

witnesses and the production of other evidence, and as such is integrally related to the concept of equality of arms. This right is protected in three of the human rights instruments examined²¹⁰ and in at least thirty-four national constitutions.²¹¹ However, this right is largely neglected even though its importance to a defense is immeasurable. This is particularly so in cases where the evidence may be located in foreign countries. Governments have the benefit of mutual legal assistance treaties,²¹² but individuals do not. Private citizens are thus unable to secure evidence needed for their defense²¹³ and are placed in a position which clearly violates the concept of equality of arms as discussed above.

j. *The right to be tried in one's own presence.* The right to be present at one's own trial is an important element of the right to defend oneself against criminal charges. It is also related to the assumption that the ability of the accused to face his or her judge and accusers adds a dimension of credibility to the proceedings and enhances the ascertainment of the truth. Of the instruments surveyed, the right is guaranteed only by the ICCPR.²¹⁴ Although nearly twenty-five national constitutions guarantee the right,²¹⁵ there are

210. ICCPR, *supra* note 4, pt. III, art. 14(3)(c), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(d), 213 U.N.T.S. at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(f), at 4.

211. The subsection of each of the twenty-seven constitutions which guarantees equality of arms also guarantees the right of compulsory process. See *supra* note 208. Seven additional constitutions guarantee this right separately. ECUADOR CONST. pt. I, tit. II, § 1, art. 19(17)(e); JAPAN CONST. ch. III, art. 37; LIBER. CONST. ch. III, art. 21(h); MEX. CONST. tit. I, ch. I, art. 20(V); NAMIB. CONST. ch. III, art. 12(1)(d) (guaranteeing only opportunity to call witnesses); PHIL. CONST. art. IV, § 19; U.S. CONST. amend. VI.

212. See 2 EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS 7-149 (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 2d ed. 1991); M. Cherif Bassiouni, *Policy Considerations on Inter-state Cooperation in Criminal Matters*, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW (Albin Esser & Otto Lagodny eds., 1992).

213. For the European system, see Ekkehart Müller-Rappard, *The European State*, in 2 INTERNATIONAL CRIMINAL LAW 95 (M. Cherif Bassiouni ed., 1986). For the United States system, see Alan Ellis and Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 INTERNATIONAL CRIMINAL LAW, *supra*, at 151.

214. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54.

215. ALB. CONST. pt. I, ch. II, art. 56; ANT. & BARB. CONST. ch. II, § 15(2); BAH. CONST. ch. III, § 20(2); BARB. CONST. ch. III, § 18(2); BELIZE CONST. ch. II, § 6(3); BOTS. CONST. ch. 11, § 10(2); DOMINICA CONST. ch. I, § 8(2); EQ. GUINEA CONST. tit. III, ch. IV, art. 38; FIJI CONST. ch. II, § 11(2); GAM. CONST. ch. III, § 20(2); GREN. CONST. ch. I, § 8(2); GUY. CONST. pt. 2, tit. 1, art. 144(2); KENYA CONST. ch. V, § 77(2); KIRIBATI CONST. ch. II, § 10(2); MALTA CONST. ch. IV, § 39(6); MAURITIUS CONST. ch. II, § 10(2); NAURU CONST. pt. II, art. 10(3); PAPUA N.G. CONST. pt. III, div. 3(B), art. 37(5); ST. CHRIS.-NEVIS CONST. ch. II, § 10(2); SOLOM. IS. CONST. ch. II, § 10(2); SWAZ. CONST. ch. II, § 10(2); TUVALU CONST. pt. II, div. 3(A), § 22(4);

exceptions for when the accused flees the jurisdiction during trial or after having been given notice of the charge,²¹⁶ or when the conduct of the accused renders the continuance of the proceedings in his or her presence impossible.²¹⁷ This right is also designed in part to avoid trial *in absentia* which is, in many respects, inherently unfair because it does not allow a defendant to effectively participate in the trial and present an adequate defense. Trials *in absentia* are prohibited by the ICCPR.²¹⁸ Some countries have found a way around the prohibition by having the *in absentia* conviction be subject to a trial *de novo* on the facts whenever an accused found guilty *in absentia* has been apprehended.

7. *The Right to Assistance of Counsel.* Representation by counsel at each important stage of criminal proceedings is a fundamental right of the defense and is paramount to the concept of due process. One of the assumptions on which this right is based is that the presence of effective counsel will deter and prevent abuses against the person arrested, charged, or prosecuted. Furthermore, having counsel present ensures that due process shall be followed. The general right to the assistance of counsel contains several components which are surveyed separately in this section. It is important to note that merely guaranteeing the right to counsel does not ensure that this right will be afforded at all stages of the criminal process, from detention through appeal.²¹⁹ The right to counsel is guaranteed in six of the instruments examined.²²⁰ In addition, the ICCPR and the BOP require that an accused be informed of the right to counsel.²²¹

More than sixty-five national constitutions guarantee the right to counsel in criminal proceedings. In some the right only exists with respect to trial proceedings, while in other constitutions the right to

UGANDA CONST. ch. III, art. 15(2); ZAMBIA CONST. pt. III, art. 20(2); ZIMB. CONST. ch. III, § 18(3).

216. See, e.g., ANT. & BARB. CONST. ch. II, § 15(2)(i).

217. See, e.g., *id.* § 15(2)(ii); BAH. CONST. ch. III, § 20(2).

218. ICCPR, *supra* note 4, pt. III, art. 14(d), at 54.

219. See *infra* text accompanying notes 237-44.

220. ICCPR, *supra* note 4, pt. III, art. 14(3)(b), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(c), 213 U.N.T.S. at 228; BOP, *supra* note 22, princ. 17, at 299; SMRTP, *supra* note 22, pt. II, art. 93, at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(d), at 4.

221. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54; BOP, *supra* note 22, princ. 17(1), at 299.