Fair Trial and Defence Rights in Criminal Matters: An Introduction

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Abstract

The purpose of this article is to give a comprehensive and clear presentation of the international human rights framework relevant to the right to a fair trial. This article also has focused on the right to a defence and the rights of the defence in international human rights law.

The legal sources referred to in this article are the major international legal instruments dealing with the right to a fair trial. In order to find examples and more detailed explanations, it also refers to the case-law developed by some of the international bodies in charge of looking at complaints from individuals, i.e. mostly the United Nations' Human Rights Committee, in charge of applying the International Covenant on Civil and Political Rights (ICCPR) from ١٩٦٦ and the European Court of Human Rights, which is the most relevant international human rights mechanism for more than forty European countries.

Some of the international standards that the article refers to are actually legally binding for the countries which are parties to them; that is the case of the ICCPR. Others are belonging to the category of soft law, as for example the basic principles on the role of lawyers established by the United Nations, which are not as such legally binding, but participate in creating a larger legal framework[١].

It is this framework which is presented in this article in order to understand the coherence of the safeguards that have been put in place concerning criminal proceedings. It

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١. Basic Principles on the Role of Lawyers, adcpted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of offender, Havana, Cuba, ٢٧ August to ٧ September ١٩٩٠.

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is important to point out at the fact that the right to a fair trial has both overall implications and very concrete and detailed implications. As to the overall implications, the right to a fair trial hangs over all other human rights and it can be advocated that all human rights comprise procedural rights as an inherent part of their effective protection. The very concrete, detailed implications concern among others more technical arrangements of proceedings before domestic courts.

The article begins with some short introductory remarks on the right to a fair trial (I), then it envisages the right to a defence (II) and the rights of the defence or defence rights (III).

It shall be underlined that this article only deals with criminal proceedings. As a matter of fact the relevant provision of the ICCPR focuses on criminal charges and proceedings; in an European context, Article ٦ of the European Convention on Human Rights (ECHR) relates in the first place to proceedings concerning the determination of "civil rights and obligations". However, most of its provision concerns, as in Article ١٤ of the ICCPR, criminal charges.

Keywords: Fair Trial, Right of Defence, Defence Rights, International Human Rights.

١- Introduction to the Right to a Fair Trial

The right to a fair trial is an essential human right. When individuals face criminal prosecution and trial, they are confronted by the State authorities, as they come into contact with the police, the court system and the prison system. The risk of human rights abuse starts from the moment when suspicion is raised against a person and through the whole criminal proceedings, i.e. through the arrest, in pre-trial detention, during the trial, during all appeals, and through the imposition of any punishment. Torture and ill-treatment of persons in custody or detention, conviction of innocent individuals, or manifestly unfair trials make the justice system loose its credibility and the State failed in its duties and responsibilities.

Every State has the duty to bring to justice those responsible for criminal offences. However, when people are subjected to unfair trials, justice is not served.

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Ubi jus, ibi remedium: If a fair procedure does not prevent unfair decisions, there is very little chance that an unfair procedure leads to a fair decision. In that respect, the effectivity of the protection of human rights depends on the remedies and procedures existing for their protection.

The international community has developed fair trial standards which are designed to define and protect individuals' rights through all the stages of a criminal trial. International human rights standards are drafted to apply to all legal systems in the world and take into account the rich diversity of legal procedures. They set out the minimum guarantees that all systems should provide: these international human rights standards represent a collective agreement by States on how they should treat an individual suspected of a crime.

The right to a fair trial is one of the universally applicable principles recognized in the Universal Declaration of Human Rights[١]. It has been reaffirmed and elaborated since ١٩٤٨ in legally binding treaties such as the International Covenant or, Civil and Political Rights[٢], and in numerous other international and regional treaties and non-treaty standards, adopted by the UN and by regional intergovernmental bodies[٣].

١. UDHR (١٩٤٨), Art. ٧ (equality before the law), Art. ٨ (right to an effective remedy), Art. ١٠ (right to a fair and public hearing and right to an independent and impartial tribunal), Art. ١١,١ (presumption of innocence and guarantees necessary for the defence of everyone charged with a penal offence), Art. ١١,٢ (no crime or punishment without a law).

٢. International Covenant on Civil and Political Rights (١٩٦٦). Art. ١٤: Right to be informed of the nature and cause of the charges, right to a fair and public hearing by a competent, independent and impartial tribunal established by law, right of the accused to have adequate time and facilities to prepare a defence, right to be tried without undue delay, right to defend oneself in person or through legal assistance, right to call witnesses, right to have free assistance of an interpreter where necessary, right of appeal in criminal matters. See also, ١١, ١٥, ١٦ and ٢٦.

٣. As far as international instruments are concerned, see, for example: Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Article ١٥; International Convention on the Elimination of All Forms of Racial Discrimination, Article ٥ (a); Convention on the Rights of the Child, Article ٤٠; Convention relating to the Status of Refugees, Article ١٦; Common Article ٣ of the Four Geneva Conventions; Protocols Additional to the Geneva Conventions of ١٢ August ١٩٤٩, and relating to the Protection of Victims of International Armed Conflicts: (Protocol ١). Art. ٧٥ and (Protocol II), Article ٦.

The following drawing tries to sketch an overview of the general human right principles relevant to the notion of fair trial and applicable to criminal law, procedure and punishment:

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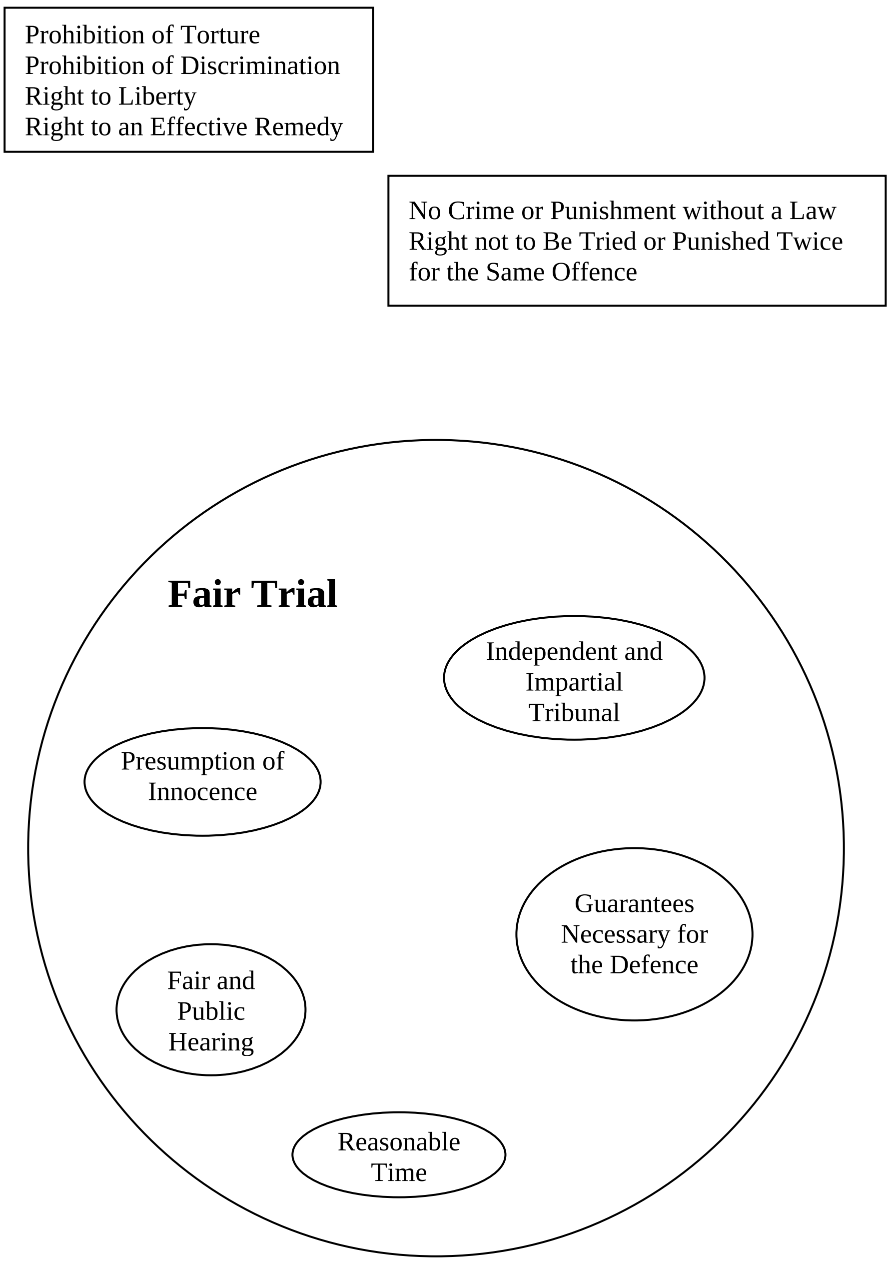

(۱) The first box contains the human rights which are closely related to fair trial, but also encompass fair trial and deals with many other aspects of an individual's life.

Prohibition of torture

The right to a fair trial cannot be realized if conditions of custody and detention interfere with the possibility for the defendant to prepare for trial, or if the individual is tortured or ill-treated[۱]. It is fundamental that people held in custody are entitled to prompt access to a doctor or a judicial official (lawyer, judge, etc…). In addition, if the detainee is a foreign national, he/she must have access to consular staff[۲]. Clearly, access to the outside world is an essential safeguard against human rights abuses, especially against gross violations of human rights that take place in the case of "disappearances" or *incommunicado* detention. In this respect, guaranteeing the access of the person in custody or detention is the most elementary and vital step in the process of guaranteeing a fair trial. Under all circumstances, if evidence have been elicited as a result of torture of other prohibited forms of coercion, they must be excluded by the courts.

Right to liberty

Furthermore, according to the right to liberty, an arrest or detention is permissible only if carried out in accordance with the law. In this respect, an arrest or detention can only be carried out by personnel authorized by law to do so[۳]. Accordingly,

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۱. See: ICCPR Art.۷ and ۱۰: Prohibition of torture
۲. Article ۳۶ of the Vienna Convention on Consular Relations from ۱۹۶۳
۳. See: ICCPR, Art. ۹: Right to liberty

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those deprived of their liberty should be brought promptly before a judge or other judicial officer, so that their rights can be protected. Furthermore, they have the right to challenge the lawfulness of their detention before a court, and to have the detention reviewed on a regular basis. In addition, the right to an affective remedy guarantees to everyone an access to courts in criminal matters as well as a right to appeal. Hence, everyone convicted of a criminal offence has the right to have the conviction and sentence reviwed by a higher tribunal.

Non - discrimination and equality before the law

The principles of non-discrimination and equality before the law operate in conjuction with the right to a fair trial. The right to equality in the context of the trial process includes a prohibition on discriminatory laws, the right to equal access to the courts and the right to equal treatment by the courts. In the ECHR system, the right to a fair trial is guaranteed to all persons within the territory of a Member State (art. ۱) regardless of their nationality and whether they are lawfully on the territory of the State.

(۲) The second box contains two specific principles directly related to criminal law, which have been at the core of national and international criminal law. The first principle is the one forbidding retroactive criminal legislation, i.e. the principle “no crime or punishment without a law” (*Nullum crimen, nulla poena sine lege*)”. According to this principle no one may be prosecuted for an act or omission which was not a criminal offence at the time that it was committed. The

second principle which is also mentioned in most international human rights instrument is the right not to be tried or punished twice for the same offence[1].

(۳) The right to a fair trial also includes more specific elements, which have been placed in the large circle.

First of all, everyone has the right to a trial by a competent, independent and impartial tribunal established by law. The tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial.

Second, the right to a fair hearing lies at the heart of the concept of a fair trial. The right to a fair hearing is specified by a number of concrete rights, such as the right to be presumed innocent, the right to defend oneself and the right to call and examine withnesses. However, the right to a fair hearing is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial. The right to a public hearing safeguards the fairness and independence of the judicial process, and helps to maintain public confidence in the justice system. Except in narrowly defined circumstances, court hearings and judgments must be public.

Finally, everyone charged with a criminal offence has the right to be heard and tried within a reasonable time or in other words "without undue delay". The length of time judged reasonable will depend on the circumstances of the case.

(۴) There exists many possibilities to reduce the scope of the right to a fair trial: the extent of these exceptions, limitations and derogations is prescribed by international human rights instruments.

Some international human rights treaties permit States to suspend certain fair trial rights during states of emergency and armed conflicts[1]. Any suspension of

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۱. For example: ICCPR, Art. ۱٤(۷) or ECHR, Prot.۷, Art.٤

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fair trial rights by a State must be strictly required by the situation, and reasonable in light of what is necessary to address an emergency threatening the life of the nation. During armed conflicts, international humanitarian law is applicable. The safeguards set out in the four Geneva Conventions of ١٩٤٩ and their Additional Protocols include guarantees of a fair trial for people charged with criminal offences. In case of international armed conflict, prisoners of war and civilians are protected under the Third Geneva Convention, the Fourth Geneva Convention and Additional Protocol I. In non-international armed conflicts, including civil wars, the safeguards in Article ٣ common to the four Geneva Conventions and in Additional Protocol II apply.

As far as military courts and tribunals are concerned, it is clear that the reason for having the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standard of justice. The ICCPR does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article ١٤[٢].

As far as juvenile justice is concerned, children are entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection. The best interests of the child must be of primary consideration in all actions concerning children, including those undertaken by courts of law, administrative or legislative bodies. In order to protect the child from stigmatization, the privacy of every child accused of breaking the law must be protected. The state has a duty to ensure that measures affecting children are

١. ICCPR, Art.٤, ECHR, Art. ١٥

٢. See general comment ١٣ on ICCPR Article ١٤ adopted on ١٢ Aprill ١٩٨٤ (A/٣٩/٤٠(١٩٨٤) Annex VI, pp. ١٤٣-١٤٧); CCPR/C/٢١/Rev.١, pp.١٢-١٦).

proportional to the gravity of the offence and take into consideration the personal circum stances of the child. Deprivation of liberty should be a measure of last resort, and for the shortest appropriate time. Juvenile justice systems should promote the physical and mental well-being of juveniles and take into account the desirability of rehabilitating the young person.

In addition, both the ICCPR and the ECHR have a limitation clause concerning the presence of the public and the medias at a trial. Article ٦ & ١, for example, stipulates that "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of the justice".

II. Right to a defence or right to legal representation[١]

According to ICCPR Article ١٤, paragraph ٣, everyone shall be entitled to a number of minimum guarantees in the determination of any criminal charge against him or her. They shall be tried in their presence and have the right to defend themselves, in person or through a lawyer; they must be informed, if they do not have legal assistance, of this right. They have the right to be assisted by a lawyer of their choice, or to have a lawyer assigned to assist them in the interests of justice, free of charge if they cannot afford to pay. It shall be underlined that the right to legal representation in criminal proceedings, and all its attendant rights are available to everyone in a country, "in full equality".

١. Part II and III of the Article are based on the commentary by MM. Van Djik and Van Hoof on ECHR Article ٦: *Theory and Practice of the European Convention on Human Rights*, Kluwer, ١٩٩٨, ٣rd edition, pp.٣٩١-٤٧٩.

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١. When does the right arise?

In principle, the right to legal representation arises immediately on arrest (whether this is actually in a police station or elsewhere), although of course a reasonable time must be allowed for the lawyer to arrive[١].

However, the question of when the right to legal representation arises depends on the domestic law in the state concerned: if domestic law attaches consequences to the attitude of the suspect at the initial stage of police interrogation then this right applies and the assistance of the lawyer is required in the pre-trial phases. This is illustrated by the *John Murray* case[٢], in which the applicant had been denied access to a lawyer for the first ٤٨ hours of police interrogation. In this case, he had been told by the police that he had the right to remain silent but that adverse inferences could be drawn from his silence. In that way, he had been confronted from the beginning of his interrogation with an important dilemma concerning his defence. Consequently, the Court found a violation of ECHR Article ٦.

In case the assistance of a lawyer at the begining or during the interrogation is not required, it is fundamental that evidences be evaluated by the court during the trial in the presence of the defendant and his counsel; at this point they will then have the possibility to contradict the evidence. In addition, the prosecution will have to be able to prove that any confession made by the defendant has been made voluntarily.

When pre-trial proceedings are covered, the suspect is entitled to have legal representation throughout the questioning and interview stages of the proceedings.

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١. See for example: Rule ٩٣ of the Standard Minimum Rules for the Treatment of prisoners [Council of Europe Res. CM (٧٣) ٥] provides that "Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative".

٢. Eur. Court H.R., *John Murray v. United Kingdom,* ٨ February ١٩٩٦, A.١٩٩٦-I

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If the suspect has declined the offer of legal assistance at this early stage, is then charged with the offence, and still does not have legal representation, he should be reminded of his right and provided with a lawyer as soon as possible if he then wants to exercise that right.

۲. Right to defend oneself

If the accused decides to avail himself of the right to defend himself, he must be present at the proceedings in order to do it in a practical and effective manner. In this case, it is of course crucial that the defendant fully enjoys his right to adequate time and facilities for the preparation of his defence.

However, the right to defend oneself in person is subject to *restrictions* by national law and the judicial authorities concerned. In the *Gillow* case[۱], the Court accepted the requirement of representation by a lawyer to lodge an appeal "as a common feature of the legal systems in several member States of the Council of Europe". If the national law stipulates or the judicial authorities decides that the defendant must be assisted by a lawyer, he must be able himself to choose this lawyer and, in case of inability to pay for such legal aid, must have a lawyer assigned to him. Undoubtedly in such a system, legal aid is considered necessary in the interest of justice.

Clearly, the situation where an individual chooses to defend himself is, for obvious reasons, not the one raising concerns. The situation causing concern is the reverse situation where the defendant wanting legal assistance and representation is not able to exercise this right.

۳. Right to choose a lawyer

۱. Eur. Court H.R., *Gillow v. United Kingdom*, ۲٤ November ۱۹۸٦, A. ۱۰۹, p.۲۷

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The right of a defendant to choose his or her own legal counsel is explicity provided by international human rights standards; however, this right is not an absolute right; generally, it only applies when the defendant has the means to pay for his legal representation.

۴. Legal aid

International human rights instruments provide explicitly for the defendants's righs to free legal representation in the case he has no sufficient means to pay for legal assistance[۱].

The right to free representation is not unconditional: the ECHR and the ICCPR (and the Rome Statute) all provide that this right arises "when the interests of justice so require". The problem is then to determine when the interests of justice so require. For instance, the European Court of Human Rights operates with three factors[۲]:

(۱) The seriousness of the offence and the severity of the potential sentence.

The European Court of Human Rights considers that, in principle the interests of justice call for legal representation in cases where deprivation of liberty is at stake[۳]. However, some States also extend this principle to cover offences that carry not only a risk of a custodial sentence, but also loss of employment or livelihood. Some other countries may also extend it to "minor" offences such as road traffic offences or shoplifting;

۱. According to the case law of the European Court of Human Rights, the defendant does not have to prove beyond all doubt that he lacks the means to pay for his defence (see: Eur. Court H.R., *Pakelli v. Germany*, ۲۵ April ۱۹۸۳, A. ٦٤, & ٣٤). States have found different way of coping with this: Some states operate with a "means test" to establish whether the defendant has no sufficient means to pay for his defence. Others provide free legal representation to all on the basis that a means test is expensive to operate and that some of the costs can be recovered from the defendant in some circumstances.
۲. Eur. Court H.R., *Quaranta v. Swilzerland,* ۲٤ May ۱۹۹۱, A. ۲۰٥ & ۳٥.
۳. Eur. Court H.R., *Benham v. United-Kingdom* ۱۰ June ۱۹۹٦, Rep. ۱۹۹٦-III .

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(۲) The complexity of the case, and

(۳) The personal situation of the defendant (foreigner, young, underprivileged background, drug addict, social benefits, no real occupational training, etc …).

The right to free legal representation does not confer a right to choose a specific lawyer; the situation varies from State to State, but in any case, any lawyer appointed by the defendant or the public authorities has to offer an effective assistance[۱]. Indeed, it is not enough that the State appoints a lawyer; the legal assistance provided must also be effective and satisfy a number of minimum requirements. For instance, the State is under a duty to ensure that the lawyer has the information necessary to conduct the defence. In addition, the defendant should receive from his lawyer any information necessary to understand the nature and consequences of the charges held against him.

III. Rights of the defence

This part of the article deals with the minimum rights of a criminal suspect or defendant.

۱. Presumption of innocence

Every person charged with a criminal offence has the right to be presumed innocent until and unless proved guilty according to law after a fair trial. According to the European Court of Human Rights, the presumption of innocence is violated if "without the accused having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is

۱.Eur. Court H.R., *Artico v. Italy,* ۱۳ May ۱۹۸۰, A.۳۷.

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guilty"[۱]. In that respect, a reasoning by which it is only suggested that the person in question is guilty is already sufficient for such a violation.

The most important aspect of the presumption of innocence concerns the foundation of the conviction. This aspect is very closely connected with the requirement of the court's impartiality: "The Court has to presume the innocence of the accused without any prejudice and may sentence him only on the basis of the evidence put forward during the trial, which moreover has to constitute lawful evidence recognized as such by law"[۲].

In addition, the presumption of innocence has consequences for the role played by the prosecution as well as for the processing of evidences and statements in court. For example, it is for the prosecution to inform the defendant of the case that will be made against him, in order for him to be able to prepare and present his defence accordingly. The prosecution must also produce evidence sufficient to convict him. Furthermore, every instance giving rise to the least doubt with regard to the evidence has to be construed in favour of the defendant. Finally, if during the trial, statements are made or produced by the prosecutor, witnesses or experts from which bias on their part is evident, the court has to make a stand against those statements in order not to appear biased as well.

The presumption of innocence also a number of implications as far as the interrogation of an accused is concerned, as for instance, the right to remain silent (which is also a safeguard against ill-treatment) and the right not to be compelled to testify or confess guilt.

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۱. Eur. Court H.R., *Minelli v. Switzerland,* ۲۵ March ۱۹۸۳, A. ٦۲, &۱۸.

۲. Van Dijk and van Hoof (۱۹۹۸), p.٤٥۹. The European Court of Human Rights also considers that the principle of the presumption of innocence "require, *inter alia*, that when carrying out their duties, the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused." (Eur. Court H.R., *Barberá, Messegué and Jabardo v. Spain,* ٦ December ۱۹۸۸, A.۱٤٦, & ۳۳).

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۲. Right to be informed of the charges

Those who are arrested or detained must be notified at once of the reasons for their arrest or detention and of their rights, including their right to a lawyer. This implies that a number of positive obligations is imposed on the public authorities.

The suspect is granted the right to be informed promptly, in a language that he understands and in detail, of the nature and cause of the accusation against him; this right is closely connected to two other rights: on the one hand, the right of the accused to have adequate time and facilities for the preparation of the defence and, on the other hand, the obligation of the State to make provisions for a translation of the information or for the presence of an interpreter.

The accused must also be informed promptly of any charges against him, i.e. not only the nature of the charge against him but also the factual and legal grounds on which the charge is based.

The question of whether the required information has been furnished promptly has to be assessed in each individual case on the basis of its specific circumstances.

۳. Right to adequate time and facilities to prepare a defence

In order to ensure that the right to defence is effective, those who are accused of a criminal offence and their lawyer, if any, must have adequate time and facilities to prepare the defence.

If the person is in pre-trial detention, this right must be respected without the time between charge and trial being excessive since Article ۹(۳) of ICCPR provides that persons arrested or detained should be tried promptly. In that respect, it is important that the accused can have contact with his counsel. In the European

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human rights system, the question of the contact between the accused and his client is attached to the one of access to court; the European Court of Human Rights has considered that the right to access to court has been violated if a detainee is not permitted to correspond with a lawyer or another person giving legal assistance. The European Court of Human Rights has also considered that the right to legal representation (Article ٦ & ٣.c) embodies the right of an accused to communicate with his counsel out of hearing of a third person. Without this requirement, the guarantee offered by the Convention would not be practical and effective.

In the Basic principles on the role of lawyers[١], the United Nations have added that it is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time (Principle ٢١). Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential (Principle ٢٢).

۴. Right to call and examine witnesses

All people charged with a criminal offence have the right to call witnesses on their behalf, and to examine, or have examined, witnesses against them. This element is closely related to the principle of “equality of arms” which is an element of a fair hearing.

١. Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of crime and the treatment of Offenders, Havana, Cuba, ٢٧ August to ٧ September ١٩٩٠.

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۵. Right to an interpreter and to translation

Those who are charged with a criminal offence have the right to the assistance of a interpreter, free of charge, if they do not understand or speak the language used in court. They also have the right to have documents translated.

According to the European Court of Human Rights, this right entails the right to receive the assistance of an interpreter, without subsequently having claimed back from him payment of the costs of interpretation after conviction[۱]. Later on the European Court of Human Rights extended that principle to "documentary material"[۲]. However, the Court also help that the right to translation does not go so far as to require a written translation of all items of written evidence or official documents in the procedure; this duty is limited to those documents which the defendant must understand in order to have a fair trial[۳].

Conclusion

This article has presented an overview of the right to a fair trial and of most defence rights in criminal matters in order to comprehend the coherence of the safeguards that have been put in place in international human rights law.

A State that ensures a fair trial to all persons charged with criminal offences, both ordinary and political offences, is thereby fulfilling a number of its international – and often – constitutional – human rights obligations.

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۳. See *supra: Kamasinski.*

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