenth article of the International Covenant of Civil and Political Rights,⁶⁹ which is ratified by 152 State members to the United Nations.⁷⁰ In addition, it is also stated in several international and regional treaties of human rights and fundamental freedoms, the American Convention on Human Rights,⁷¹ the African Charter on Human and Peoples' Rights,⁷² Arab Charter on Human Rights,⁷³ and Cairo Declaration of Human Rights in Islam.⁷⁴

The right to appeal the issued verdict in a criminal charge before a higher court or tribunal is considered a major element of the right to a fair trial. The one tier trial has been condemned by the international community and the international organizations to be missing an important part of fairness. As a result, the major human rights bodies, guided by the United Nations, declared this right as an element of the

⁶⁸ See *Supra* note 1.

⁶⁹ See *Supra* note 2.

⁷⁰ Office of the United Nations High Commissioner for human rights, Status of Ratifications of the Principal International Human Rights Treaties as of 9 June 2004 available at <http://www.unhchr.ch/pdf/report.pdf>.

⁷¹ See *Supra* note 3.

⁷² See *Supra* note 4.

⁷³ See *Supra* note 5.

⁷⁴ See *Supra* note 6.

fairness to the trial. The United Nations, besides declaring it as a human right through the International Covenant of Civil and Political Rights,⁷⁵ was obligated to serve this right through its Courts. Therefore, the right to an appeal against the issued judgement is stated in article 25 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,⁷⁶ article 24 of the Statute of the International Tribunal for Rwanda,⁷⁷ and in a more detailed way, the newly founded International Criminal Court.⁷⁸

The regional bodies also indicated the importance of this right. As a result, the American Convention on Human Rights recognized the right to appeal in its eighth article.⁷⁹ In addition, although that the European Convention for the Protection of Human Rights and Fundamental Freedoms did not mention this right in its main body. However, the European community recognized the importance of the right to appeal by putting it in the second article of the seventh protocol to the Convention.⁸⁰

In this chapter, the author will review what were the development, application and commentary on this right under international human rights law. It will begin by discovering what the U.N. system issued about this right, the conventions issued by the U.N. that discussed the right to appeal. How did the human rights committee issue its decisions concerning various submitted communications and what were these opinions dealing with. Did the U.N. and the committee state that this is an obligatory right to be compelled on the states to implement in its municipal law, and if yes by which mean and how many stages of appeal is required, or it left this to every state to

⁷⁵ See *supra* note 2.

⁷⁶ See *supra* note 10.

⁷⁷ See *supra* note 11.

⁷⁸ See *supra* note 12.

⁷⁹ See *supra* note 3.

⁸⁰ See *supra* note 9.

control. Did the U.N. system itself implement this right to its tribunals, Ad Hoc tribunals, which will lead to the analysis of the statute of the Ad Hoc tribunals the ICTY, ICTR, and the Sierra Leone Special Court, and exploring whether the sentence issued by these tribunals can be appealed or not, and if yes, how many stages of appeals.

Moreover, this chapter will look to the newly initiated International Criminal Court, and whether this court will issue final judgments or it can be appealed, and to what stage, and due to what reasons and whether this review will be “de novo” or to certain parts of the verdict or the case.

In addition, it will be looking at the three regional systems of human rights, the European, Inter American, and African. It will analyze these systems to determine whether they include this right or not. If so, is it obligatory in every domestic legal system, which is part of the larger regional arrangement, or it can be left to the State to decide? This chapter will also contain an analysis of the both issued verdicts of the European and Inter American Courts of Human Rights on this issue.

A. The United Nations system

1. Origins

International law was concerned from its beginnings with the protection of human rights against wrongful acts of uncivilized people or States. This protection was clear in the early works of drafting treaties or declarations concerning human rights. In the 17th and 18th centuries, the work of the great legal experts *Hugo Grotius*, *Samuel von Pufendorf*, and *Jean Jaques Burlamagui* was concerned of adding the concept of human rights to the minds of the people. These works reflected on the drafting of the French Declaration of the Rights of Man and the Citizen in 1789. Its

second article affirmed the citizens' rights to security, liberty, property, and resistance to oppression.⁸¹

These rights were also guaranteed to the individuals in one of the first national instruments, the *Magna Carta*. Established in 1215, it recognized the persons' rights of their property, that they should enjoy freedom of imprisonment, and to enjoy freedom from prosecution or exile unless justified 'by the lawful judgment of his peers or by the law of the land.'⁸² These principles enshrined in the *Magna Carta* were adopted by the colonists in North America as stated in their Declaration of independence. The founding fathers of the United States declared that all men are created equal, and gifted by god for certain rights, which are not transferable. Right to life, liberty, and happiness were included among the recognized rights.⁸³

During the nineteenth century, only few States knew the idea of protection of human rights, even in Europe. In addition, the States also neglected the idea of international protection of human rights. After World War I, some developments occurred in the idea of establishing an international system for the protection of human rights under the League of Nations that included the supervision of the traffic of women and children, the establishment of a first arrangement of an international protecting system of the refugees.

After World War II, and due to the atrocities made by the fighting forces, especially the Nazis, a feel of concern with an international system of protection of human rights began to evolve. This concluded in the initiation of the United Nations.

There are a lot of institutions and supervisory systems initiated under the United Nations system. Some of these systems are separated from each other since

81 ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 223 (2002).

82 *Id.*

83 *Id.*

every one of them is established by a treaty, which apply to specific fields and have independent implementation mechanism.⁸⁴

An example of these instruments is the International Covenant of Civil and Political Rights. Drafted and adopted by the United Nations, but has its own supervising body, the Human Rights Committee, and has its own implementation mechanism.

2. The International Covenant of Civil and Political Rights

The International Covenant of Civil and Political Rights was adopted by the United Nations General Assembly in 1966, and came into force in 1976 as soon as it was ratified by thirty-five States. It is the most comprehensive and well-established treaty by the United Nations on civil and political rights.⁸⁵ Article 14 paragraph 5 of the International Covenant of Civil and Political Rights provided the right of the person convicted of a crime to appeal the issued sentence before a higher court.⁸⁶

The first optional protocol to the International Covenant of Civil and Political Rights⁸⁷ allowed individuals of States party to the protocol to submit complaints to the Human Rights Committee, which was initiated for monitoring the implementation of the Covenant and its protocol. These communications are being examined by a working group established under rule 89 of its rules of procedures, which is in command with the duty of submitting recommendations to the Committee concerning the received communications.

⁸⁴ SCOTT DAVIDSON, HUMAN RIGHTS 525 (1997).

⁸⁵ SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 236 (2000).

⁸⁶ See *Supra* note 2, article 14(5).

⁸⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

The Human rights Committee declared the right to appeal in several communications. In addition, the Committee in its General Comment number 13 affirmed that this right is generally applicable to anybody facing criminal accusations, in spite of the gravity of his/her crime by stating that

Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgment, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14⁸⁸

In addition, the Committee stated that this right, according to the Covenant, is only applicable in criminal trials. In its communication number 450/91 (*I.P. v. Finland*), when the author complained that he was denied the possibility to appeal against a decision issued by the Tax Office in front of an independent tribunal, the committee declared that appeal under article 14(5) applies only to criminal matters, and that the International Covenant of Civil and Political Rights does not guarantee a right to appeal in civil cases and, as a result, it considered the communication to be inadmissible.⁸⁹

Moreover, the Committee confirmed the right to appeal and that it is the State's obligation to maintain a system to review the verdict and sentence in spite that there are some differences occurring between the States' domestic legal systems.⁹⁰

The Committee interpreted the fifth paragraph of the article, with the view that this right should be preserved in all criminal charges, no matter how the State defines it. As a result, the Human Rights Committee declared that an imprisonment period of

⁸⁸ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

⁸⁹ *I.P. v. Finland*, Human Rights Committee, Communication No. 450/91, U.N. doc. CCPR/C/48/D/450/1991, 26 July 1993, para. 6.2.

⁹⁰ *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, U.N. doc. CCPR/C/51/D/355/1989, 20 July 1994, para. 14.3.

only one year was adequately grave to deserve to be reviewed by a higher court; even so the domestic law classified this crime as a contravention.⁹¹

Paragraph 5 of article 14 of the ICCPR supports the persons' right to appeal 'according to law'. Nevertheless, it does not call for States parties to supply several degrees of appeal. On the other hand, if the State provided different instances of appeal, the accused person should be given effective access to every one of them. In

Douglas v. Jamaica (352/1989), the Human Rights Committee stated that

The Committee had examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. It observed that the Covenant does not require States parties to provide for several instances of appeal. It found, however, that the words "according to law" in article 14, paragraph 5, must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them. The Committee observes that, in the instant case, the State party provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. It further observes that Jamaican law also provides for the possibility of recourse to the Constitutional Court, which is not, as such, a part of the criminal appeal process. Thus, the Committee finds that the availability of legal aid for constitutional motions is not required under article 14, paragraph 5, of the Covenant. Accordingly, the Committee concludes that the authors' rights under this provision were not violated⁹²

In addition, the Committee in its constant jurisprudence declared that it is not entitled with evaluating the facts and the evidence submitted to the domestic court, or to review the interpretation of domestic law by these courts, and that the review should be applied only by the States' appellate courts.

In *G.J. v. Trinidad and Tobago* (comm. No. 331/1988), a prisoner, who had been sentenced to death for murder, complained of irregularities during the conduct of his trial in the court of first instance. The Court of Appeal, although acknowledging that there had been irregularities during the trial, dismissed the prisoner's appeal. The

⁹¹ *Montejo v. Colombia*, Human Rights Committee, Communication No. 64/1979, U.N. doc. Supp. No. 40 (A/37/40) at 168 (1982).

⁹² *Douglas v. Jamaica*, Human Rights Committee, Communication No. 352/1989, U.N. doc. CCPR/C/49/D/352/1989, 3 November 1993, at 11.2. See *Henry v. Jamaica*, Human Rights Committee, Communication No. 230/1987, U.N. DOC. CCPR/C/43/D/230/1987 (1991), at 8.4.

Human Rights Committee (decision on admissibility of 5 November 1991), after examining the case, recalled that it is generally for the appellate courts of States parties to the International Covenant on Civil and Political Rights, and not for the committee, to evaluate the facts and evidence and to review the interpretation of domestic law. Similarly, it is for appellate courts and not for the committee to review the judge's attitude during the trial, unless it is apparent that the judge manifestly violated his obligations of impartiality or the violation amounts to a denial of justice.

In this regard the Committee stated

After a careful consideration of the material placed before the author concerning his claims of unfair trial, the Committee recalls its constant jurisprudence that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and the evidence placed before the domestic courts and to review the interpretation of domestic law by those courts. Similarly, it is for appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality⁹³

Consequently, in *Montejo v. Colombia*,⁹⁴ the author of the communication claimed that her right to appeal, as declared in paragraph 5 of article 14 of the ICCPR was violated, as she was convicted by a military court and she was denied to appeal to a higher tribunal. In return, the State party replied that

[a]rticle 14 (5) of the Covenant establishes the general principle of review by a higher tribunal without making such a review mandatory in all possible cases involving a criminal offence since the phrase "according to the law" leaves it to national law to determine in which cases and circumstances application may be made to a higher court. It explained that under the legal regime in force in Colombia, criminal offences are divided into two categories, namely *delitos* and *contravenciones* and that convictions for all *delitos* and for almost all *contravenciones* are subject to review by a higher court. It added that Consuelo Salgar de Montejó committed a *contravencion* which the applicable legal instrument, namely Decree No. 1923 of 1978, did not make subject to review by a higher court

93 G. J. v. Trinidad and Tobago, Human Rights Committee, Communication No. CCPR/C/43/D/331/1988, 2 December 1991, Para. 5.8. See H.T.B. v. Canada, Human Rights Committee, Communication No. 534/1993, U.N. doc. CCPR/C/49/D/534/1993, Para. 4.3.

94 See *supra* note 91 at 10.4.

However, the Committee refused this argument affirming that the expression ‘according to law’ is not left to preference of the States to choose from and that article 14(5) was violated and replied to the State’s claim by stating that

The Committee considers that the expression "according to law" In article 14(5) of the Covenant is not Intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities by which the review by a higher tribunal is to be carried out. It is true that the Spanish text of article 14 (5), which provides for the right to review, refers only to "un. delito", while the English text refers to a "crime" and the French text refers to "une infraction". Nevertheless the Committee is of the view that the sentence of imprisonment imposed on Mrs. Consuelo Salgar de Montejo, even though for an offence defined as "contravencion" in domestic law, is serious enough, in all the circumstances, to require a review by a higher tribunal as provided for in article 14 (5) of the Covenant

Furthermore, the Committee affirmed that a judicial review to an appeal should demonstrate a full evaluation of the evidence and the conduct of the trial, and that a review on matters of law only constitutes a violation to right to appeal. The Committee stated

The Committee notes from the information before it that the authors could not appeal their conviction and sentence, but that the law provides only for a judicial review, which apparently takes place without a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of article 14, paragraph 5, of the Covenant, for a full evaluation of the evidence and the conduct of the trial and, consequently, that there was a violation of this provision in respect of each author⁹⁵

In addition, in *Lumely v. Jamaica* (Communication no. 662/1995) the Committee stated

While on the basis of article 14, paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case⁹⁶

95 Domukovsky et al v. Georgia, Human Rights Committee, Communication No. 623/1995, 624/1995, 626/1995, 627/1995, U.N. Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995 (29 May 1998) at 18.11.

96 Peter Lumely v. Jamaica, Human Rights Committee, Communication No. 662/1995, U.N. doc. CCPR/C/65/D/662/1995, 30 April 1999 at 7.3.

The Committee asserted that the convicted person, in his/her attempt to benefit from his/her right to appeal, should be allowed to have, according to reasonable time, access to written judgments of the verdicts of courts of first instance, with appropriate reasoning, and for all available degrees of appellate review.

In *Smith v. Jamaica* (282/1988) the Committee declared that a delay of four years after the dismissal of an appeal to issue a reasoned judgment is considered a violation to the right to appeal. The Committee stated

It remains for the Committee to decide whether the failure of the Court of Appeal to issue a reasoned judgment violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". For the effective exercise of this right, a convicted person must have the opportunity to obtain, within a reasonable time, access to duly reasoned judgments, for every available instance of appeal. The Committee observes that the Judicial Committee of the Privy Council dismissed the author's first petition for special leave to appeal because of the absence of a written judgment of the Jamaican Court of Appeal. It further observes that over four years after the dismissal of the author's appeal in September 1984 and his petitions for leave to appeal by the Judicial Committee in February and December 1987, no reasoned judgment had been issued, which once more deprived the author of the possibility to effectively petition the Judicial Committee. The Committee therefore finds that Mr. Smith's rights under article 14, paragraph 3(c) and article 14, paragraph 5, of the Covenant, have been violated⁹⁷

Consequently, in *Pinkney v. Canada*, the Committee stated that a period of delay for about two and a half years in the production of the transcripts of the trial 'appears excessive and might have been prejudicial to the effectiveness of the right to appeal.'⁹⁸

97 *Smith v. Jamaica*, Human Rights Committee, Communication No. 282/1988, U.N. doc. CCPR/C/47/D/282/1988, 12 May 1993, at 10.5. Also see *Pratt & Morgan v. Jamaica*, Human Rights Committee, Communications No. 210/1986, and 225/1987 U.N. doc. Supp. No. 40 (A/44/40) at 222 (1989), *Kelly v. Jamaica*, Human Rights Committee, Communication No.253/1987 U.N. doc. CCPR/C/41/D/253/1987, 10 April 1991, *Little v. Jamaica*, Human Rights Committee, Communication No.283/1988 U.N. doc. CCPR/C/43/D/283/1988, 19 November 1991, *Francais v. Jamaica*, Human Rights Committee, Communication No. 320/1988 U.N. doc. CCPR/C/47/D/320/1988, 12 May 1993, *Johnson v. Jamaica*, Human Rights Committee, Communication No. 588/1994 U.N. doc. CCPR/C/56/D/588/1994 (1996).

98 *Pinkney v. Canada*, Human Rights Committee, Communication No. R.7/27/1977, U.N. doc. Doc. Supp. No. 40 (A/37/40) at 101 (1982) at 22. Also see *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, U.N. doc. CCPR/C/51/D/355/1989 at 14.3.

In addition, in the murder cases of *Raphael Henry v. Jamaica* (comm. No. 230/1987),⁹⁹ and *Aston Little v. Jamaica* (comm. No. 283/1988),¹⁰⁰ the authors of the communications were Jamaican citizens under sentence of death who alleged various irregularities in the course of the judicial proceedings against them, such as inadequate legal representation, unavailability of witnesses, and undue prolonging of the judicial procedures – all in violation of the rights found in the International Covenant on Civil and Political Rights. In the former case the Human Rights Committee, in views adopted on 1 November 1991, due to the absence of a written judgment from the Courts of Appeal of Jamaica, found a violation of the author's right to have his sentence reviewed by a higher tribunal as provided in article 14 (5) of the International Covenant on Civil and Political Rights. It found a similar violation of the author's right to have his sentence reviewed by a higher tribunal as provided in article 14 (5) of the International Covenant on Civil and Political Rights. It found a similar violation, in views adopted on 1 November 1991, in the case of Mr. Little, who had also been unable to obtain a reasoned judgment from the court of Appeal for many years. In the former case the Committee stated

[I]n order to enjoy the effective use of this right, the convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal. Thus, while Mr. Henry did exercise a right to appeal to "a higher tribunal" by having the judgment of the Portland Circuit Court reviewed by the Jamaican Court of Appeal, he still has a right to a higher appeal protected by article 14, paragraph 5, of the Covenant, because article 110 of the Jamaican Constitution provides for the possibility of appealing from a decision of the Jamaican Court of Appeal to the Judicial Committee of the Privy Council in London. The Committee therefore finds that Mr. Henry's right under article 14, paragraph 5, was violated by the failure of the Court of Appeal to issue a written judgment¹⁰¹

The Committee, in its decision considering the communication submitted by Francis Peter Perera against the Australian government, who claimed that his right to

⁹⁹ *Henry v. Jamaica*, Human Rights Committee, Communication No. 230/1987, U.N. doc. CCPR/C/43/D/230/1987, 19 November 1991.

¹⁰⁰ *Little v. Jamaica*, Human Rights Committee, Communication No. 283/1988, U.N. doc. CCPR/C/43/D/283/1988, 19 November 1991.

¹⁰¹ *See id.* at 8.4.

have his conviction and sentence reviewed by a higher tribunal according to law has been violated, since his appeal under Australian law can be argued only on points of law and allows no rehearing of facts, declared that the State is not obliged to initiate a factual retrial. However, it affirmed that the State must evaluate both the evidence submitted, and the conduct of the first instance court. It stated

With regard to the author's complaint about the review of his conviction, the Committee notes from the judgment of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial¹⁰²

On the other hand, the Committee affirmed that if the State placed procedures that limited the review to the legal or formal phases of the conviction, this constitutes a violation to the right to appeal. In this context the Committee stated

As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court on the basis of a procedure which his counsel, following the criteria laid down in article 876 *et seq.*, of the Criminal Procedure Act, characterizes as an incomplete judicial review, the Committee takes note of the State party's claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides. The information and documents submitted by the State party do not refute the author's complaint that his conviction and sentence were not fully reviewed. The Committee concludes that the lack of any possibility of fully reviewing the author's conviction and sentence, as shown by the decision referred to in paragraph 3.2, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant¹⁰³

Moreover, the Committee asserted that the person is entitled to legal assistance during the process of appeal. In *La Vende v. Trinidad and Tobago* the Committee declared that the State violated the applicant's right to appeal due to the denial of legal aid for an appeal. The Committee stated

102 Perera v. Australia, Human Rights Committee, Communication No. 536/1993, U.N. doc. CCPR/C/53/D/536/1993, 28 April 1995 at 6.4.

103 Gomez v. Spain, Human Rights Committee, Communication No. 701/1996, U.N. doc. CCPR/C/69/D/701/1996, 11 August 2000 at 11.1.

Regarding the claim under article 14, paragraph 3(d), the State party has not denied that the author was denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings. Section 109 of the Constitution of Trinidad and Tobago provides for appeals to the Judicial Committee of the Privy Council. It is uncontested that in the present case, the Ministry of National Security denied the author legal aid to petition the Judicial Committee in forma pauperis, thereby effectively denying him legal assistance for a further stage of appellate judicial proceedings which is provided for constitutionally; in the Committee's opinion, this denial constituted a violation of article 14, paragraph 3(d), whose guarantees apply to all stages of appellate remedies. As a result, his right, under article 14, paragraph 5, to have his conviction and sentence reviewed "by a higher tribunal according to law" was also violated, as the denial of legal aid for an appeal to the Judicial Committee effectively precluded the review of Mr. LaVende's conviction and sentence by that body¹⁰⁴

The Committee asserted that guarantees of fair trial should also apply during the appellate procedures. Therefore the accused person is entitled, in front of the appellate court, to be notified of the outcomes of his leave of appeal, and to have an opportunity to consult with his/her attorney in the process of preparing his/her defense.

In *Thomas v. Jamaica* (comm.No.272/1988), Mr. Thomas, who had been sentenced to death for murder by the court of first instance, was informed about the date of the appeal hearing only after it had taken place. The Human rights Committee, in views adopted on 31 March 1992, taking into account the combined effect of these circumstances, found that the appeal proceedings in this case did not meet the requirements of a fair trial under the International Covenant on Civil and Political Rights and requested Jamaica to offer Mr. Thomas an appropriate remedy. The Committee stated

[i]t is uncontested that the author was only informed about the date of the hearing after it had taken place. He was therefore unable to communicate with his representative with regard to the appeal. Taking into account the combination of circumstances in the instant case, the Committee is of the view that the appeal proceedings did not meet the requirements of a fair trial...¹⁰⁵

104 Robinson La Vende v. Trinidad and Tobago, Human Rights Committee, Communication No. 554/1993, U.N.doc. CCPR/C/61/D/554/1993 17 November 1997 at 5.8.

105 Alrick Thomas v. Jamaica, Human Rights Committee, Communication No. 272/1988, U.N. doc. CCPR/C/44/D/272/1988, 8 April 1992 at 11.5.

In addition, in *Leroy Simmonds v. Jamaica* (comm. No. 338/1988), a prisoner, who had been sentenced to death, claimed that he was not informed about either the date or outcome of his appeal from a sentence of death until two days after it had been dismissed. The Human Rights committee, in views adopted on 23 October 1992, found a violation of article 14 of the International Covenant on Civil and Political Rights because the delay in notification of the hearing date jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer. The committee was of the view that Mr. Simmonds was entitled to a remedy and requested the State party to provide information within 90 days on any relevant measures taken in respect of the Committee's wishes. The Committee stated

In this connection, the Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. This applies to the trial in the court of first instance as well as to appellate proceedings. In Mr. Simmonds' case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether he should have been notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing of the appeal, and whether he should have been afforded an opportunity to be present during the hearing of the appeal.

.....The Committee further notes with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal; this delay jeopardized his opportunities to prepare his appeal and to consult with his court appointed lawyer, whose identity he did not know until the day of the hearing itself. His opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present. In the circumstances, the Committee finds a violation of article 14, paragraph 3 (b) and (d)¹⁰⁶

In addition, the Committee of Human Rights considered that hearings during appeal are not required to be oral hearings. In *R.M. v. Finland*, the Committee stated that the absence of oral hearings in the appellate proceedings "raises no issue under article 14 of the Covenant"¹⁰⁷

¹⁰⁶ *Leroy Simmonds v. Jamaica*, Human Rights Committee, Communication No. 338/1988, U.N. doc. CCPR/C/46/D/338/1988, 23 October 1992 at 8.3, 8.4.

¹⁰⁷ *R. M. v. Finland*, Human Rights Committee, Communication No. 301/1988, U.N. doc. CCPR/C/35/D/301/1988, 27 March 1989. See *Bryn v. Norway*, Human Rights Committee, Communication No. 789/1997, U.N. doc. CCPR/C/67/D/789/1997, 2 November 1999.

Furthermore, the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions addressed this issue in his report dated 7 December 1993,¹⁰⁸ by expressing concerns about the appellate procedures in both of Algeria and Kuwait. In the former country the Rapporteur declared that the judicial review performed by the Algerian Court of Cassation, in reviewing matters of law only, is inconsistent with the right to appeal. He stated “The Special Rapporteur is also concerned that the appeal procedure against convictions and sentences passed by the Special Courts, namely the review of cassation before the Supreme Court, does not ensure the full right to appeal, as the Supreme Court only reviews legal aspects and not facts”¹⁰⁹

In addition, he raised similar concerns regarding the State Security Courts of Kuwait in depriving the citizens of their right to appeal. He stated

The Special Rapporteur appreciates the willingness to cooperate shown by the Government of Kuwait. However, he remains concerned that in proceedings before the State Security Court, defendants do not benefit fully from the right to appeal as set forth in the pertinent international instruments, since they are deprived of a stage of appeal which fully reviews the case, both with regard to facts and legal aspects. This full appeal procedure is, however, provided for in ordinary criminal proceedings¹¹⁰

In conclusion, the Human rights Committee, through its constant decisions, declared that the person’s right to appeal should have the following requirements:

- The appeal should be within a criminal accusation.
- It should be allowed in any case, not only in serious ones.
- The appellant should be awarded access to every instance of appeal provided by the State.

108 Report by the Special Rapporteur on extrajudicial, summary, or arbitrary executions Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1993/71, U.N. doc. E/CN.4/1994/7, 7 December 1993.

109 *See id.* at 113.

110 *See id.* at 404.

- The appellant should have an access to the verdict issued by the first instance court, which should be written, and with proper reasoning.
- The appellate court review should be a full evaluation to the evidence and the trial conduct and not to matters of law only.
- The appellant should be assisted by legal aid.
- The appellant must be informed of the outcomes of his/her leave for appeal.
- The appellant must be given a reasonable time to prepare the appeal grounds, including an access to consultations with hi/her attorney.
- The appellant should be informed of the outcomes of the submitted appeal.

3. UN Tribunals

The norms regarding the right to a fair trial have been regularly evolving since being presented in articles 10 and 11 of the universal Declaration of Human Rights of 1948.¹¹¹ These standards have been advanced through international and regional organizations and instruments which have required expanding and clarifying those rights while giving voice to demands for respect of the notion of human rights. It is therefore, with some irony that those accused before recently established international *ad hoc* tribunals of committing the most shocking crimes are benefiting from standards established which was mainly established to protect victims of such abuses. This apparent paradox, which is currently being used by individuals who stand accused of serious violations of international humanitarian law, can be solved by recognizing that the right to a fair trial includes, as a fundamental keystone, the presumption of innocence which is to be accorded to all individuals.

¹¹¹ See *supra* note 1.

Moreover, before proceeding to examine the standards governing the right to appeal within the international tribunals it may be instructive to consider the manner in which every international criminal tribunal was established.

a. Some predecessors

In the history of international criminal trials, the verdicts were formed of one judgment rendered by a single body. The accused persons at the Nuremberg and Tokyo War Crimes Tribunals, formed to prosecute the defeated countries, had only a chance to ask for clemency from a political body as there was a lack of a judicial review of the facts or the law underlying the verdicts.¹¹²

b. International Criminal Tribunal for the Former Yugoslavia

On 22nd February 1993, the United Nations Security Council adopted resolution no. 808 (1993)¹¹³ in which it decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and requested the Secretary-General to submit a report to the Council on all aspects of the matter including specific proposals for the effective and expeditious implementation of the decision.

On the 3rd of May 1993 the Secretary-General issued a report¹¹⁴ proposing the establishment of an international tribunal as requested by the Security Council in its resolution 808 (1993) and recommending a statute for the tribunal. On 25th May 1993,

112 Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 *Tex. Int'l L.J.* 111 (Winter 2002)

113 Resolution 808 (1993) adopted by the Security Council at its 3175th meeting on 22 February, 1993, U.N. doc. S/RES/808 (1993), 22 February, 1993.

114 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993), reprinted in 32 *ILM* (1993) 1163.

the Security Council adopted resolution 827 (1993)¹¹⁵ in which it approved the Secretary-General's report and established 'an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1st January 1991'¹¹⁶ and a later date to be determined by the Security Council. Article 15 of the Statute of the International Tribunal¹¹⁷ authorizes the judges of the International Tribunal to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims, and witnesses and other matters."¹¹⁸ Article 20 of the Statute provides that the Trial Chambers of the international tribunal "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."¹¹⁹

Article 20 through 26 contains more specific provisions relating to the right of a fair trial, judgment and appeal. In particular, most of the fair trial provisions in article 14 of the International Covenant on Civil and Political Rights¹²⁰ are reproduced in article 21 of the Statute,¹²¹ although the Covenant is not mentioned as such.

115 United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. res. 827, 48 U.N. SCOR at __, U.N. Doc. S/RES/827 (1992).

116 *Id.*

117 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

118 *Id.* article 15.

119 *Id.* article 20.

120 *Supra* note 2.

121 *Supra* note 10 article 21.

The International Tribunal adopted Rules of Procedure and Evidence on 11th February 1994.¹²² The rules contain safeguards designed to ensure the impartiality of the tribunal (rule 14-36), ensure the suspect's right to free counsel and the assistance of an interpreter (42), provide for the video or audio-taping of all suspect questioning (43), contain procedural safeguards for all indictments and arrest warrants (47-61), require that all accused be brought promptly before the tribunal (62), do not allow the suspect to be questioned without counsel present (63), require the prosecution to disclose all exculpatory evidence to the accused (68), allow the judges to close the proceedings to the public in certain circumstances (79), and provide for appeal (107-122) and pardon (123-125) procedures. The rules also provide, however, for the pre-trial release of a suspect only in exceptional circumstances, thus making pre-trial detention the rule rather than the exception.

The norms as expressed in Article 14(5) of the ICCPR that every person convicted of a crime is permitted to appeal the issued sentence and verdict before a higher court find voice in the Statute of the ICTY at article 25, which declares that both the prosecutor and the defendant possess the right to appeal the verdict issued by the trial chamber before the appeals chamber.¹²³

In addition, the Statute limited this right by stating that the appeal will only be permitted on the basis of a law error that annul the verdict and the facts errors that caused a miscarriage of justice. The Statute also gave the Appeals Chamber the authority to confirm, review, or even annuls the decision issued by the Trial Chambers.¹²⁴

¹²² International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996.

¹²³ See *supra* note 10 article 25.

¹²⁴ *Id.*

Moreover, the United Nations Secretary General in his report to the Security Council stated that “[...] right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant of Civil and Political Rights”¹²⁵

The ICTY Appeals Chamber further confirmed this by noting “Article 25 of the Statute of the International Tribunal [.....] opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right to appeal”¹²⁶

After the presiding judge declares his verdict, the next step can be taken by the defendant is the Appeal Chamber. According to article 25 of the statute, the convicted by the court has a right to appeal due to an error or on a question of law that cancel the verdict, or due to an error of fact which lead to a miscarriage of justice. The Appeals Chamber hears the case based upon the facts submitted before the court of first instance. However, fresh evidence can be submitted if it was not available to the defendant or the prosecution at the first trial.¹²⁷ Moreover, defendant is guilty upon the approving by the majority of the Chamber judges and beyond a reasonable doubt. In addition, the Tribunal’s rules require that the Chamber’s decision should be announced in public and in the presence of the accused person.¹²⁸

In addition, if new facts have been discovered that were not known during the proceedings in front of the Trial Chamber or the Appeals Chamber, which could have

125 See *supra* note (114).

126 Case No. IT-94-1-T, 2 October 1995 (Appeals Chamber), at 4.

127 See *supra* note 112.

128 Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 Stan. J Int'l L. 255 (Summer 2001).

been a decisive factor in reaching the verdict, the convicted person or the prosecutor has the right to submit an appeal for review of the judgment.¹²⁹

Furthermore, it should be recalled that the Tribunal allow for interlocutory appeals, which allows for a higher court to be seized of a matter, not after the trial has been completed but during, or in the case of the Tribunal, even before the commencement of a trial so as to consider the decision of a trial, which is a right that goes beyond the provision of article 14(5) of the ICCPR. Such an interlocutory appeal was made by the defense in the *Tadic* case.¹³⁰ The rules of procedure and evidence allows for such interlocutory appeals based on a perceived ‘lack of Jurisdiction, where an appeal’ is a right via rule 72(B). The interlocutory appeal in the *Tadic* case was dismissed by the Appeals Chamber, on 2nd October 1995, in rendering the Decision of Defense Motion for Interlocutory Appeal on Jurisdiction.

Beyond this ability to launch an interlocutory appeal as a right, provisions of Rule 72(B) allow for appeals where a bench of judges gives leave ‘upon serious cause being shown.’ The meaning of this phrase was set out in the Decision on Application for leave to appeal (Separate Trials), in the *Celebici* four case, where the bench, made up of three judges of the appeals chamber, established the scope of Rule 72(B). The bench sets out a three-pronged test that seeks to determine if an application for appeal is to be granted. First, an application for leave to appeal must be within the purview of the interlocutory jurisdiction of the Appeals Chamber. Because the leave to appeal provisions are found within the section of the rules of procedure and evidence governing “Preliminary Motions”, the bench established that “interlocutory jurisdiction” is to be understood as an appeal based on items to which one can file a preliminary motion. The second test is one where the bench will dismiss appeals if it

¹²⁹ *Id.*

¹³⁰ *See supra* note 126.

considers that the application is “Frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or as vague and imprecise as to be unsusceptible of any serious consideration, in accordance with the age-old maxim *Causa Vaga et incerta non est causa rationabilis*”¹³¹

Moreover, if the application passes both of the previous tests, as the conditions to be met are cumulative,¹³² a third test is to be applied. This test consists of an applicant showing ‘serious cause’ in the form of a ‘grave error which would cause substantial prejudice to the accused or is detrimental to the interest of justice, or raise issues which are not only of general importance but are also directly material to the future development of trial proceedings.....’¹³³

c. The International Tribunal for Rwanda

Due to the horrible atrocities that occurred in Rwanda, which lead to the death of almost one million person of Tutsis and moderate Hutus, the United Nations Security Council created the International Tribunal for Rwanda (ICTR) by resolution no. 955 of 8th November 1994,¹³⁴ which its purpose was prosecuting persons responsible for genocide and other serious violations of humanitarian law committed in Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of the neighboring states, between 1st January 1994 and 31st December 1994.

By resolution no. 977 of 22nd February 1995,¹³⁵ the Security Council decided that the Tribunal would be located in Arusha, United Republic of Tanzania. Both of

131 Decision on application for leave to appeal (Separate Trials), IT-95-21-AR72.1, 14 October 1996.

132 Decision on application for leave to appeal (Provisional Release), IT-95-21-AR72.2, 15 October, 1996.

133 *Id.*

134 Security Council Resolution 955 (1994), Adopted by the Security Council at its 3453rd meeting, on 8 November 1994, U.N. doc. S/RES/955 (1994), 8 November 1994.

135 Security Council Resolution 977 (1995), Adopted by the Security Council at its 3502nd meeting, on 22 February 1995, U.N. doc. S/RES/977 (1995), 22 February 1995.

the ICTY and ICTR have similar Statutes and they share the same Chief Prosecutor and the same five-judge Appeal Chamber.

The right to appeal was declared in article 24 of the ICTR statute¹³⁶ that copied the same right in the ICTY.

However, some law experts criticized the lack of limitation on the prosecutor's right to appeal situated in the Tribunals law. This criticism was on grounds of double jeopardy, mainly adopted from the United States legal system. If the Tribunal acquits a defendant on the basis of the case facts, the commentator's opinion was not to allow the prosecution to take an appeal on the same case.¹³⁷

In addition, the same law expert's opinion was that rule 119 of the Rule of Procedure and Evidence of the ICTY,¹³⁸ and the similar rule number 120 in the ICTR,¹³⁹ which permits the prosecutor, during a year after the final judgment is issued, to submit to trial chamber an application for review "where a new fact has been discovered which was not known to the prosecutor at the time of the proceedings and could not have been discovered through the exercise of due diligence" is also jeopardizing the accused person's rights on the basis of giving the prosecutor the ability to chase a released person for several months as additional evidence becomes known.¹⁴⁰

On the other hand, law experts commented on the appellate review by both the ICTY and ICTR by stating that they contain other procedural guarantees that may

136 See *supra* note 11.

137 Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 *Hous. J. Int'l L* 381 (Winter 1998).

138 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996.

139 International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995.

140 See *supra* note 137.

reduce the importance of appeals in the prevention of erroneous mistakes. The most significant of these safeguards that both trial chambers of the ICTY and the ICTR sit in panels of three judges, without juries. Those judges are hearing witnesses, reviewing the case facts, hearing testimonials, deliberating, and rendering a judgment accompanied by their detailed opinions. This was considered “stranger than the prevalent situation in many domestic systems where a conviction is pronounced by a single judge or a jury and subsequently reviewed by an appellate court that has not heard evidence or witnesses”¹⁴¹

d. The Special Court for Sierra Leone

On 14th August 2000, the United Nations Security Council adopted resolution 1315 (2000)¹⁴² which requested the Secretary-General of the United Nations to establish an agreement with the government of Sierra Leone in order to initiate an independent special court for the reason of prosecuting persons responsible of the atrocities occurred in Sierra Leone committed since 30th November 1996 which constituted serious crimes under International Humanitarian law. The Secretary-General replied to the Security Council on 4th October 2000 with a report of his negotiations and appended a draft statute.¹⁴³ The United Nations organized the Court in conjunction with the government of Sierra Leone in a shape of a “hybrid” tribunal. This court differed than the Tribunals for former Yugoslavia and Rwanda as it hired local officials, and it is situated in the country of conflict, operating from Sierra Leone’s capital Freetown.

¹⁴¹ See *supra* note 112.

¹⁴² Security Council Resolution 1315 (2000), Adopted by the Security Council at its 4186th meeting, on 14 August 2000, U.N. doc. S/RES/1315 (2000), 14 August 2000.

¹⁴³ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. doc. S/2000/915, 4 October 2000.

However, Amnesty International, in its published report dated 1st November 2003,¹⁴⁴ argued that amendments made to the Rules of Procedure and Evidence in August 2003 denied defendants in front of the court of their right to appeal on Preliminary Motions challenging the jurisdiction of the Court, which constitutes a violation to standards of fair trial.

Rule 72 (E) of the Rules of Procedure and Evidence of the Court¹⁴⁵ provides that “preliminary motions made in the trial chamber prior to the prosecutor’s opening statement which raise a serious issue relating to jurisdiction shall be referred to the appeals chamber, where they will proceed to a determination as soon as practicable.”

In addition, Amnesty International raised similar concerns regarding rule 72(F) of the Rules of Procedure¹⁴⁶ that provides

Preliminary Motions made in the trial chamber prior to the prosecutor’s opening statement which , in the opinion of the trial chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial / shall be referred to the appeals chamber where they will proceed to a determination as soon as practicable

The report argued that the former paragraphs are incompatible with article 14(5) of the ICCPR as the Appeals Chamber is the highest chamber of the court. However, if this chamber was considered to issue the decision concerning preliminary motions, then the defendant will not have a way to appeal this decision before a higher level. The report provides

The appeals chamber is the sole highest chamber of the court. If it were to decide preliminary motions in the first instance, the defendant would not be able to make an interlocutory appeal against the decision on an error on a question of law at a higher level. Even if the defendant were allowed to raise the issue on appeal post-

¹⁴⁴ Amnesty International, *Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI index: AFR 51/012/2003, 1 November 2003 available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510122003ENGLISH/\\$File/AFR5101203.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510122003ENGLISH/$File/AFR5101203.pdf)

¹⁴⁵ Rules of Procedure and Evidence of Special Court of Sierra Leone, Adopted on 16 January 2002, as amended on 7 March 2003, as amended on 1 August 2003, as amended on 30 October 2003, as amended on 14 March 2004, as amended on 29 May 2004, as amended 14 May 2005 available at <http://www.sc-sl.org/rulesofprocedureandevidence.pdf> at 72(E).

¹⁴⁶ *Id.* at 72(F).

conviction, the very same Appeals Chamber that made the decision in the first instance could certainly not be viewed as impartial in reviewing its own decisions¹⁴⁷

The report declared that this would be considered a violation committed under the obligations of the State of Sierra Leone under the ICCPR. Sierra Leone has ratified the ICCPR without reservation to the article 14(5); therefore the state must comply with its obligations under article 14(5).

In addition, the report declared that these provisions would be in conjunction with article 20 of the statute of the special court of Sierra Leone. This article provides

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
 - a. A procedural error;
 - b. An error on a question of law invalidating the decision;
 - c. An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.
3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Issues of jurisdiction and other matters of law raised in preliminary Motions could in many cases fall under sub-paragraph (b) of article 20 of the Statute.

Moreover, the organization declared that these sub-paragraphs are incompatible with contemporary international criminal law. These sub-paragraphs are in conjunction with similar statutes provided for international courts and tribunals. They are in conjunction with rule 72(b) of the rules of procedure and evidence of the ICTY, rule 72(B) of the Rules of Procedure and Evidence of the ICTR, and article 82 of the Rome statute of the International Criminal Court.

e. International Criminal Court

International legal experts demanded for an international criminal court since the middle of the twentieth century. This demand was adopted by the United Nations

¹⁴⁷ See *supra* note 144.

during 1989, when Trinidad and Tobago, motivated by the need for international cooperation to fight drug trafficking, proposed the establishment of such a court to the General Assembly of the United Nations. The International Law Commission (ILC) compiled a draft statute for the International Criminal Court.

In December 1994, the General Assembly of the United Nations created and *ad hoc* committee to review the draft compiled and submitted by the ILC, which was open to all the United Nations States members. A year later, the General Assembly initiated a preparatory committee (prep com), which was also open to all member states, to review the raised issues and to draft a statute for the court. In 1996, the General Assembly, after receiving proposals compiled by the prep com, decided to organize a diplomatic conference to negotiate the final draft of the court state.¹⁴⁸

On July 17th, 1998, the Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court. This Statute was entered into force in 1st of July 2002 after it was ratified by sixty U. Number States.

In drafting the ICC Statute, the drafters were influenced by the work of the *ad hoc* tribunals formed by the United Nations, especially the ICTY. While drafting the articles concerning the right to appeal before the ICC, the drafters were interested of overcoming the mistakes made in the past tribunals.¹⁴⁹

The drafters considered to give the Appeal Chamber of the Court the authority for conducting a new trial. The drafters stated in their commentary that the court will be able to consider questions of law and facts equally, giving it, in the words of the drafters “some of the functions of appeal in civil law systems” and “some of the

148 Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. Int'l L. & Pol. 535 (Winter / Spring 1999).

149 *Id.*

functions of the cassation.”¹⁵⁰ Furthermore, they allowed the Appeal Chamber “all the powers of a Trial Chamber.”¹⁵¹

Moreover, the ILC draft statute provided that a convicted person and the prosecutor may appeal against the judgment or sentence on three grounds: “Procedural unfairness, error of fact or law, or disproportion between the crime and sentence”. This drafting was an outcome of the mistakes to be shown in the ICTY, where the accused person cannot challenge the sentence.¹⁵² However, many commentators and law experts affirmed, while drafting the statute, the need for limiting the Prosecutor’s authorities in appealing the verdicts of acquittals to “an appeal on points of law only, with the remedy of the Appeals Chamber limited to issuing an opinion correcting the legal error for future cases, but having no effect on the acquittal.”¹⁵³ This recommendation was not considered in the final draft of the three articles concerned with the right to appeal in the Rome Statute.

The Rome Statute affirmed both the accused person and the prosecutor right to appeal to the Appeal Chamber of the court following a judgment of the Trial Chamber. This appeal is supposed to be on grounds of procedural error, error of fact or law, or disproportion between the crime and the sentence.¹⁵⁴

The Statute gave the Appeal Chamber the power, when finding that the proceedings at the Trial Chamber were “unfair” or the verdict was “vitiated by error

150 Report of the International Law Commission, U.N. GAOR, 49th Session., Supp. No. 10, U.N. Doc. A/49/10 (1994).

151 *Id.*

152 *Id.*

153 “The International Criminal Court: Drafting effective Rules of Procedure and Evidence concerning the trial, appeal and review” a memorandum distributed to the participants at the intercessional meeting organized by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy from 22 to 26 June 1999 to discuss issues concerning Rules of Procedure and Evidence (ICC Rules) implementing Parts 6 (The Trial) and 8 (Appeal and Revision) of the Rome Statute of the International Criminal Court (Statute). Persons invited to the meeting include representatives of governments, intergovernmental organizations, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals), and non-governmental organizations, published at <http://www.Amnesty.org> AI index IOR 40/12/99.

154 Mahmoud Sherif Bassyouny, *Al Mahkama Al Gena’ia Al Daolia* (The International Criminal Court) 181 (2001).

of fact or law”, to annul or amend the Trial Chamber’s verdict, or order a new trial. In addition, if the prosecutor filed an appeal of acquittal, the Appeal Chamber may also amend the sentence issued by the trial chamber if it finds it disproportionate to the crime committed by the defendant.

4. The Geneva Conventions

The right to appeal before a higher court is also permitted to the prisoners of war under the third Geneva Convention and the civilian persons in the time of war. Article 106 of the third Geneva Convention allows the prisoners of war, in an equal basis with the members of the armed forces of the detaining power, to be informed of hi/her right to appeal and the time limit of using it. In addition, the person is also allowed to submit an appeal, which can lead to the annulment, modification of the judgment, and even the reopening of the trial.¹⁵⁵ Also, the fourth Geneva Convention allows the civilian persons in time of war to have the same right of appeal.¹⁵⁶

B. The European System of Human Rights: European Court of Human Rights

The European System of human rights stands upon a main instrument which is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This Convention was adopted by the Council of Europe in Rome

¹⁵⁵ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950., article 106 states

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so

¹⁵⁶ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950, article 73 states

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

on 4 November 1950 and entered into force in September 1953.¹⁵⁷ Although preceded by the non-binding Universal Declaration of Human Rights and American Declaration on the Rights and Duties of Man, both from 1948, the ECHR is considered the oldest legally binding human rights instrument. The ECHR represents a substantial step by European States towards enforcing human rights, mainly civil and political rights.

The original version of the ECHR created the right of complaint against a state member by other states or by applicants (individuals, groups of individuals or non-governmental organizations). However, states did not have to accept the right of complaint. Subsequently, Protocol No. 11 to the ECHR modified this to make the state's acceptance compulsory.¹⁵⁸

After the adoption of Protocol No. 11 to the Convention, the European Commission was replaced by the European Court of Human Rights, which received petitions against contracting states that declared their accept of the court's jurisdiction.

The ECHR declares the right to fair trial in its article 6. However, this article came out short as to the right to appeal. However, Protocol No. 7 to the Convention adds the right to appeal to the rights guaranteed under the European Convention. This article states

Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal¹⁵⁹

157 European Convention For Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

158 See *supra* note 84.

159 See *supra* note 9.

The European Court did not interpret the right to appeal situated in the 2nd article of protocol no. 11. As a result, there is no available jurisprudence from the European Court on this right. However, the court tried to discuss the requirements of a fair trial needed in the appellate courts. In the *Delcourt case*, the principle was established that the protection afforded by article 6 of the European Convention does not cease with the decision at first instance. The rule is, however, not absolute and the manner of application of article 6 is dependant on the particular features of the proceedings involved.¹⁶⁰ In addition, the court declared that “Article 6 paragraph 1 (art. 6-1) of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6.”¹⁶¹

When determining whether an individual has been given a “fair hearing” at the appellate level, different factors have been considered by the court. In the *Monnell* and *Morris case*,¹⁶² for example, the nature of the procedure at the appellate level and its significance in the domestic legal order; the role of the appellate court in the domestic law; the scope of the appellate court’s powers; and the manner in which the applicant’s interests were protected before the appellate court were regarded as relevant.

These criteria were subsequently applied in *Botten v. Norway* case where the Court held that the Supreme Court was under an affirmative duty to ensure that the applicant was given an opportunity to present his case to them. “Having regard to the entirety of the proceedings before the courts, to the role of the Supreme Court and to

160 *Delcourt v. Belgium*, European Court of Human Rights (1970) Application no.2689/65, 17 January 1970.

161 *Id.* at 25.

162 *Monnell v. United Kingdom*, European Court of Human Rights (2002) Application no. 38784/97, 22 February 2002.

the nature of the issues adjudicated on, there were no special features to justify the fact that the Supreme Court did not summon the applicant and hear evidence from him directly before passing judgment.”¹⁶³ Hence, the court found a violation of article 6 (1).

The right to a public trial would not apply to all appellate proceedings. Both the Court and the Commission have limited the right to proceedings that examine the merits of a case.¹⁶⁴ Non-public proceedings at an appellate level have not been held to be in violation of article 6 (1) when the lower court proceedings were public, and when the appellate court did not examine new points of law.¹⁶⁵

Furthermore, no violation has been found if the applicant can appeal a single judge’s examination to a public tribunal. In *X. v. United Kingdom*,¹⁶⁶ the applicant had been convicted of taking documents and of obtaining a passport unlawfully. The applicant argued that he had been denied a public hearing by the appellate court deciding on his application for leave to appeal. Under English law, leave to appeal is decided by a single judge sitting in chambers. If leave to appeal is refused, however, the applicant is entitled to renew his application to the full court of appeal, where the proceedings are held in public. The European court found that the applicant had not exercised his right to renewal of application and he had thus failed to exhaust the remedies available to him. There had consequently not been a breach of article 6 (1). The Court also stated that the defect of a non-public proceeding, however, may be cured by a public hearing at a later stage of the proceedings.¹⁶⁷

163 *Botten v. Norway*, European Court of Human Rights (1996) Application no. 16206/90, 19 February, 1996.

164 *Albert and Le Compte v. Belgium*, European Court of Human Rights (1983) Applications no. 7299/75 and 7496/76, 10 February 1983.

165 *Id.*

166 *X. v. United Kingdom*, European Court of Human Rights (1981) Application no. 7215/75, 5 November 1981.

167 *H. v. Belgium*, European Court of Human Rights (1987) Application no. 8950/80, 30 November 1987.

In addition, during the appellate procedures, the right of a person to be tried by a competent, independent and impartial court established by law, within a reasonable time is also preserved. In *Melin V. France*, the court found no violations, however, it stated certain rights guaranteed during appellate procedures under the notion of fair trial.¹⁶⁸

Moreover, the European Court declared the person's right to have access to a reasoned verdict issued by the court of first instance. In *Hadjianastassiou v. Greece*,¹⁶⁹ where the petitioner was a military officer accused with disclosing military secrets, and convicted by a first instance military court, heard the reasons of his conviction orally, but only in summary method. When the petitioner had access to the full record of his conviction, it was late for him to submit an appeal to the Court of Cassation. The European Court affirmed that the accused person has a right to access to a reasoned verdict of the first instance court in a timely manner. The denial to do so by the state considered a violation to the petitioner's right to have adequate time and facilities to prepare his defense.

However, the European Court stated that the requirement of giving reasons judgments of the case by the first instance court cannot be understood to be an obligation for the appellate court to answer for every argument raised before it in the proceedings. The court stated that the appellate court, in dismissing an appeal, may approve the reasons for the inferior court's decision.¹⁷⁰

The ECHR jurisprudence is much richer than this indicates; maybe review it one more time.

C. The Inter-American System of Human Rights

¹⁶⁸ Melin v. France, European Court of Human Rights (1993) Application no. 12914/87, 22 June 1993.

¹⁶⁹ Hadjianastassiou v. Greece, European Court of Human Rights (1992) Application no. 69/1991, 16 December 1992.

¹⁷⁰ Garcia Ruiz v. Spain, European Court of Human Rights (1999) Application no. 30544/96, 21 January 1999.

The Organization of American States (OAS), founded in 1948, and defined by the United Nations as a ‘regional agency’ according to article 52 of the UN Charter, adopted the Charter of the Organization of American States¹⁷¹ which was entered into force in 1951. This organization brought into existence the Inter-American System of the Rights and Duties of Man in April 1948, which was the first international human rights instrument of a general nature.

The Inter-American Commission was created in 1959 and held its first session in 1960. This commission was created according to a resolution by the fifth meeting of consultation of ministers of Foreign affairs of the OAS in Santiago, Chile 1959. The Commission’s sole obligation is promoting human rights “set forth in the American Declaration of the Rights and Duties of man.”¹⁷²

After the addition of article 9 (bis) to the Commission’s Statute, the Commission held the powers to receive individual complaints of human rights violations against contracting states, and to make recommendation to states. In addition, the Commission is empowered to ‘make specific recommendations on human rights violations to member states and to under take studies and make reports on human rights situations in states where large-scale violations were alleged.’¹⁷³

171 Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, entered into force Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, entered into force September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, entered into force January 29, 1996.

172 Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992).

173 *See supra* note 84.

In 1969, the American Convention on Human Rights was adopted, which entered into force in 1978.¹⁷⁴ This Convention created the Inter-American Court of Human Rights and defines the functions and procedures of both the Commission and the Court. The Inter-American Convention of Human Rights declared the right to appeal in its 8th article that states

...2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

.....h. the right to appeal the judgment to a higher court”

The right to due process requires full judicial observance of all rights, not only during the investigation and trial at the lower court but in all stages of appeal or review. In a case submitted by an Argentine citizen,¹⁷⁵ it was claimed that, imprisoned after conviction for politically motivated offences, he sought an appeal of his 1979 conviction and life sentence. He claimed that the trial court had violated his due process rights and had used a confession obtained under torture. Although the first trial occurred in a military-influenced court, when a constitutional court review his case it denied a new trial. The Supreme Court also denied his petition for review. In denying a review, the Supreme Court reasoned that the appeal brief failed to provide a basis on which to order an investigation and review.

The Commission found that the reviewing courts failed to consider and protect the petitioner’s due process rights. According to the Commission, enforcement of the judicial guarantees in article 8(1) and article 25(1) require more than ‘mere formal verification of procedural requirements.’¹⁷⁶ It noted that the record before the reviewing courts showed many indications that the convicted man had been imprisoned on evidence illegally obtained under coercion. The Commission held that

174 *See supra* note 3.

175 Case 9850, Inter American Commission of Human Rights, 41, 75, OEA/Ser.L/II.79, DOC. 12 REV. 1 (1991).

176 *Id.*

during the appeal process courts must examine not only the grounds for appeal but whether or not due process had been observed throughout the judicial proceedings.

The state must permit appeal of a petition for habeas corpus. During a state of siege the supreme court of Paraguay disqualified itself from hearing writs of habeas corpus. The commission found that if the Supreme Court abdicated its power to review the petitions the right to habeas corpus was violated.¹⁷⁷

When evidence indicating the innocence of an accused is discovered after the person is tried and convicted, the case must be reconsidered in light of the evidence. A man convicted of murder and sentenced to death in Jamaica subsequently discovered evidence that showed he could not have committed the murder. The evidence came from the pathologist's testimony at the trial but neither the defense nor the court took notice of the exculpatory evidence. On appeal, the court denied reviewed without considering the new evidence. The Commission held that the appeals process must permit a correction.¹⁷⁸

The right to appeal must provide a genuine review of the case and must be timely. It is a violation of the right to appeal when, although the right exists by law, the political chief of the locale either routinely confirms the sentence imposed by the police judge, or the sentence has already been served by the time the appeal has been decided by the Supreme Court.¹⁷⁹

A court must stay execution of the sentence while the case is on appeal. The commission found that executing the death penalty while the sentence is on appeal

¹⁷⁷ Status of Human Rights in Paraguay, Inter American Commission of Human Rights, 180, OEA/Ser.L/V/II.68, doc. 8 rev. 1 (1986).

¹⁷⁸ Case 9260, Inter American Commission of Human Rights, 154, 162, OEA/Ser.L/V/II.74, doc. 10 rev. 1 (1988).

¹⁷⁹ Report on the Situation of Human Rights in Nicaragua, Inter American Commission of Human Rights, 62, OEA/Ser.L/V/II.45, doc. 16 rev. 1 (1978)

violates the defendant's right to appeal.¹⁸⁰ Moreover, the Commission declared that it seriously undermines the right to appeal to threaten a defendant with a longer sentence if s/he appeals.¹⁸¹

D. The African System of Human Rights

The right to a fair trial is guaranteed under article 7 of the Banjul Charter.¹⁸² In addition, the African Charter is distinguished from other human rights instruments as it did not permit derogation from the rights included in its articles. However, as this could be considered a necessity in concern with some rights guarding the integrity of the persons, "many of the individual rights which deal with matters such as freedom of expression and association are formulated in a manner which implies the possibility of derogation."¹⁸³

The African Charter established the African Commission on Human and Peoples' Rights, which its task is to ensure the promotion and protection of human rights throughout the African continent. The African Commission's mandate is to receive complaints from state members against each other, and to receive individual communicates against the contracting states.

The notion of appeal is not clear under the African Charter. The word 'appeal,' as we explained before, is usually used as the request submitted by the person before a higher court asking for a review to the inferior's verdict. However, the

180 Second Report on the Situation of Political Prisoners and Their Relatives in Cuba, Inter American Commission of Human Rights, 7, OEA/Ser.L/V/II.23, doc. 6 rev. 1 (1970).

181 Report on the Situation of Human Rights in Suriname, Inter American Commission of Human Rights, 36, OEA/Ser.L/II.61, doc. 6 rev. 1 (1983).

182 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, article 7 states

Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force...

183 Supra note 85.

Charter used this word in its seventh article, in some opinions, and in contradiction to its obvious meaning, as the right to seek redress to judicial remedy.¹⁸⁴

On the other hand, the African Commission seems not to agree with this interpretation to this particular article. The Commission held in the case of *Constitutional Rights Project v. Nigeria (60/91)*¹⁸⁵ that an established Decree that included the death penalty, which prohibited appeals to the verdicts issued by special courts and allowing defendants to only seek pardon by the Governor who had the power to confirm or annul the verdict, is violating the right to appeal. (This was because the initial special courts were not sufficient to be courts of law to which even an initial petition could be brought).

In addition, the Commission held in another case, in which the applicants were sentenced to death under a special tribunal decree, and were not permitted to submit an appeal against that decision.¹⁸⁶ The Commission held that the codified punishments do not necessarily constitute violations of human rights. However, it also added that by using these codes to exclude any attempt of appeal to "competent national organs" (it means any fair court, even in first instance) in criminal cases that has criminal penalties is considered a violation to article 7 of the Charter. Therefore, the author argues that the first clause of article 7 should be interpreted according to the apparent meaning of the word appeal, which the Commission tends to interpret as an appeal to a higher court or tribunal.

In addition, the African Commission published a recent report on its website under the title of "principles and guidelines on the right to a fair trial and legal

184 EYILEN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURE 124 (1996). See also MALCOLM D. EVANS & RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 156 (2002).

185 *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegan and others) v. Nigeria*, Case 60/91, 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995.

186 *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, case 87/93.

assistance in Africa” in which the African Commission, in resemblance to the General Comments by the UN Human Rights Committee, analyzed the different aspects of the right to a fair trial under the African Charter in order to raise the awareness of this right in Africa and to ensure the promotion and protection of this right.¹⁸⁷

These guidelines declared every convicted person’s right to the review of his conviction or sentence by a higher tribunal. In addition, the report also put certain conditions for appeal that includes the necessity to be both genuine and in a timely manner, and the review should be to both the facts and procedures of the case. Moreover, the guidelines declared that the appeal is only permitted if there is exculpatory evidence discovered after conviction and that this evidence would have likely to change the verdict.¹⁸⁸

The guidelines also affirmed the principle of postponing the sentence’s execution while the case is still under appeal to a higher court. Moreover, the guidelines gave the persons sentenced with death penalty a unique status. It declared their right to a mandatory appeal and urged the states to ensure this right.¹⁸⁹

As a result, the right to appeal is guaranteed under the African Charter on Human and Peoples’ Rights. In addition, appeal under this right should be genuine, and the higher tribunal should have the powers to review both the facts and the procedures of the appealed case.

E. The Right to a Fair Trial as a Non-Derogable Right

Under the international Covenant on Civil and Political Rights, the right to a fair trial may at present be the subject of derogation and therefore it may be suspended in certain circumstances, such as times of public emergency.

¹⁸⁷ The African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, available at http://www.achpr.org/english/declarations/Guidelines_Trial_en.html

¹⁸⁸ *Id.* at 10(a) 1.

¹⁸⁹ *Id.* at 10(a) 2(a).

Article 4 of the civil and political covenant provides that in situations threatening the life of the nation, a government may issue a formal declaration suspending most human rights as long as (1) the exigencies of the situation strictly require such a suspension, (2) the suspension does not conflict with the nation(s) other international obligations, and (3) the government informs the United Nations Secretary-General immediately.¹⁹⁰ The only rights that are not subject to suspension in this situation are those specified in article 4 of the civil and political covenant as protected from derogation. These rights include freedom from discrimination based on race, color, sex, language, religion, or social origin. The civil and political Covenant also does not permit any derogation from the rights to be free from arbitrary killing, torture or other cruel, inhumane or degrading treatment or punishment, slavery, imprisonment for debt, retroactive penalties, or failure to recognize a person before the law. It should be noted that the right to a fair trial and a remedy is not included in this provision.

Probably at no other time will the right to a fair trial and a remedy be as important as it is during a time of civil or international conflict. Yet it is precisely at this time that the right to a fair trial becomes vulnerable under article 4 of the international covenant on civil and political rights. In addition, the right of appeal in the Geneva Conventions is also considered an un-derogable human right.

¹⁹⁰ See *supra* note 2 article 4 states

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

The African charter does not contain a provision allowing states to derogate from their obligations under the treaty in times of public emergency. Hence, it appears that derogation will not be permitted under the African charter. Some commentators have suggested that the African charter's use of broadly worded limitation clauses in several provisions made it unnecessary for the African charter to include the concept of derogation. Article 7 of the African charter does not, however, contain any limitations.

Similarly, article 26 of the African charter, which guarantees the independence of the courts does not allow for either derogation or limitation in the times of public emergency, of any of the rights under the African Charter.

Article 27 of the American convention¹⁹¹ authorizes the suspension of guarantees in "times of war, public danger, or other emergency that threatens the independence or security of the state party." Although article 27 does not make article 8 (the right to a fair trial) a non-Derogable right, article 27 does extend non-Derogable status to "judicial guarantees essential for the protection of such rights" as the right to life, humane treatment, and the other rights identified in article 27. Hence, a certain

191 See *supra* note 3 article 27 states

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

aspect of the right to a fair trial has been made non-Derogable by the American Convention.

Therefore, while the right to a fair trial has not been recognized as a non-Derogable right in article 4 of the international Covenant on Civil and Political Rights, the African charter and the American convention indicate that aspects of the right to a fair trial have been accepted as non-Derogable. For this very reason, it is essential that the draft third optional protocol to the international covenant on civil and political rights be adopted. This optional protocol, if adopted, would make the provisions of the international covenant on civil and political rights guaranteeing a fair trial and a remedy non-Derogable in all situations.

III. THE RIGHT TO APPEAL IN EGYPT

The origin of the Egyptian jurisprudence can be owed to different sources that affected the Egyptian legal life. These sources vary from the Napoleonic Code, Roman laws, and Islamic sharia'. In addition, the main principle of the Egyptian democratic life is the "separation of powers," which separates between the legislative, executive, and judicial Egyptian authorities.

On the top of the hierarchy of the Egyptian legal system comes the Egyptian constitution that is based upon respect of individual freedoms and human rights, and the rule of law. Moreover, there are legislations that usually issued by Parliament, decrees issued by the President of the Republic, decrees issued by the Prime Minister, Ministerial decisions, and acts issued according to Governors and heads of governmental bodies and public corporations orders. The Egyptian constitution declares the independence of the Egyptian judiciary, and that judges may not be subject to any authority other than law.

A. The Egyptian Constitution

1. The Constitution

The 1971 Egyptian Constitution¹⁹² did not refer to the citizens rights to appeal in particular; it did not mention this right neither in its preamble nor in its articles.

However, the Constitution affirmed the right to a fair trial in its 67th article which states that a defendant has a right to defend himself before a legal court.¹⁹³

In addition, the Egyptian Constitution affirmed a set of civil rights related to the right to fair trial. It affirmed the right to individual freedom as enshrined in article 41 and

¹⁹² The Constitution of the Arab Republic of Egypt, hereinafter the Egyptian Constitution, after the amendments ratified on May 22, 1980 referendum, Translated and published by the Egyptian Parliament *available at* <http://www.parliament.gov.eg/EPA/en/sections.jsp?typeID=1&levelid=54&parentlevel=6&levelno=2>

¹⁹³ *Id.* article 67 states

Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself

gave the law the authority of determining the period of custody of an arrested person. It also states that this authority is being governed by the competent judge or the Public Prosecution office.¹⁹⁴

The Egyptian Constitution also regulated the right to humane conditions of detention and freedom from torture in article 42, which states that arrested citizens should be treated in dignity without any physical and moral harm.¹⁹⁵ The same article also affirmed the prohibition against coerced confessions by affirming that any confession obtained by means of coercion “shall be considered invalid and futile.”¹⁹⁶

The fourth part of the Egyptian Constitution was dedicated to the Sovereignty of law. This part also declared the personality of the penalty imposed upon the citizens as it affirmed that crimes and penalties should be mentioned by law. It also declared the prohibition of retroactive application of criminal laws.¹⁹⁷

In addition, The Egyptian Constitution declared the presumption of innocence in its 67th article until the person is proved guilty before a legal court, and granted the

194 *See supra* note 192 article 41 states

Individual freedom is a natural right and shall not be touched.

Except in cases of a flagrant delicate no person may be arrested, inspected, detained or his freedom restricted or prevented from free movement expect by an or necessitated by investigations and preservation of the security of the society.

This order shall be given by the competent judge or the Public Prosecution in accordance with the provisions of the law.

The law shall determine the period of custody

195 *See supra* note 192 article 42 states

Any person arrested, detained or his freedom restricted shall be treated in the manner concomitant with the preservation of his dignity.

No physical or moral harm is to be inflicted upon him.

He may not be detained or imprisoned except in places defined by laws organizing prisons.

If a confession is proved to have been made by a person under any of the aforementioned forms of duress or coercion, it shall be considered invalid and futile.”

196 *Id.*

197 *See supra* note 192, article 66.

person the right to legal counsel for his/her defense when accused of committing a crime.¹⁹⁸

The Constitution also granted the person on his/her right to defend him/herself or to be represented by a counsel and affirmed the incapable citizens' right to have "access to justice and defend their rights."¹⁹⁹

The right to challenge the lawfulness of detention is also granted by the Egyptian Constitution. This constitution gave the detained or arrested person the right to be informed with the reasons of the arrest and the right to have access to the outside world to ask for help. It also gave him/her the right to be informed of the reason for arrest or detention and to have the power to challenge it by lodging a complaint and to be ensured the right of obtaining a judgment concerning his/her detention "within a definite period" or else he/she should be released.²⁰⁰

2. The Supreme Constitutional Court

Before the establishment of the Supreme Court in 1969, all the Egyptian courts irrespective of their level and regardless of the nature of the scope of their jurisdiction had exercised a form of judicial review known as "abstention control."²⁰¹

In September 1969, the first Supreme Court was established according to law No. 81 of 1969. This Court started its work at 1970 after issuing the law number 66 of year 1970 to provide the Court with the procedures and fees. After the issuance of the Constitution of September 1971, the same court continued its job until 1979 when the present Supreme Constitutional Court was founded according to law number 48 of

198 *See supra* note 192 article 67.

199 *See supra* note 192 article 69.

200 *See supra* note 192 article 71.

201 KEVIN BOYLE & ADEL OMAR SHERIF, HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 124 (1996).

year 1979 to substitute the old 1969 court and all the cases pending before the old court were turned over to the newly established one.

The new Court differed than the old one in the source of its formation since the newly established court was initiated according to articles 174 to 178 of the 1971 Constitution, which gave the court the sole judicial control in respect of the constitutionality of the laws and regulations and the power of statutory interpretation. In addition, the Court had been given powers to resolve jurisdictional conflicts between different courts. It also possesses the powers to settle both administrative and financial disputes related to the Court members.

This court is an independent judicial body situated in Cairo. Its counselors cannot be dismissed; its verdicts on constitutional issues and interpretive decisions are published in the Official Gazette. Such verdicts are considered compulsory on all the State systems, and whenever they have been issued and published in the Official Gazette according to the legally specified time, any content that is confirmed therein to be unconstitutional becomes invalid on the day subsequent to the publication of the verdict. If the text that is considered unconstitutional has an effect on criminal procedure, any convictions that have been issued based upon that text are considered to be annulled.

The Supreme Constitutional Court has issued various verdicts concerning human rights and fundamental freedoms in general and has declared a considerable number of legislative texts to be unconstitutional on the basis that they violated, contradicted or restricted those rights or freedoms.

Among these rulings that article 68 of the constitution provided that every citizen has the right to refer to competent judge and that this right is protected to all

citizens without discrimination.²⁰² In addition, the court also affirmed that the right to a fair trial, preserved in the Universal Declaration of Human Rights, is protected by article 67 of the Egyptian Constitution that is adopted from articles 10 and 11 of the Universal Declaration.

In addition, the Egyptian Constitution, in its 67th article, proclaimed that a criminal accusation can put grave restrictions which can amount to a threat to right to life, which will demand a balance between the citizens' right to liberty and the protection of social interests.

Moreover, the court affirmed that fair trial guarantees is a set of rules which reflects a complete system that must maintain the preserve of the human being dignity and his basic rights and protects against any misuse of the penalty, which get it out of its target and “branding all such encroachments as deviations from the purposes and methods of criminal law, as determined by social values of a given society at a given time.”²⁰³

In relation to right to appeal, the Court issued numerous verdicts, which declared a set of rules. The Court declared that the conditions set by the Egyptian legislator pertaining only one-phase of judicial process in concern with some judicial verdicts, is not contradicting with the Egyptian Constitution and its articles which does not prohibit a one-degree trials in which the verdict is final. In this regard the Court stated that the disciplinary rulings issued in done disciplinary cases in relation to some violations committed by judges, and ruled by a specially formed council of 7

202 The Supreme Constitutional Court in Egypt, hereinafter the SCC, case number 39, judicial year 15, decided on 4th February 1995, Official Gazette number 9, 6th March 1995.

203 The SCC, case number 13, judicial year 12, decided on 2nd February 1996, Official Gazette number 7, 19th February 1996.

senior judges on the top of the judicial hierarchy, which is a final verdict that cannot be appealed, is not contradicting with the Egyptian Constitution.²⁰⁴

This rule was also confirmed through the verdicts issued by the Court, which affirmed that the limiting of one-phase trials process is considered among the appraisal authority of the Egyptian legislator. However, the Court stated that if the legislator decided the need of a two-stage trial, these phases should possess a complete set of judicial guarantees which should be fully preserved to the citizens without any shortness or failure. Therefore, the two-phase trials, when subscribed by legislator, should be identified according to objective basis which should not include the speediness of the trial process against the nature of the cases and with appreciation of public interest and equality before the law.²⁰⁵

However, the court settled a fundamental rule that verdicts - as a principle - should be appealed, as two-phase trials is considered a basic guarantee for the fairness of the trial process and parties of the case should not be banned their right to appeal without a clear jurisdiction and according to rational basis.²⁰⁶

B. The Egyptian Legislation

1. The law

The Egyptian legislators recognized the right of the accused person to appeal the sentence issued against him/her in the majority of the issued legislations. The legislators allowed the two-phase courts and the appeal process in the Egyptian

204 The SCC, case number 31, judicial year 10, decided on 7th December 1991, Official Gazette number 51, 19th December 1991. Also see case number 64, judicial year 17, decided on 7th February 1998, Official Gazette number 8, 19th February 1998, and case number 224, judicial year 19, decided on 9th September 2000, Official Gazette number 38, 21st September 2000.

205 The SCC, case number 64, judicial year 17, decided on 7th February 1998, Official Gazette number 8, 19th February 1998.

206 The SCC, case number 39, judicial year 15, decided on 4th February 1995, Egyptian Supreme Constitutional Court judgments, part 6, page 511.

Criminal Procedures Code,²⁰⁷ which is recognized as the main frame of the criminal procedures to be applied to all the criminal cases in Egypt. This criminal procedures code is one of the oldest codes in the Egyptian legal history, issued by a law number 150 of year 1950, this law cancelled all the former laws used in investigating criminal offences and replaced them in application.²⁰⁸

The Egyptian Criminal Procedures Code states the phases of trial in the Egyptian criminal courts. In addition, the same Code states the system of the Egyptian courts and their phases in sentencing and reviewing criminal cases.

2. The Egyptian Code of Criminal Procedures

The Egyptian Criminal Procedures Code arranged the jurisdiction of different Egyptian tribunals and provided the fundamental rules of conducting investigations and the process of trial through various stages of courts. The Egyptian legal system categorized the committed crimes according to their imposed sentence into three categories. First, the contraventions, which are the crimes punished with a fine not exceeding one hundred pounds.²⁰⁹ The second category is the misdemeanors which are the crimes punishable with imprisonment with a minimum of twenty four hours and maximum of three years or a fine with a minimum limit of one hundred pounds.²¹⁰ The third category of crimes is the one punishable with death sentence, jail for life, intense jail, or jail.²¹¹

207 The Egyptian Criminal Procedures Code, issued by law number 150 of year 1950, published in the Official Gazette number 90, 15 October 1950, as amended by several recent laws.

208 *Id.*

209 The Egyptian Penal Code, issued by law no. 58 of year 1937, published in the Official Gazette number 71, 5 August 1937, article 12 states

The contraventions are the crimes punishable with a fine that its maximum limit does not exceed one hundred pounds

210 *Id.* article 11 states

The misdemeanors are the crimes punishable with the following penalties:

Imprisonment.

Fine that its minimum limit exceeds one hundred pounds.

As a result, the Egyptian legislators followed this way of categorization throughout the system of ordinary courts in the Egyptian legal system. The Egyptian Code of Criminal Procedures categorized the ordinary courts system into Summary Courts, which are authorized of contraventions and misdemeanors, Courts of First-Instance that plays the role of appeal courts to review cases sentenced by Summary Courts, and High Appeal Courts that are entitled with cases of felonies.

C. The arrangement of ordinary courts in Egypt

The ordinary courts in Egypt handle the majority of cases in the Egyptian legal system. They usually see all civil, criminal, commercial, and family-status cases unless the jurisdiction is authorized to other different kind of courts, as prescribed by law. The Egyptian ordinary system of courts is fundamentally composed out of three levels, begins with the entry points of the judicial process, the Summary Courts and Courts of First Instance (Primary Courts) that in its criminal branch is called Misdemeanors Chamber of Appeals Court, and ending with the top of the system, which is called the Appeal Courts and in the criminal division they usually called Court of Felonies.²¹² The system of Egyptian courts is usually defined as a four tier system;²¹³ however, in other opinions this is considered to be “misleading.”²¹⁴ The

In addition, article 18 of the same Code defines imprisonment as putting the sentenced person in one of the public prisons for the sentenced period that should not be less than twenty four hours and does not exceed three years, or other wise stated by law.

211 See supra note 209 article 10 as amended by law no. 95 of year 2003, published in the Official Gazette no. 25, 19 June 2003 states

Felonies are crimes punishable with the following penalties:

Death penalty.

Jail for life.

Intensive jail.

Jail.

In addition, article 16 of the same Code defined jail for life and intense jail as putting the sentenced person in a jail and committing him/her to work inside it for his/her life time or for the sentenced period that the period of the intense jail and that the period of jail should be between three to fifteen years, or otherwise stated by law.

212 ALAN N. KATZ, LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK 345 (1986).

213 See supra note 52.

Court of Cassation is not considered among the regular hierarchy of the Egyptian courts.²¹⁵ This Court only hears appeals based on certain rules, generally upon error of interpretation of the law.

The judicial authority law arranged the structure of the Court of Cassation and states that it is situated in Cairo²¹⁶ and that it consists of a President and adequate number of President Deputies and counselors and contains number of circuits to review criminal matters.²¹⁷ In addition, the law required the structure of at least five counselors in every circuit for the issuance of a verdict.²¹⁸

In addition, the Judicial Authority law settled the location of the Courts of Appeals and declared that every Court consists of a President and adequate number of head of court, head deputies, and counselors. Moreover, every circuit of the Court is composed of three counselors issuing its verdicts.²¹⁹

Moreover, the Judicial Authority law distinguished the Courts of Felonies by a separate article.²²⁰ This article states that every Appeal Court contains one or more Courts of Felonies consists out of three counselors working at the Court of Appeals. These Courts are authorized to see cases of felonies, and every circuit is headed by a head counselor of the court, one of the head deputies' of the court, or a counselor of the court if deemed necessary.²²¹

214 ENID HILL, MAHKAMA: STUDIES IN THE EGYPTIAN LEGAL SYSTEM, COURTS & CRIMES, LAW & SOCIETY 222 (1979).

215 See *supra* note 48, also see MOHAMAD MOHY AL DYN AWAD, HQOUQ AL INSAN FI AL IGRA' AT AL GENA'YA (HUMAN RIGHTS IN CRIMINAL PROCEDURES) 520-640 (1989).

216 The Egyptian Judicial Authority law number 46 of year 1972, hereinafter the Judicial Authority law, article 2.

217 *Id.* article 3.

218 *Id.*

219 See *supra* note 216 article 6.

220 See *supra* note 216 article 7.

221 *Id.*

Article 9 of the “Judicial Authority law” proclaims that a Primary Court is situated in the capital of every Egyptian governorate.²²² It also declares that every Primary Court is constituted out of sufficient number of judges and head of courts²²³ and its President is a mandated counselor from the Court of Appeal that the Primary Court is in its jurisdiction or any other subsequent Appeal Court according to the detailed arrangement enshrined in article 54 of the same law.²²⁴ This deputation is according to a decision issued by the Ministry of Justice, after hearing the opinion of the “High Council of Judiciary”, for a renewable year.

In addition, every Primary Court should have an adequate number of circuits each headed by the President of the court, one of the court heads, or a judge if deemed necessary.²²⁵

In addition, the same law announces that in every Primary Court, a number of Summary Courts must be initiated. These Summary Courts are situated within the Primary Court jurisdiction. Their location, jurisdiction, and fields of specialization are appointed according to a decree issued by the Ministry of Justice.²²⁶

This arrangement instructed according to the Judicial Authority law categorized the ordinary courts of the Egyptian legal system, in concern to criminal affairs, into four categories

1. The Summary Courts

²²² See *supra* note 216 article 9.

²²³ *Id.*

²²⁴ See *supra* note 216 articles 6 and 54 arranged the Egyptian Courts of Appeal in the following ascending order: Qena Court of Appeal, Asuit Court of Appeal, Bany Soeif Court of Appeal, Ismaelia Court of Appeal, Al Mansoura Court of Appeal, Tanta Court of Appeal, Alexandria Court of Appeal, and Cairo Court of Appeal.

²²⁵ See *supra* note 216 article 9.

²²⁶ See *supra* note 216 article 11.

Every Summary Court is composed of one judge²²⁷ who issues its judgments,²²⁸ and selected from the judges of the Primary Court. Summary Courts are established within the jurisdiction of the Courts of First Instance according to a Ministerial Decree issued by the Ministry of Justice.²²⁹ The number of the Summary Courts is classified according to their judicial jurisdiction and inhabitants' population. In addition, any Summary Court can be held in another place within its jurisdiction or out of it if it deemed necessary according to a decision by the Ministry of Justice upon the request of the President of the Primary Court.²³⁰

These Courts are distributed everywhere in Egypt "throughout the metropolitan areas and in the country-side and towns in all administrative sub-units."²³¹

Every Summary Court is accompanied by a Public Prosecutor Office "*Niaba*" that is being run by a Public Prosecutor and assisted by an adequate number of Prosecutors.

Summary Courts Judges are selected from First Instance (Primary) Court judges. Their assignment is according to the decision made by the general assembly of the Court of First Instance where the Summary Court is located within its jurisdiction.

227 See *supra* note 216 article 14

228 See *supra* note 216 article 38 required specific qualifications for the eligibility of an Egyptian judge:

To be a citizen of the Arab Republic of Egypt and pertains civil eligibility.

He should not be younger than 30 years for appointing in Primary Courts, 38 years for Courts of Appeal, and 43 years For Court of Cassation.

He should have a Bachelor of law from a college of law of any of the Egyptian colleges, or any equivalent foreign degree.

Not to be sentenced by a court, or any administrative council for a dishonoring reason.

He should declare a good reputation

229 See *supra* note 216 article 11

230 *Id.*

231 See *supra* note 214.

Moreover, the law authorized the Ministry of Justice, after the approval of the Court of First Instance general assembly, in issuing a Ministerial Decree authorizing certain Summary Courts of receiving a specific type of cases.²³²

The Summary Courts' jurisdictions are to undertake cases of contraventions (minor offences) and misdemeanors submitted both by the Public Prosecution Office, or filed directly before the court.

In addition, in concern with the misdemeanors those are not punishable with imprisonment or a fine that exceeds one thousand pounds, according to the demand of the Public prosecution office,²³³ the Summary Court judge might issue a direct order of punishing the accused person of the case with a fine not exceeding one thousand pound beside any additional penalties and expenses. He also may suspend the penalty or issue a verdict of innocence.²³⁴ This direct order can be appealed by both the Public Prosecution Office and the defendant.²³⁵ The Public Prosecution office may appeal this order within three days of its issuance, while the defendant can appeal it within the same period after the order which the accused person receives notice thereof.²³⁶

On the other hand, the Egyptian Code of Criminal Procedures made a sole exception to the Summary Courts' jurisdiction in the case of a certain type of misdemeanors, which occurred as a result of crimes made by newspapers or other ways of publicity.²³⁷ These misdemeanors are referred to the Court of Felonies to issue its verdict, even if the crime of accusation in the case is considered a misdemeanor.

2. The Appellate Court (Misdemeanors Chamber of Appeals Court)

²³² See *supra* note 216 article 13

²³³ See *supra* note 207 article 323.

²³⁴ *Id.* article 324.

²³⁵ *Id.* article 327.

²³⁶ *Id.*

²³⁷ See *supra* note 207 articles 215, 216.

The Court of First Instance is composed from a number of circuits, and every circuit consists of three judges assigned of the court judges. The President of the court is a mandated counselor from the Court of Appeal that the Primary Court is in its jurisdiction, or any other subsequent Court of Appeal, for a renewable year, after taking the opinion of the “High Council of Judiciary.”²³⁸

The assignment of the Court’s work is according to the decision issued by its general assembly, which is constituted out of all of its working judges and the President of the Court in a purpose of grouping the same type of cases together. In addition, the general assembly of every court usually groups the criminal cases according to its location.

Every First Instance Court is accompanied by a Public Prosecutor Office “Niaba” that is being run by a Public Defender “Mohamy A’am”, who should be a counselor and assisted by an adequate number of Prosecutors.

The First instance Court plays the role of the Appellate Court in concern with the criminal offences, it hears appeals in concern to verdicts of misdemeanors and contraventions issued by Summary Courts. However the Egyptian Code of Criminal Procedures limits the appeal of some verdicts, which are contraventions, and misdemeanors punishable with only a fine that does not exceed three hundred pounds.²³⁹

In contraventions, the defendant can appeal the verdict if he/she was punished other than fine and expenses. In addition, the Public Prosecution Office can appeal verdicts of contraventions if it demanded a penalty other than fine and expenses and the defendant was judged to be innocent, or the verdict did not apply its demands.

²³⁸ See *supra* note 216 article 9.

²³⁹ See *supra* note 207 article 402 as amended by law no. 174 of year 1998, Official Gazette no. 51 (bis) published in 20 December 1998.

Other than these two cases, an appeal is not accepted other than on specific grounds. These grounds includes that the issued verdict was depending upon inconsistence with the applicable law or error in its application, or its interpretation, if the verdict is invalid, or if the procedures were invalid, and that these were related to the verdict.²⁴⁰

In misdemeanors punishable with only a fine that does not exceed three hundred pounds and expenses, both the defendant and the Public Prosecution Office can appeal the verdict on the grounds that the issued verdict was depending upon inconsistence with the applicable law or error in its application, or its interpretation, if the verdict is invalid, or if the procedures were invalid, and these procedures were related to the verdict.²⁴¹

In reviewing the Summary Courts verdicts, the Misdemeanors Chamber of Appeals Court has the authority to review the whole case, a *de novo* review. It may approve, decline, or alter the verdict issued by the Summary Court. However, the correction of the verdict, if the case was appealed by the defendant, must not apply a graver penalty on the defendant.²⁴²

The appeals of verdicts issued by the Misdemeanors Chamber of Appeals Court is being reviewed before the Court of Cassation on the grounds of matters of law only, as appeals before Court of Cassation can be submitted only on certain reasons, which varies between inconsistence with the applicable law or error in its application, or its interpretation, if the verdict is invalid, or if the procedures were invalid, and were related to the verdict.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *See supra* note 207 article 417.

However, the legislations permitted the Court of Cassation to review the entire case, facts and procedures, in the case of the second appeal before the Court of Cassation.

3. The Court of Appeal (Court of Felonies)

In Egypt, there are eight Courts of Appeals as enshrined in the Judicial Authority law, these Courts are situated in eight main governorates of Egypt and arranged in ascending order: Qena Court of Appeal, Asuit Court of Appeal, Bany Soeif Court of Appeal, Ismaeilia Court of Appeal, Al Mansoura Court of Appeal, Tanta Court of Appeal, Alexandria Court of Appeal, and Cairo Court of Appeal.²⁴³ Judges working in these courts are considered the “senior judges”²⁴⁴ named in the Egyptian laws as Counselors. Every Court of Appeal consists of different circuits, and each circuit consists of three counselors.

Counselors of the Court of Appeal can judge both civil and criminal cases. However, this depends upon the organization of work declared according to the decision of the general assembly of every Court of Appeal.

Courts of Felonies are the Criminal circuits of the Court of Appeal. They consist of different circuits and every circuit consists of three counselors. The circuit is headed by the President of the court, one of his deputies, a head of a circuit, or one of the court’s counselors if it deemed necessary.²⁴⁵

Courts of Felonies are being held in every city possesses a Primary Court and its local jurisdiction is the same as the Primary Court.²⁴⁶ The Court of Felonies is

²⁴³ See *supra* note 216 article 54.

²⁴⁴ See *supra* note 214.

²⁴⁵ See *supra* note 216 article 7.

²⁴⁶ See *supra* note 216 article 8.

entitled to rule on cases of felonies. In addition, they judge cases of crimes committed through newspapers or other ways of publicity.²⁴⁷

The Egyptian Courts of Felonies verdicts' are considered one-phase judgments, issued by one-stage courts. Their verdicts are final and can only be appealed before the Court of Cassation. However, these appeals should only be based upon certain rules that are affecting only matters of law, but not facts of the case.

4. The Court of Cassation

The Egyptian Court of Cassation is a single court situated in Cairo. It is considered the "supreme court of appeal."²⁴⁸ It is composed of a President and adequate number of president deputies and counselors.²⁴⁹ The Court is constituted of circuits and every circuit is headed by either the Court's President, one of his deputies, or a counselor of the Court if it deemed necessary. The verdicts of the Court are issued by five of its members.²⁵⁰ The general assembly of the Court of Cassation composes of two main committees, a civil committee and a criminal one. Every committee composes of eleven counselors and headed by the Court's President or one of his deputies.²⁵¹

The Egyptian legal system is considered generally a two-phase trial system, based upon three stages of courts, the Summary Courts, the Primary Courts, and the Courts of Appeal. These three stages of courts ensures right to appeal to criminal verdicts issued by Summary Courts before Misdemeanors Chamber of Appeals Court.

However, crimes identified as felonies according to the Egyptian laws are being tried only by Courts of Felonies that issue a final verdict in concern to the facts

²⁴⁷ See *supra* note 207 article 216.

²⁴⁸ See *supra* note 214.

²⁴⁹ See *supra* note 216 article 3.

²⁵⁰ *Id.*

²⁵¹ See *supra* note 216 article 4.

of the case being tried before these courts. Appeal against verdicts of felonies can be only appealed before the Court of Cassation.

The Court of Cassation only reviews verdicts issued by Courts of Felonies on certain basis.²⁵² It only permits appeals based upon that the issued verdict was depending upon inconsistency with the applicable law or error in its application or its application or its interpretation, if the verdict is invalid, or if the procedures were invalid, and were related to the verdict.²⁵³

However, the legislations permitted the Court of Cassation to review the whole case, facts and procedures, in the case of the second appeal before the Court of Cassation. As a result, if the Court of Cassation ruled that the appealed verdict was inconsistency with the law due to one of the former reasons, it shall order that the case should be sent again to the inferior court to be tried again.²⁵⁴

Moreover, after the issuing of the verdict by the inferior court for the second time and if it was appealed for the second time before the Court of Cassation, this permits the Court of Cassation to review the entire case.²⁵⁵ Therefore, the Court of Cassation will be restricted to the case facts and the same accused persons brought forward by the Public Prosecution Office. In addition, the court is not permitted to sentence a defendant of the case with a sentence harder than issued by the inferior court.²⁵⁶

D. The non appealable cases before ordinary courts

The Egyptian Code of Criminal Procedures considered the appeal process as a regular way of challenge to an issued verdict or sentence. It permitted the review of

²⁵² Law number 57 of year 1959 of cases and procedures of appeal in front of Court of Cassation, hereinafter Court of Cassation law, article 30.

²⁵³ *See id* article 39.

²⁵⁴ *See supra* note 252 article 39.

²⁵⁵ *See supra* note 252 article 45, also *see supra* note 52.

²⁵⁶ *See supra* note 252 article 43, also *see supra* note 52.

this appeal before a higher court or tribunal in principle, and gave the higher court the authority of agreeing and approving, canceling, or amending the verdict issued by the inferior court. This principle was based upon, in the opinion of some jurists, the base of unifying the principles of judgments issued by equal courts, and allowing the appeal courts to unify the same way interpretation to the law. In addition, it can be a way of fixing the disorders committed by the inferior courts while sentencing a case.²⁵⁷

The Egyptian Code of Criminal Procedures makes provisions of several methods of appeal against judicial verdicts. These appeals are permitted against all kind of judgments handed down according to the Egyptian Code of Criminal Procedures, both in presence of the accused person or in absentia. Moreover, the same Code states that the appeal period can not begin before the sentenced person until after the verdict which the accused person receives notice thereof.²⁵⁸

However, the Egyptian code of criminal procedures excluded some types of verdicts from being subject to appeal. These verdicts are not appealable whatever the verdict is: one from the court of felonies, one from the court of sessions, or a verdict concerning issues of procedure.

1. Verdicts of Court of Felonies

Judgments issued by the Egyptian Court of Felonies are not subject to any kind of appeal, whether these verdicts are issued in a felony, misdemeanor, or even a contravention. Article 381 of the Egyptian Code of Criminal Procedures prohibited the appeal against the verdicts issued by the Courts of Felonies otherwise by an appeal

²⁵⁷ See *supra* note 52.

²⁵⁸ See *supra* note 207 article 406 states

The appeal occurs with a report submitted to the issuing court's registrar within ten days of the pronouncement of the verdict in the accused person's presence, or after him/her receiving notice of the verdict, or after the sentence issued in the opposition to the issued in absentia sentence

in front of Court of Cassation or by submitting an application of reconsideration of the case.²⁵⁹ These two ways of reconsidering the case are considered an irregular ways of appeal and can not be considered as a second-phase court or trial.²⁶⁰

The Court of Cassation law²⁶¹ limits the appeal that can be submitted before the Court of Cassation to certain reasons. These reasons are limited to permit the court of cassation authority only to review matters of law. The law does not permit the court to review the case facts. In addition, the law prevents the accused person from adding different reasons to the appeal after submitting a report that contains the appeal's reasons to the court registrar.²⁶²

The law number 57 of year 1959 of court of Cassation limited in its 30th article the reasons of appeal to the court to three definite cases. First, if the issued verdict was depending upon inconsistency with the applicable law or error in its application or its application or its interpretation. Second, if the verdict is invalid. Third, if the procedures were invalid and they were related to the verdict.²⁶³

However, the legislations permitted the Court of Cassation to review the whole case, facts and procedures, in the case of the second appeal in front of the Court. This means that if the Court of Cassation issued its verdict declaring that the

²⁵⁹ See *supra* note 207 article 381 paragraph 4 states

... and it is not permitted to appeal a verdict issued by Court of Felonies unless through an appeal to Court of Cassation or a re-consideration

²⁶⁰ See *supra* note 52, also see *supra* note 48.

²⁶¹ See *supra* note 252.

²⁶² See *supra* note 252 article 35 paragraph 1 states

It is not permitted to submit new reasons in front of the Court other than the ones that has been written in the appeal memorandum

²⁶³ See *supra* note 252 first paragraph of article 30 states:

Both the Public Prosecution office and the sentenced person can appeal the verdict before the Court of Cassation the final verdicts issued by the court of last resort in felonies or misdemeanors due to the following reasons:

If the appealed verdict was based upon inconsistency with law or an error in its application or interpretation.

If an invalidity occurred to the verdict.

If the procedures were invalid that had an effect to the verdict

appealed verdict was inconsistent with the law due to one of the former reasons, it shall order that the case should be returned to the inferior court to be tried again.²⁶⁴ However, after the court issues the verdict for the second time and if it was appealed for the second time before the Court of Cassation, this permits the Court of Cassation to review the whole case.²⁶⁵ Therefore, the Court of Cassation will be restricted to the case facts and the same accused persons brought forward by the Public Prosecution Office. In addition, the Court should not sentence an accused person of the case with a sentence harder than issued by the inferior court.²⁶⁶

The Egyptian Code of Criminal Procedures admitted the accused person a second way of appeal against a final verdict, which is an application of reconsideration. This is considered another irregular way of appeal pertained in the Egyptian legal system, which admits the sentenced person with a final verdict to submit an application of reconsideration before the same court that issued the verdict. However, the Egyptian Criminal Procedures Code limited the cases which allow the person to submit this application.

These reasons which allows a reconsideration of the verdict begins with the case of a murder that the alleged victim was to be found alive, also if a person was sentenced for committing a certain crime and another person was sentenced for the same crime and the two verdicts were contradicting, which concludes the innocence of one of the two sentenced person. In addition, the law allowed reconsideration if a witness or an expert of the case was sentenced for a false testimony, or a document

264 See *supra* note 252 article 39 (which referred to article 30), which states that if the first reason occurred ...the court should cancel the verdict and rule the case itself, and in the case of the second reason occurrence, it should cancel the verdict and return the case to the same issuing court for a re-trial by a circuit formed of other judges, or can be returned to the same circuit in case of necessity

265 See *supra* note 252 article 45 states

If the case was appealed for the second time before the Court of Cassation, the Court of Cassation must issue a sentence on the case, and in this case it will follow the procedures adopted by the trial court of the occurring case

266 See *supra* note 52.

used in the case was ruled to be forged, and the document or the witness or the expert had an effect to the judgment of the case. Moreover, the verdict can be reconsidered if it was based upon a civil or a family law verdict can be reconsidered if it was based upon a civil or a family law verdict and this verdict was cancelled or if new circumstances occurred after the verdict or new documents appeared after the issuance of the sentence.²⁶⁷

The reconsideration is issued by the Court of Cassation after hearing the Public Prosecution and the case parties and doing any necessary investigations. If the court accepted the application, it should cancel the verdict and issue a verdict of innocence if it is obvious, otherwise it should refer the case to the issuing court for a retrial by other judges.²⁶⁸

However, the Code states that this application does not stop the implementation of the issued sentence unless the person is sentenced with death penalty.²⁶⁹ Moreover, if this application was refused, another one should not be submitted if to be based upon some reasons.²⁷⁰

The two ways of irregular appeals are to be considered an extra insurance to the implementation of human rights in concern with the accused persons' rights. Moreover, the Egyptian jurists considered these two methods irregular ways to maintain a review to a sentenced case.²⁷¹ In addition, both ways are restricted by law to certain aspects and reasons of review, or else they should be dismissed according to law.

²⁶⁷ See *supra* note 207 article 441.

²⁶⁸ See *supra* note 207 article 446.

²⁶⁹ See *supra* note 207 article 448.

²⁷⁰ See *supra* note 207 article 452.

²⁷¹ See *supra* note 52, also see *supra* note 48, and also see RAOUF EBEID, MABADE' AL EGRA' AT AL GENA'YA FI AL QANOUN AL MASRI (THE PRINCIPLES OF THE EGYPTIAN CRIMINAL PROCEDURES IN THE EGYPTIAN LAW) 945-1034 (1989).

Nevertheless, the Egyptian legislators made an exception concerning felonies committed by children. Child law number 12 of year 1996, adopted the view of initiating two-phase courts for the trial procedures of any crime committed by a child, including felonies. The child law defined the child as every Egyptian person younger than eighteen years.²⁷² In addition, this law replaced the minors' law, which was cancelled by the child law, in initiating two-stage courts for the trials of children and minors. This law initiated a child court in every governorate, which is constituted of three judges and assisted by two experts at least one of them a woman.²⁷³ This court is entitled with all the cases in which the defendants are children, when committing any crime, including felonies.²⁷⁴

Moreover, this law initiated Courts of Appeal to review the verdicts issued by the child court. These courts are formed in the district of every primary court and are constituted out of three judges; at least two of them are head of a court.²⁷⁵ These appeal courts are entitled to review all the verdicts issued by the child courts, and appealed before it including felonies committed by children, and their review to the case is "*de novo*".

However, the child law made an exception concerning the case of an accused child in a crime committed in accomplice with an adult. The law entitled the Courts of Felonies to undertake any cases that includes children older than fifteen years as defendants, if the child is accused of committing the crime with another adult defendant.²⁷⁶

272 The Egyptian Child law, hereinafter Child law, issued by law no. 12 of year 1996, article 2.

273 *Id.* article 121.

274 *Id.* article 122.

275 *Id.* article 121 paragraph 3.

276 *Id.* article 122 paragraph 2 states

...and in exception of the rule of the previous paragraph, the jurisdiction is held to Court of Felonies or High Court of State Security (which was cancelled by law no. 95 of year 2003) to try felonies committed by a child defendant older

This distinction made by law between any child who commits a felony alone of being tried in front of the child court and have the opportunity to appeal the issued verdict before a higher court, and another child committed the same felony in accomplice with another adult person, who will be facing trial before the Court of Felonies, which will be only one-phase trial, and will lose the opportunity to appeal the issued verdict, raises the question of non-constitutionality of paragraph 2 of article 122 of the child law and its contradicting with article 40 of the Egyptian constitution,²⁷⁷ which settles the principle of equality before the law.

2. Verdicts on crimes committed while court in session

The second type of non-appealable crimes is the crimes committed while a court session is in process. If a person present at a court session commits a contravention or a misdemeanor, the court, whether criminal or civil, is entitled by law to try the accused person that committed such a crime immediately after hearing the opinion of the Public Prosecutor and the accused person's defense.²⁷⁸

This sentence is not subject to any appeal in front of any higher court. In addition, any Egyptian court is authorized to issue a sentence of imprisonment period of twenty four hours to a person who commits any disorder to the court session or its regulations, and this sentence is also not subject to any type of appeal.²⁷⁹

than 15 years at the day of committing the crime, when committing the crime in participation with an adult and the latter is being prosecuted with him. In this case the Court, before issuing its verdict, should examine the child status from all the faces, and it may get help from any expert it choose

²⁷⁷ See *supra* note 192 article 40 states

All citizens are equal before the law.

They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed

²⁷⁸ See *supra* note 207 article 244 paragraph 1 states

If a misdemeanor or a contravention occurred while the court is in session, the court is permitted to try the committer at once and issue a sentence after hearing the Public Prosecution and the defendant's defense

²⁷⁹ See *supra* note 207 article 243 states

The order of the court session and its administration are entitled to its head and in pertaining this, he has the authority to expel out of court whoever commits any disorder, and if he/she did not comply, the court can sentence him/her

3. Verdicts Concerning Issues of Procedure

The third category of non-appealable judgments is verdicts issued by the court in concern with primary issues facing the procedures of the case. The court can issue a primary verdict in concern with any procedures affecting the case as appointing an expert, who is entitled of examining any issue concerning the case. In addition, the court can issue a primary verdict of arresting any defendant or even holding the process of the case procedures until the forgery of a submitted document is investigated. These verdicts are called “primarily verdicts” and they are issued previous to issuing the final verdict of the whole case. These verdicts, according to the law, are not subject to appeal provided that it was not issued as a final verdict of the case.²⁸⁰ Some jurists put reasons for this by arguing that appeal should be postponed until these procedures, concerned by primarily verdict, are complete and the case parties can see the court’s reasons behind these issued procedures.²⁸¹

However, the Egyptian law made an exception to this case. It allowed the case parties to appeal a primarily decision if it was issued in relation to the incompetence of the pertaining court to the case before it.²⁸² This permission of appeal against these primary verdicts is based upon the fact that the court is actually dismissing the case delegating before it and transferring this case to another court, and the latter court can be incompetent with the case.

immediately with imprisonment for a period of twenty four hours or a fine of ten pounds and this sentence is not subject to any appeal

280 *See supra* note 207 article 405 paragraphs 1 & 2 states

It is not permitted before issuing a verdict of the whole case to appeal the primarily verdicts.

And the appeal of the case verdict will also include an appeal of the primarily verdicts

281 *See supra* note 48.

282 *See supra* note 207 article 405 paragraph 3 states

However, all the verdicts of non-competence are subject to appeal

IV. CONCLUSION

The right to appeal the issued verdict and sentence is a fundamental human right. This right was to be found necessary for the correction of any committed errors in the appealed verdict, which will enhance the public's confidence in the justice system.

This right is recognized by the main human rights instruments and the major human rights bodies, both internationally and regionally. As a result, this right is clearly stated in the International Covenant on Civil and Political Rights (ICCPR), which is one of the main international human rights instruments. Also, the Human Rights Committee's jurisprudence asserted the right to appeal in the criminal cases and put certain conditions for practicing this right by the accused persons.

In addition, the African Commission on Human and Peoples' Rights interpreted the African Charter by putting a set of principles and guidelines for the right to a fair trial enshrined in the Charter. In these principles, the Commission declared every convicted person's right to appeal the issued verdict or sentence. The Commission also urged the member states to incorporate these standards into their domestic legislation.

The Egyptian legal system recognized the right of the accused person to appeal the sentence issued against him/her in the majority of the issued legislations. The legislators allowed the two-phase courts and the appeal process in the Egyptian Criminal Procedures Code, which is recognized as the main frame of the criminal procedures to be applied to all the criminal cases in Egypt. This Code considered the appeal process as a regular way of challenge to an issued verdict or sentence. It permitted the review of this appeal before a higher court or tribunal in principle, and

gave the higher court the authority of agreeing and approving, canceling, or amending the verdict issued by the inferior court.

On the other hand, the Egyptian code of criminal procedures excluded some types of verdicts from being subject to appeal. These verdicts are not subject to the appeal that reviews both the facts and procedures of the case. As a result, this can be considered a violation to the Egyptian defendants' right to appeal.

The most obvious, and definitely the most devastating, violation to the right of appeal concerns the verdicts issued by the Egyptian Courts of Felonies. After the Court of Felonies issues its verdict against a defendant, this defendant is permitted to submit an appeal against the verdict or his sentence only before the Egyptian Court of Cassation. However, the appeal that can be submitted before the Court of Cassation is limited to certain reasons that limit the authority of the court to review matters of law only. The law does not permit the court to review the case facts. In addition, the law prevents the accused person from adding different reasons to the appeal after submitting a report that contains the appeal's reasons to the court registrar. As a result, the author's opinion that this can not be considered an appeal as identified by both international and regional human rights bodies and therefore these verdicts are considered not appealable.

The Egyptian Constitution declares that treaties are considered part of the domestic legal hierarchy and equal to the laws when they are signed, ratified by the Egyptian government, and approved by the Egyptian Parliament. Egypt had signed and ratified both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights and both instruments were approved by the Egyptian Parliament. As a result, these treaties are part of the Egyptian legislations and Egypt is bound by the principles enshrined in both instruments

including the right to appeal in criminal cases. However, the current form of appeal before the Court of Cassation is short than the international standards and does not amount to be an appeal, which is a clear violation of the right to a fair trial.

Confirming this view, the French legal system, that Egypt adopted its major characteristics, amended its criminal procedures code permitting the convicted persons to appeal the verdict issued against them by the Court of Felonies before another circuit of the same court appointed by the criminal chamber of the Court of Cassation. Furthermore, both the Kuwaiti and Arab Republic of Emirates legal systems, which were influenced by the Egyptian legal system, added a second tier to their Courts of Felonies allowing the appeal of both facts and procedures before the second tier.