# *CONTENT AND MANDATORY NATURE OF THE REQUIREMENTS UNDER ARTICLE 74(5) OF THE ICC STATUTE IN RELATION TO NO CASE TO ANSWER DECISIONS*


**AUTHORS**[1]

Sofía Campos Sánchez
María Fernanda Jaramillo Gómez
Sofía Linares Botero
Sara Paula Mosquera López


[1] This memorandum has been written by the members of the ninth promotion (2019) of the International Law Clinic, organized by the Universidad del Rosario, Bogotá, Colombia and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), under the supervision of Prof. Héctor Olasolo Alonso and with the cooperation of Clara Esperanza Hernández Cortés.

## INTRODUCTION

1. This paper is part of the research work by the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the *Ibero-American Institute of the Hague for Peace, Human Rights and International Justice* (IIH), in cooperation with the Office of Public Counsel for Victims (OPCV) of the International Criminal Court (ICC). It answers the following questions:

> *In relation to the first ground of appeal against Trial Chamber I's no case to answer decision in relation to Laurent Gbagbo and Charles Blé Goudé, which are the requirements of Article 74(5) of the Statute? Are they all mandatory? Can a decision lacking any of those requirements produce legally binding effects?*

2. At the outset, it must be noted that Article 74(5) of the ICC Statute provides as follows:

> *The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.*

3. Terrier considers that Article 74(5) of the ICC Statute compels the Trial Chamber to deliver a judgment in writing, containing a full and reasoned statement of the evidence, findings, conclusions and a clear answer to any charges brought by the Prosecution or requests of the defence.[2] Considering that its object is to explain to the parties and to the public the reasons that have led to the judgment itself, the reasoning ought to be: (i) based on demonstrative logic; (ii) without contradictions; and (iii) precise and complete. Moreover, it must leave none of the arguments raised by the parties unresolved.[3]

4. For Klamberg, Article 74(5) of the ICC Statute is one of the few aspects of the ICC proceedings with a detailed regulation. In his view, the requirements provided for in this provision aim at satisfying the principles of public hearing and fairness and the right to appeal.[4] As a result, while other aspects of the ICC proceedings (for instance, the presentation of evidence) are left to the discretion of the Trial Chamber, all requirements provided for in Article 74 (5) of the ICC Statute are mandatory.[5] Moreover, according to Klamberg, while Articles 23 and 22 of the ICTY and ICTR Statutes refer specifically to 'judgments', Article

---

[2] Terrier, Frank. *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY: Chapter 31.2: The Procedure before the Trial Chamber*. Edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones. Vol. II. New York, New York: Oxford University Press, 2002. Page 1315.
[3] Ibid. Page 1315, paragraph E.
[4] Klamberg, Mark. *COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT*..Brussels: Torkel Opsahl Academic EPublisher. 2017. Pages 565-569.
[5] Ibid. Page 554.

74(5) of the ICC Statute uses the broader term 'decisions',[6] which could be understood as including *inter alia* 'no case to answer decisions' issued by the ICC Trial Chambers.

5. Nevertheless, the ICC case law has only addressed, so far, the mandatory nature of the second requirement provided for in Article 74(5) of the ICC Statute (the Trial Chamber's duty to provide a full and reasoned statement on its finding on the evidence and conclusions), and the effects of not complying with it (a procedural error). This has been done in the 8 June 2018 Public Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (Bemba Appeals Judgement)..

6. As a consequence, the ICC case law has not yet addressed the issue of whether this second requirement applies only to judgments, or whether it is also applicable to other decisions, such as Trial Chamber I's no case to answer decision in the Laurent Gbagbo and Charles Blé Goudé case ('the no case to answer decision' or 'TC I's no case to answer decision').

7. Thus, in relation to the last issue, as well as in relation to the content and mandatory nature of the other three requirements under Article 74(5) of the ICC Statute, there is no ICC case law.

8. As a consequence, according to Article 21(1)(b) and (3) of the ICC Statute, these issues have to be addressed in light of the case law of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).

9. In order to address these questions, sections 1 to 4 of this paper deal in a separate manner with each of the following requirements established in Article 74(5) of the ICC Statute: (i) the decision shall be in writing (section 1); (ii) the decision shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions (section 2); (iii) the Trial Chamber shall issue one decision; when there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority (section 3); and (iv) the decision or a summary thereof shall be delivered in open court (section 4).

## SECTION 1. THE DECISION SHALL BE IN WRITING

### A. *International Criminal Tribunals for the former Yugoslavia and Rwanda*

10. The first requirement under Article 74(5) of the ICC Statute is that '*the decision shall be in writing'*. A similar provision is contained in relation to judgments in Article 23 of the ICTY Statute,[7] Rule 98 Ter (c) of the ICTY Rules of Procedure and Evidence,[8] Article 22 of

[6] Idem.
[7] Rule 23 of the ICTY Statute says as follows: '2. The judgment shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.'

the ICTR Statute[9] and Rule 88 (c) of the ICTR Rules of Procedure and Evidence.[10] Similar provisions can also be found for appellate proceedings in Rule 117 (b) of the ICTY Rules of Procedure and Evidence and 118 (b) of the ICTR Rules of Procedure and Evidence.

11. When addressing this requirement, the ICTY and the ICTR case law has affirmed that a written judgment is needed in order to guarantee that the judgment rendered fulfils the requirement of a reasoned opinion.[11]

12. Furthermore, the ICTY Appeals Chamber in the *Kvočka* case has specifically stated that the requirement to deliver the judgment in writing can also be applied to all other decisions that are essential for the determination of responsibility.[12] This would include 'no case to answer decisions' issued by Trial Chambers because they are essential for the determination of responsibility, as its main effect is to end the trial due to the insufficient evidence put forward by the Prosecutor during her case.

B. *Human Rights Committee*

13. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to 'a fair and public hearing'. Nevertheless, neither this provision, nor HRC's General Comment 13 on Article 14 of the ICCPR, refer explicitly to the oral or written nature of judgments and other decisions.

14. The requirement for decisions to be delivered in writing can only be explicitly found in Article 14 (3) of the ICCPR in relation to the accused's right to *be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.* In this context, the HRC highlights in its General Comment 13 that this requirement can be 'met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.'[13]

---

[8] Rule 98 Ter (c) of the ICTY Rules of Procedure and Evidence says as follows: 'The Judgement shall be rendered by a majority of the Judged. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.'

[9] Rule 22 of the ICTR Statute says as follows: '2. The Judgment shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing to which separate or dissenting opinions may be appended.'

[10] Rule 88(c) of the ICTR Rules of Procedure establishes in relation to the judgment that 'It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.'

[11] *ICTR. Appeals Chamber. Prosecutor v Kayishema. Judgment 1 june 2001. Para 165. ICTR. ICTR, Appeals Chamber. The Prosecutor v. Furundzija. Judgment 20 July 2000. Para 69.*

[12] *ICTY. Appeals Chamber. Prosecutor v. Kvocka et al. Judgement 28 February 2005. Para. 286 ICTY.*

[13] According to Article 14 (3)(a) of the ICCPR: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.' Moreover, paragraph 8 of HRC's General Comment No. 13 on Article 14 (rights of persons charged with a criminal offence) says as follows: 'The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.' In Evelio Ramón Giménez v. Paraguay (Communication Num. 2372/2014), the applicant stated that he was not informed in detail of the charges against him at the time of his arrest, as the authorities told him that he knew the facts and the charges against him, but later there was no formal charging decision in writing against him. The HRC found that Paraguay had incurred in a violation of Article 14 (3) of the ICCPR and ordered the commutation of the sentence, the reimbursement of

15. Moreover, in *Pratt and Morgan v. Jamaica* (Communication Num. 210/1986), where a Jamaican Appeals Court did not disclose the reasons why it dismissed the applicants' appeal until almost four years later, the HRC found undue delay in the judicial proceedings constituting a violation of the applicants' rights to be tried within a reasonable period of time. The HRC agreed with the applicants that the delay of the Jamaican Appeals Court to formulate its decision and its reasons in writing could be the cause of serious injustice because it prevented the applicants from exercising their right to appeal before the *Privy Council*. As a result, the HRC ordered the commutation of the sentence, the reimbursement of any legal costs incurred by the applicants in the proceedings before the HRC, and monetary compensation.[14]

C. *European Court of Human Rights*

16. The ECtHR has stated that the State Parties ought to comply with the requirements established in article 6 of the European Convention on Human Rights (ECHR) on the r*ight to a fair trial*. According to the ECtHR, there is no specific requirement under this provision for judgments or other decisions to be delivered in writing. Moreover, State Parties to the ECHR enjoy a wide margin of appreciation on the way in which they comply with their obligations under the ECHR.

17. Nevertheless, the ECtHR, in the case of *Cerovšek And Božičnik v. Slovenia (2017)*, has found that, in light of Slovenian penal and procedural laws and regulations, any Slovenian Judge or Court that conducts a trial and examines the evidence must provide a written judgmentin which the grounds that justify the verdict are addressed.[15] As no written reason was provided for almost three years, the ECtHR found that Slovenia had breached the applicants' right to a fair trial.

18. As a result, the ECtHR declared that Slovenian higher courts should have ordered a retrial and should have remitted the case to a new first-instance court for a new hearing. Nevertheless, as Slovenian higher courts did not provide for a proper remedy to overcome the violation, and the sentence had already been served by the applicants, the ECtHR condemned Slovenia to pay each of the applicants the sum of 5.000 Euros for non-pecuniary damage and 2.500 Euros for the legal costs of the proceedings held before the ECtHR.[16]

19. As a result, according to the ECtHR, when determining the fairness of a process, it is essential to consider the proceedings as a whole, in light of the specific statutory

---

any legal costs incurred by the applicant in the proceedings before the HRC, and monetary compensation. Vid. HRC. Communication 2372/2014. *Evelio Ramón Giménez v. Paraguay*.

[14] HRC. Communication CCPR/C/35/D/210/1986. *Pratt and Morgan v. Jamaica*.

[15] European Court of Human Rights, the Case of Cerovšek And Božičnik v. Slovenia, 2017. Paragraph 43: 'In the Court's view, she should, for precisely that reason, address her observations in the written grounds justifying the verdicts. Indeed, under domestic law, such observations (...).'Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-171777"]}

[16] Ibid. Para. 45.

requirements, the circumstances of the case[17] and the decisions of the appellate courts.[18] Thus, if there is a statutory provision requiring a judgment - or even an interlocutory decision - to be in writing, the Court or Judge must comply with that requisite, in order to ensure the proper administration of justice and prevent arbitrariness.

D. *Inter-American Court of Human Rights*

20. According to Article 8(1) of the American Convention on Human Rights (ACHR), '[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.'

21. The IACtHR has interpreted this provision in relation to the requisite of providing judgements and other decisions in writing in the *Claude-Reyes et al v. Chile case.*[19] According to the facts of the case, the applicants formally requested in 1998 to the Vice-President of the Foreign Investment Committee ('the Committee'), a Chilean State body, to provide information on *inter alia*: (i) whether the Vice-President of the Committee had requested all companies in the public and private sectors the reports required for the fulfilment of the Committee's mandate; and (ii) any infraction or crime committed by companies under the oversight of the Committee.[20] The Vice-President of the Committee refused to provide such information. Moreover, he also refused to provide, at the request of the applicants,[21] a reasoned written decision explaining why he refused to provide the information requested by the applicants.[22]

22. Based on the above-mentioned, the IACtHR found that, by not providing a written and reasoned decision, the applicants' rights under article 8 (1) of the ACHR had been breached by Chile. Thus, for the IACtHR, the decision of the Vice-President of the Committee was arbitrary and unfounded, thus unacceptable.[23] As a result, the IACtHR condemned Chile to provide reparations to the applicants for non-pecuniary damage by: (i) providing the information requested by the applicants, if appropriate, or adopting a reasoned decision in this regard; (ii) publishing in the official gazette and in another newspaper with extensive circulation, the chapter on proven facts of the IACtHR's decision in this case; (iii) adopting the necessary measures to ensure the right of access to State-held information; and (iv) providing training on the law and regulations governing this right to public entities,

[17] European Court of Human Rights, the Case of Ruiz Torija v. Spain, 9 December 1994, paragraph 29: 'The extent to which this duty to give reasons applies may vary according to the nature of the decision.'
[18] European Court of Human Rights, the Case of Cerovšek And Božičnik v. Slovenia, 2017. Paragraph 37: 'The Court reiterates that in determining issues of the fairness of proceedings for the purposes of Article 6 of the Convention, it must consider the proceedings as a whole, including the decisions of the appellate courts.'
[19] IACtHR. *Claude-Reyes et al v. Chile* case. Judgement. 19 September 2006.
[20] Ibid. Para. 57(13).
[21] Ibid. Para. 57(16).
[22] Ibid. Para. 122.
[23] Idem.

authorities and agents responsible for deciding on requests for access to State-held information.[24]

23. In reaching its decision, the IACtHR found that Article 8(1) of the ACHR requires that all decisions made by domestic bodies must be delivered in a written form, no matter the nature of the decision or of the State body making it.

## SECTION 2. THE DECISION SHALL CONTAIN A FULL AND REASONED STATEMENT OF THE TRIAL CHAMBERS' FINDINGS ON THE EVIDENCE AND CONCLUSIONS

### A. *International Criminal Court*

24. The second requirement under Article 74(5) of the ICC Statute is that 'the decision shall contain a full and reasoned statement of the Trial Chamber findings on the evidence and conclusions.' In the Bemba Appeals Judgement, the ICC Appeals Chamber has affirmed that Article 74(5) of the Statute requires the Trial Chamber to provide a full and reasoned statement on its findings on the evidence and conclusions.[25] For the ICC Appeals Chamber, the Trial Chamber's obligation aims at protecting the rights of the parties to appeal the Trial Chamber's judgment, as this right can only be properly exercised when the Trial Chamber provides in a clear way the factual and legal basis of the judgment.[26] Moreover, the ICC Appeals Chamber has established that, in order to fulfil this requirement, it is not necessary to consider every single factor, but only those factors that were relevant to come to the Trial Chamber's conclusion.[27]

25. According to the ICC Appeals Chamber, if the Trial Chamber fails to provide a full and reasoned statement on its findings on the evidence and conclusions, it would amount to a procedural error.[28] Nevertheless, the Appeals Chamber has also made clear that the appropriate remedy will depend on the specific circumstances of the case.[29]

26. For the ICC Appeals Chamber, when the lack of reasoning is extensive, the Appeals Chamber may decide to order a new trial before a different Trial Chamber.[30] In turn, when the reasoning is merely insufficient, the Appeals Chamber may remand some factual findings to the original Trial Chamber with instructions to (i) strengthen the reasoning in support of them; and (ii) send the judgment back to the Appeals Chamber.[31]

---

[24] Ibid. para 156.
[25] ICC. Appeals Chamber. *The Prosecutor v. Jean-Pierre Bemba Gombo*. Judgement. 8 June 2018. Para. 49.
[26] Ibid. Para. 50.
[27] Ibid. Para. 51.
[28] Ibid. Para. 49.
[29] Ibid. Para. 56.
[30] Ibid. Para. 56.
[31] Idem.

27. The Bemba Appeals Judgement has not addressed the issue of whether this second requirement applies only to judgments, or whether it is also applicable to other decisions, such as the TC I's no case to answer decision.

B. *International Criminal Tribunals for the former Yugoslavia and Rwanda*

28. The Trial Chamber's obligation to provide a full and reasoned statement is also found in relation to judgements in Rule 98 Ter (c) of the ICTY Rules of Procedure and Evidence and in Rule 88 (c) of the ICTR Rules of Procedure and Evidence. Similar provisions can also be found for appellate proceedings in Rule 117 (b) of the ICTY Rules of Procedure and Evidence and 118 (b) of the ICTR Rules of Procedure and Evidence.

29. In the *Kuranac et al., Limaj et al.* and *Krajisnik* cases, the ICTY Appeals Chamber has found that a full and reasoned opinion by the Trial Chamber is a key safeguard for the right to a fair trial, as it ensures the parties' effective exercise of their right to appeal. As a consequence, not only the judgements, but also all decisions relating to the central issues of the case ('no case to answer decisions' would fall within this category), must contain a full and reasoned statement of the Trial Chamber´s findings on the evidence and conclusions.[32] In reaching its conclusion, the ICTY Appeals Chamber has taken into consideration the ECtHR decision in the *Hadjianastassiou v Greece* case.[33]

30. In the *Karera* case, the ICTR Appeals Chamber has taken the same approach than the ICTY Appeals Chamber, as it has explicitly found that '[a] reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 24 of the Statute.'[34]

31. For the ICTR Appeals Chamber (*Ndindiliyimana* case), in order to fulfil the requirements provided for in Article 22(2) of the ICTR Statute and Rule 88(C) of the ICTR Rules of Procedure and Evidence, the Trial Chamber 'should set out in a clear and articulated manner the factual and legal findings on the basis on which it reached the decision to convict or acquit an accused. In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.'[35]

---

[32] ICTY Appeals Chamber. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. Judgement. 12 June 2002. Paras 41-42. ICTY, Appeals Chamber. *Prosecutor v. Fatmir Limaj*. Judgement. 27 September 2007. Para. 81. ICTY Appeals Chamber. *Prosecutor v. Momcilo Krajisnik*. 17 March 2009. Para. 139. ICTY. Appeals Chamber. *Prosecutor v. Mladen Naletilic, and Vinko Martinovic.* Judgement 3 May 2006. Para 603. ICTY. Appeals Chamber. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic.* Judgment 12 June 2002. Para 41.

[33] ECtHR. *Hadjianastassiou v. Greece* case. Judgement. 16 December 1992. Para 33. Here the ECtHR found that national courts must, however, indicate with enough clarity the grounds on which they base their decisions.

[34] ICTR. Appeals Chamber. *Prosecutor v. Francois Karera*. Judgement. 2 February 2009. Para. 20. ICTR. Appeals Chamber. *Prosecutor v. Tharcisse Muvunyi.* Judgment 29 August 2008. Para 144. ICTR. Appeals Chamber. *Prosecutor v. Aloys Simba.* Judgement 27 November 2007. Para. 152. ICTR. Appeals Chamber. *Prosecutor v. Juvénal Kajelijeli.* Judgment 23 May 2005. Para 59. ICTR. Appeals Chamber. *Prosecutor v. Alfred Musema.* Judgment 16 November 2001. Para 20. ICTR. Appeals Chamber. *Prosecutor v. Laurent Semanza.* Judgement 20 May 2005. Para 130. ICTR. Appeals Chamber. *Prosecutor v. Eliézer Niyitegeka.* Judgement 9 July 2004. Para 124. ICTR. Appeals Chamber. *Prosecutor v. Georges Rutaganda.* Judgment 26 May 2003. Para 536.

35 ICTR. Appeals Chamber. Prosecutor v. Augustin Ndindiliyimana. Judgement. 11 February 2014. Para. 293.

32. The ICTR Appeals Chamber has also highlighted in the *Karera* case that the reasoned opinion requirement is applicable to all decisions addressing central issues of the case,[36] which is clearly consistent with the above-mentioned case law of the ICTY Appeals Chamber.

*C. Human Rights Committee*

33. There is one relevant communication before the HRC in relation to the second requirement. In *Lenford Hamilton v. Jamaica* (Communication Num. 333/1988), the HRC found that the lack of a reasoned judgment in writing by a Jamaican appeals court violated the applicant's rights under Article 14 (3)(c) and (5) of the ICCPR, as it materially deprived the applicant from exercising his right to appeal before the *Privy Council*. As a result, the HRC requested Jamaica to commute the sentence, reimburse any legal costs incurred by the applicant in the proceedings before the HRC, and provide monetary compensation.[37]

*D. European Court of Human Rights*

34. The ECtHR has dealt with the second requirement in several cases, starting with *Hadjianastassiou v. Greece* case (1992).[38] In this case, a Greek aeronautical engineer was sentenced to prison for disclosing military secrets. The Greek military Appeals Court failed to provide reasons in the judgment, that was read out in a public hearing. The applicant only found the specific reasons for his conviction two months after the public hearing. As a result, for the ECtHR, the applicant's appeal was bound to fail because he did not have enough elements to prepare a well-grounded appeal.[39]

35. In reaching its decision, the ECtHR highlighted that national courts must indicate with sufficient clarity the grounds on which they base their judgments, because otherwise the convicted person cannot effectively exercise his right to appeal.[40] As a result, the ECtHR found that Greece had breached Article 6 of the ECHR and had to provide monetary compensation to the applicant (this was the only remedy granted by the ECtHR in this case, because the applicant had already served his time in prison, and his claim aimed at obtaining pecuniary compensation).[41]

36. The ECtHR has followed its conclusion in the *Hadjianastassiou v. Greece* case in more than 20 subsequent cases, including *inter alia* the *Taxquet v. Belgium* (2010)[42] and the

[36] Idem.
[37] HRC. *Lenford Hamilton v. Jamaica*. Communication Num. 333/1988. In the Roberto Zelaya Blanco v. Nicaragua (Communication Num. 328/1988), the HRC considered a report by Amnesty International entitled Nicaragua: Derechos Humanos 1986-1989, which concluded that the judgment did not cite enough evidence to provide enough reasons for the applicant's conviction. Nevertheless, the HRC did no reach any conclusion on this issue. Vid. HRC. Roberto Zelaya Blanco v. Nicaragua. Communication Num. 328/1988. Vid also, Amnistía Internacional. Nicaragua: Derechos Humanos 1986-1989.
[38] ECtHR. *Hadjianastassiou v. Greece* case. Judgement. 16 December 1992.
[39] Ibid. Para. 29.
[40] Ibid. Para. 33.
[41] Ibid. Para. 49.
[42] ECtHR. *Taxquet v. Belgium* case. Judgement. 16 November 2010.

*Nikolay Genov v. Bulgaria* (2017) cases[43]. In this last case, the ECtHR also emphasized that it must be clear in national courts' judgments that all essential issues of the case have been addressed[44].

37. Finally, in the *Suominen v. Finland* case[45], the applicant claimed that she did not receive a fair hearing, as she was prevented from presenting all the evidence she requested to be admitted at trial. The Finish District Court refused to admit the evidence without giving a reasoned written decision. It just made an interlocutory oral decision not to accept the evidence at a preparatory hearing. [46] For the ECtHR, this constituted a violation of article 6 of the ECHR because, although the impugned decision was not a judgment, national courts have an obligation to deliver a reasoned decision in order to allow applicants to effectively exercise their right to appeal against interlocutory decisions.[47]

*E. Inter-American Court of Human Rights*

38. The IACtHR has dealt with the second requirement in several cases, starting with the *Yatama v. Nicaragua case* (2005). [48] According to the facts of this case, the Yatama indigenous group was not allowed to participate in the 2000 elections in Nicaragua. The decision was made by the Nicaraguan Supreme Electoral Council (a Nicaraguan administrative body) without apparent justification and no proper notification. It simply issued an unreasoned resolution stating the decision.[49]

39. The IACtHR found that Nicaragua failed to duly justify the decision, thus violating the Yatama indigenous group's judicial guarantees and its right to due process.[50] [51] As a result, the IACtHR condemned Nicaragua: (i) to compensate the applicants with 80.000 US dollars; (ii) to publish the relevant paragraphs of the IACtHR's decision in (a) the official national gazette and in another newspaper with widespread national circulation; and (b) a radio station with broad coverage in the Atlantic Coast; (iii) to adopt the necessary legislative measures to establish a simple, prompt and effective judicial recourse against the decisions made by the Nicaraguan Supreme Electoral Council (this included the derogation of any norm that could be an obstacle for the effective exercise of such judicial recourse); and (iv) to reform Electoral Act No. 331 of 2000 to ensure that members of indigenous and ethnic communities may participate in electoral processes effectively. Moreover, the IACtHR stated that the judgment also constituted, *per se*, a form of reparation.[52]

[43] ECtHR. *Nikolay Genov v. Bulgaria* case. Judgement. 13 July 2017.
[44] Ibid. Para. 27.
[45] ECtHR. *Suominen v. Finland* case. Judgement. 24 July 2003. Para. 34.
[46] Ibid. Para. 25.
[47] Ibid. Paras. 35-37.
[48] IACtHR. *Yatama v. Nicaragua* case. Judgment. 23 June 2005.
[49] Ibid. Para. 154.
[50] Ibid. Para. 152.
[51] Ibid. Para. 164.
[52] IACtHR. *Yatama v. Nicaragua* case. Judgment. 23 June 2005. Paras. 230-260.

40. The Yatama precedent has been followed by the IACtHR since 2005 in more than 15 cases,[53] the last one being the *Rico v. Argentina case* (2019).[54]

41. Moreover, over the years, the IACtHR has elaborated, based on the Yatama precedent, the State Parties' duty to state grounds (also known as the 'duty to motivate'). In this regard, it is particularly relevant the *Apitz Barbera et al. v Venezuela* case (2008).[55] According to the facts of the case, the five applicants were appointed in September 2000 by the Judicial Commission of the Supreme Court of Justice of Venezuela as provisional judges for the 'First Court of Administrative Disputes'. Three years later, in October 2003, three of the five judges were deemed by an administrative decision of the said Judicial Commission to have committed a *'serious legal error of an inexcusable character',* as a result of approving a request against an administrative decision related to the sale of real estate.[56] No grounds were stated for this decision. As a consequence, they were subjected to criminal proceedings, a disciplinary investigation, precautionary suspension and removal from office.[57]

42. In subsequent cases, such as in the *Chocrón Chocrón v. Venezuela* case (2011),[58] the IACtHR has elaborated on the content of the States Parties' duty to state grounds by making clear that State bodies (including national courts) have the obligation to provide in their decisions the facts, the grounds and the legislation on which their decisions are grounded, no matter the nature of the State Body that issues the decision.[59]

43. According to the IACtHR, the duty to motivate is a fundamental one, since it is related to the *exteriorization of the reasoned justification that allows a conclusion to be reached*. Its fulfilment brings credibility to the decisions of State bodies and shows their lack of arbitrariness in decision making.[60] Its lack of fulfilment constitutes a violation of the right to due process under Article 8(1) of ACHR.[61]

## SECTION 3. THE TRIAL CHAMBER SHALL ISSUE ONE DECISION

[53] For example: IACtHR. Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Judgment. 21 November 2007. IACtHR. *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* case. Judgment. 5 August 2008. IACtHR. *Chocrón Chocrón v. Venezuela* case. Judgment. 1 July 2011. *López Mendoza v. Venezuela* case. Judgment. 1 September 2011. IACtHR. *J. v. Perú* case. Judgment. 27 November 2013. IACtHR *Landaeta Mejías Brothers et al. v. Venezuela* case. Judgment. 27 August 2014. IACtHR. *Maldonado Ordóñez v. Guatemala* case. Judgment. 3 May 2016. IACtHR. *V.R.P., V.P.C. et al. v. Nicaragua* case. Judgment. 8 March 2018.
[54] IACtHR. *Rico v. Argentina* case. 2 September 2019.
[55] IACtHR. *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* case. Judgment. 5 August 2008.
[56] Ibid. Para. 33.
[57] Ibid. Paras. 77-91, 136.
[58] IACtHR. *Chocrón Chocrón v. Venezuela* case. Judgment. 1 July 2011. Para. 118.
[59] In the *Chocrón Chocrón v. Venezuela* case, Mercedes Chocrón Chocrón was appointed as a temporary judge by the Judicial Commission of the Supreme Court of Justice of Venezuela. Nevertheless, after merely three months, the same Commission through an administrative decision, with no full or reasoned explanation, removed judge Chocrón from her position.
[60] IACtHR. *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* case. Judgment. 5 August 2008. Para. 77.
[61] Ibid. Para. 78.

44. The third requirement under article 74(5) of the ICC Statute is that '*the Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority'.*

*A. International Criminal Tribunals for the former Yugoslavia and Rwanda*

45. Rules 98 Ter (c) (trial proceedings) and 117 (c) (appellate proceedings) of the ICTY Rules of Procedure and Evidence provides for the Chambers' duty to issue one decision, to which separated or dissenting opinions may be appended. Rules 88 (c) (trial proceedings) and 118 (c) (appellate proceedings) of the ICTR Rules of Procedure and Evidence use the same language to provide for the Chambers' duty to issue one decision. Nevertheless, the International Law Clinic has found no ICTY or ICTR case law on the content of the Chambers' duty to issue one decision.

*B. Human Rights Committee*

46. No HRC communication has been found by the International Law Clinic in relation to the duty to issue one decision.

*C. European Court of Human Rights*

47. No ECtHR case law has been found by the International Law Clinic in relation to the duty to issue one decision.

*D. Inter-American Court of Human Rights*

48. No IACtHR case law has been found by the International Law Clinic in relation to the duty to issue one decision.

**SECTION 4. THE DECISION OR A SUMMARY THEREOF SHALL BE DELIVERED IN OPEN COURT**

49. The fourth and last requirement under Article 74(5) of the ICC Statute is that '*the decision or a summary thereof shall be delivered in open court'*.

*A. International Criminal Tribunals for the former Yugoslavia and Rwanda*

50. Rule 98 Ter (a) of the ICTY Rules of Procedure and Evidence and Rule 88 (a) of the ICTR Rules of Procedure and Evidence establish that '[t]he Judgment shall be pronounced in public, on a date of which notice shall have been given to parties and counsel and at which they shall be entitled to be present, subject to the provision of Rule 102 (B).' Similar provisions can be found in Rules 117 (d) and 118 (d) of the ICTY and ICTR Rules of Procedure and Evidence in relation to appellate decisions. Nevertheless, the International

Law Clinic has found no ICTY or ICTR case law on the specific content of the fourth requirement.[62]

*B. Human Rights Committee*

51. The HRC addresses in General Comment No. 32 the link between the Chambers' obligation to have judgments and decisions delivered in open court, and the interest of the parties to the proceedings that ought to be protected in order to guarantee their right to a public hearing.[63] Nevertheless, the International Law Clinic has found no HRC case law on the specific content of the fourth requirement.

*C. European Court of Human Rights*

52. The ECtHR has dealt with the fourth requirement in a number of cases, including *Pretto and others v. Italy* (1983)[64], *Axen v. Germany* (1983)[65] and *Ryakib Biryukov v. Russia* (2008)[66]. The last case is especially relevant for the present work.

53. According to the facts of the *Ryakib Biryukov v. Russia* case, the applicant brought proceedings for damages against the hospital where he was given first aid. He claimed that the hospital's medical staff did not provide him with appropriate medical care and that their negligence had led to the loss of his arm. The applicant appealed on the grounds that a reasoned judgment had not been 'pronounced publicly', as required by article 6 (1) of the ECHR[67]. According to Russia, the domestic court read out the provisions of its decision at the hearing in the applicant's presence, and later served him a copy of its reasoned decision.

54. In light of the above-mentioned, the ECtHR ruled in favour of the applicant because, although States Parties enjoy, when designing their judicial systems, a wide margin of appreciation to comply with the requirements of article 6 of the ECHR, the requirement of publicity in the delivery of judgments must always be fulfilled[68], as a core component of the right to a fair trial under art. 6 (1) of the ECHR.[69]

---

[62] The requirement of openness in trial proceedings is not absolute. According to Rule 20 (4) of the ICTY Statute, '[t]he hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.' In the Karadzic case, the ICTY has emphasized the need to find a balance between the parties' right of access to material to prepare the case and the need to guarantee the protection of witnesses. See ICTY. Trial Chamber. *Prosecutor v. Radovan Karadzic*. Decision on motion for access to confidential materials in completed cases. 5 June 2009. Para. 17-18 ICTY.

[63] HRC. General Comment No. 32. *Article 14. Right to equality before courts and tribunals and to a fair trial*. Para. 15.

[64] ECtHR. *Pretto and others v. Italy* case. Judgment 8 December 1983.

[65] ECtHR. *Axen v. Germany* case. Judgement. 8 December 1983.

[66] ECtHR. *Rayakib Biryukov v. Russia* case. Judgment. 17 January 2008.

[67] Ibid. Para. 7.

[68] Ibid. Para. 30.

[69] For the ECtHR, the special features of the relevant national proceeding must be analysed as a whole, in light of the object and purpose of the fair trial guarantees provided for Article 6 (1) of the ECHR. Ibid. Para. 32.

55. Moreover, the ECtHR found in this case that its decision provided in itself to the applicant a sufficient compensation for the non-pecuniary damage that he had sustained.[70] For the ECtHR, an appropriate remedy for breaches of the States Parties' duty to pronounce the judgement publicly is the declaration of such a violation by the ECtHR.

*D. Inter-American Court of Human Rights*

56. Finally, no IACtHR case law has been found by the International Law Clinic in relation to the specific content of the fourth requirement.

## TABLE OF CASES

- **International Cases**

**A. European Court of Human Rights**

Case of Pretto and others v. Italy. Judgment 8 December 1983.

Case of Axen v. Germany. Judgement. 8 December 1983.

Case of Hadjianastassiou v. Greece. Judgement. 16 December 1992.

Case of Ruiz Torija v. Spain, Judgment. 9 December 1994.

Case of Suominen v. Finland. Judgement. 24 July 2003.

Case of Rayakib Biryukov v. Russia. Judgment. 17 January 2008.

Case of Taxquet v. Belgium. Judgement. 16 November 2010.

Case of Cerovšek and Božičnik v. Slovenia, 7 March 2017.

Case of Nikolay Genov v. Bulgaria. Judgement. 13 July 2017.

**B. Inter-American Court of Human Rights**

Case of Yatama v. Nicaragua. Judgment. 23 June 2005.

Case of Claude-Reyes et al v. Chile. Judgement 19 September 2006.

Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Judgment. 21 November 2007.

Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Judgment. 5 August 2008.

Case of Chocrón Chocrón v. Venezuela. Judgment. 1 July 2011.

Case of López Mendoza v. Venezuela. Judgment. 1 September 2011.

Case of J. v. Perú. Judgment. 27 November 2013.

Case of Landaeta Mejías Brothers et al. v. Venezuela. Judgment. 27 August 2014.

Case Maldonado Ordóñez v. Guatemala. Judgment. 3 May 2016.

[70] Ibid. Para. 51.

Case of V.R.P., V.P.C. et al. v. Nicaragua. Judgment. 8 March 2018.
Case of Rico v. Argentina. Judgment. 2 September 2019.

**C. United Nations Commission on Human Rights**

Case of Pratt and Morgan v. Jamaica. Communication No. 210/1986.
Case of Roberto Zelaya Blanco v. Nicaragua. Communication Num. 328/1988.
Case of Lenford Hamilton v. Jamaica. Communication Num. 333/1988.
General Comment No. 32. Article 14. Right to equality before courts and tribunals and to fair trial. U.N. Doc. CCPR/C/GC/32 (2007).
General Comment No. 13. Article 14. Administration of Justice, Equality before the Courts and the Right to a Fair and a Public Hearing by an Independent Court Established by Law. 04/13/1984.

**D. International Criminal Court**

Appeals Chamber. The Prosecutor v. Jean-Pierre Bemba Gombo. Judgement. 8 June 2018.

**E. International Criminal Tribunal for Rwanda**

Appeals Chamber. Prosecutor v Kayishema. Judgment 1 June 2001.
Appeals Chamber. Prosecutor v. Alfred Musema. Judgment 16 November 2001.
Appeals Chamber. Prosecutor v. Georges Rutaganda. Judgment 26 May 2003.
Appeals Chamber. Prosecutor v. Eliézer Niyitegeka. Judgement 9 July 2004.
Appeals Chamber. Prosecutor v. Laurent Semanza. Judgement 20 May 2005.
Appeals Chamber. Prosecutor v. Juvénal Kajelijeli. Judgment 23 May 2005.
Appeals Chamber. Prosecutor v. Aloys Simba. Judgement 27 November 2007.
Appeals Chamber. Prosecutor v. Tharcisse Muvunyi. Judgment 29 August 2008.
Appeals Chamber. Prosecutor v. Francois Karera. Judgement. 2 February 2009.
Appeals Chamber. Prosecutor v. Augustin Ndindiliyimana. Judgement. 11 February 2014.

**F. International Criminal Tribunal for the former Yugoslavia**

Appeals Chamber. The Prosecutor v. Furundzija. Judgment 20 July 2000.
Appeals Chamber. Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. Judgement. 12 June 2002.

Appeals Chamber. Prosecutor v. Kvocka et al. Judgement 28 February 2005.

Appeals Chamber. Prosecutor v. Mladen Naletilic, and Vinko Martinovic. Judgement 3 May 2006.

Appeals Chamber. Prosecutor v. Fatmir Limaj. Judgement. 27 September 2007.

Appeals Chamber. Prosecutor v. Momcilo Krajisnik. 17 March 2009.

Trial Chamber. Prosecutor v. Radovan Karadzic. Decision on motion for access to confidential materials in completed cases. 5 June 2009.

## BIBLIOGRAPHY

Klamberg, Mark. 'Commentary on the Law of the International Criminal Court'. Brussels: Center for International Law Research and Policy, Torkel Opsahl Academic EPublisher, 2017. https://www.legal-tools.org/doc/aa0e2b/pdf/

Terrir, Frank. 'The Rome Statute of the International Criminal Court: A Commentary'. Edited by Paola Gaetam, John R.W.D. Jones, Antonio Cassese. Vol. II. New York, New York: Oxford University Press, 2002.