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## **Chapter 7**

# The right to a fair trial Part II: from trial to final judgement

Facilitator's Guide

## Learning objectives I

- To familiarize course participants with some of the international legal standards that exist concerning the rights of persons charged with criminal offences throughout the trial stage, and the application of these standards by international monitoring organs
- To make the participants aware of the importance of applying these legal standards in order to protect a wide number of human rights in a society based on the rule of law

## Learning objectives II

 To create awareness among the participating judges, prosecutors and lawyers of their essential role as pillars of the enforcement of the rule of law including the right to a fair trial in all circumstances, including in a crisis

### **Questions I**

- Are you already conversant with the international legal standards relating to a fair trial?
- Do these standards form part of the national legal system within which you work?
- If so, what is their legal status and have you ever been able to apply them?

### **Questions II**

- In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – in ensuring a person's human rights at the pretrial or trial stages?
- If so, what were these concerns or problems and how did you address them, given the legal framework in which you work?
- Which issues would you like to have specifically addressed by the facilitators during this course?

### **Questions III**

 Would you have any advice to give to judges, prosecutors and lawyers exercising their professional responsibilities in difficult situations that might help them secure the application of fair trial standards?

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14 (1):

... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18 (1):

... In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

### Key legal texts II

The African Charter on Human and Peoples' Rights, article 7:

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

[...]

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

### Key legal texts III

The American Convention on Human Rights, article 8 (1):

Every 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, labor, fiscal, or any other nature.

### **Key legal texts IV**

The European Convention on Human Rights, article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .

### **Key legal texts V**

The Statute of the International Criminal Court, article 67 (1):

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially . . .

### What it means in general I

The right to a fair trial can be violated in many ways, but as a general principle it has always to be borne in mind that the accused person must at all times be given a genuine opportunity to answer the charges, challenge evidence and cross-examine witnesses, and to do so in a dignified atmosphere.

### What it means in general II

Failures and shortcomings at the stage of the criminal investigation may seriously jeopardize the right to fair trial proceedings and thereby also prejudice the right to be presumed innocent.

# The right of access to a court and the right to justice

#### What it means

The right of access to the courts means that no one must be prevented either by law, administrative procedures or material resources from addressing him or herself to a court or tribunal for the purpose of vindicating his or her rights.

Men and women are entitled to equal access to the courts.

# The right to equality of arms in adversarial proceedings

### What it means

The right to equality of arms or the right to truly adversarial proceedings in civil and criminal matters forms an intrinsic part of the right to a fair trial and means that there must at all times be a fair balance between the prosecution/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.

## Compelling the attendance of witnesses

Under article 14 (3) (e) of the International Covenant on Civil and Political Rights, a court shall exercise the same legal powers to compel the attendance of witnesses and the examination or cross-examination of any witnesses for the defence as are available to the prosecution.

### Judge's instructions to the jury

In trial by jury, the judge's instructions to the jury must be impartial and fair in that the case of both the prosecutor and the defence must be presented in such a way as to ensure the right to a fair trial, which must be free from arbitrariness. A violation of this essential duty amounts to a denial of justice.

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14 (1):

... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

### Key legal texts II

The American Convention on Human Rights, article 8 (5):

Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

### Key legal texts III

The European Convention on Human Rights, article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but 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 justice.

#### Key legal texts IV

The Statute of the International Criminal Court:

Article 67 (1): In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially . . ..

Article 68 (2): As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

### **Key legal texts V**

The Statute of the International Criminal Court, article 74 (5):

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 decision or a summary thereof shall be delivered in open court.

#### What it means

As a minimum, every person charged with a criminal offence has the right to public proceedings in the court of first instance and at all levels of appeal proceedings if the appeal concerns an assessment of both facts and law including the question of guilt.

A judgement in a criminal case or a suit at law must be made public except in cases involving juveniles, matrimonial disputes or the guardianship of children. At the appeal stage, the duty to make a public pronouncement of judgements may in some cases be satisfied by making the relevant judgements available to the public at the court registry.

# The right to be tried "without undue delay" or "within a reasonable time"

#### **Key legal texts**

The right to be tried "without undue delay" is provided for in:

- Article 14 (1) of the International Covenant on Civil and Political Rights
- Article 18 (3) (c) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Article 67 (1) (c) of the Statute of the International Criminal Court

The right to be tried "within a reasonable time" is guaranteed by:

- Article 7 (1) (d) of the African Charter on Human and Peoples' Rights
- Article 8 (1) of the American Convention on Human Rights
- Article 6 (1) of the European Convention on Human Rights

# The right to be tried "without undue delay" or "within a reasonable time"

#### What it means

Everyone charged with a criminal offence has the right to be tried without undue delay/within a reasonable time. All States have a duty to organize their judiciary in such a way that this right can be effectively ensured. The accused cannot be blamed for delays caused by his or her making use of the right not to speak or to cooperate with the judicial authorities. Judicial delays can be attributed to the accused only in cases of deliberate obstructive behaviour.

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

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

[...]

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

[...]

(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay[.]

### Key legal texts II

The African Charter on Human and Peoples' Rights, article 7:

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

 $[\ldots]$ 

(c) The right to defence, including the right to be defended by counsel of his choice.

#### Key legal texts III

The American Convention on Human Rights, article 8:

2. . . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

 $[\ldots]$ 

- (d) The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- (e) The inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

### Key legal texts IV

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:

 $[\ldots]$ 

(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

#### **Key legal texts V**

The Statute of the International Criminal Court, article 67:

 In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

#### What it means I

Everyone has the right to defend himself or herself in person or to appoint a lawyer of his or her own choice in order to ensure an efficient defence.

The right to legal assistance must be effectively available, in particular in capital punishment cases. The domestic courts have a duty to ensure that the accused enjoys an effective defence.

Incommunicado detention cannot be used to violate the right to have effective access to one's lawyer.

#### What it means II

If a person accused of a criminal offence has insufficient means to pay for a lawyer, and if the interests of justice so require, that person has the right to free legal aid. The interests of justice relate to aspects such as the severity of the crime and potential sentence that might be imposed as well as the complexity of the case.

The accused person must have adequate time and facilities to communicate with his of her legal counsel. Their communications are privileged and must be confidential.

## The right to be present at one's trial

#### **Key legal texts**

The right to be tried in one's presence is expressly provided for by:

- Article 14 (3) (d) of the International Covenant on Civil and Political Rights
- Article 67 (1) (d) of the Statute of the International Criminal Court
- Article 18 (3) (d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The right to be tried in one's presence is guaranteed by article 6 (1) of the European Convention on Human Rights through interpretation, this right being consistent with the "object and purpose" of the article.

## The right to be present at one's trial

### What it means

An accused person has the right to be present at his or her trial. Trials in absentia may be acceptable in special circumstances but must preserve the rights of an effective defence. Once an accused, who has not wilfully tried to avoid justice, is aware of the proceedings, he or she should be entitled to a new determination of the merits of the charge.

# The prohibition on self-incrimination The right to remain silent The prohibition on the use of evidence obtained through unlawful means

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

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

[...]

(g) Not to be compelled to testify against himself or to confess guilt."

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

 $[\ldots]$ 

(g) Not to be compelled to testify against themselves or to confess guilt.

The prohibition on self-incrimination
The right to remain silent
The prohibition on the use of evidence obtained through
unlawful means

### Key legal texts II

The American Convention on Human Rights, article 8:

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

- (g) The right not to be compelled to be a witness against himself or to plead guilty.
- 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

The prohibition on self-incrimination
The right to remain silent
The prohibition on the use of evidence obtained through
unlawful means

### Key legal texts III

Article 67 (1) (g) of the Statute of the International Criminal Court provides that an accused shall have the right:

Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

The prohibition on self-incrimination
The right to remain silent
The prohibition on the use of evidence obtained through
unlawful means

### **Key legal texts IV**

#### **Guidelines on the Role of Prosecutors**

Guideline 16: "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

The prohibition on self-incrimination
The right to remain silent
The prohibition on the use of evidence obtained through unlawful means

#### What it means I

The right of an accused not to be compelled to testify against himself or herself remains valid throughout the trial proceedings. It means that there must be an absence of both direct and indirect physical or psychological pressure from the investigating authorities for the purposes of obtaining a confession. An accused who has confessed guilt after such undue pressure must bring the matter before the competent authorities, including the judge(s) in the trial court, failing which he or she runs the risk of not having this undue compulsion considered in connection with the determination of the criminal charge.

The prohibition on self-incrimination
The right to remain silent
The prohibition on the use of evidence obtained through
unlawful means

#### What it means II

Judges and prosecutors must be attentive to any sign of unlawful compulsion related to confessions and are not allowed to invoke such confessions against the accused.

The use of evidence and confessions obtained by torture is unlawful, except against a person accused of torture as evidence that the statement was made, and should be expressly prohibited by national law.

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

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

[...]

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

[...]

(e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

### Key legal texts II

The American Convention on Human Rights, article 8:

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

 $[\ldots]$ 

(f) The right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.

### Key legal texts III

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:

 $[\ldots]$ 

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

### Key legal texts IV

The Statute of the International Criminal Court, article 67:

1. In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:

 $[\ldots]$ 

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

#### What it means I

An accused person has the right to call and examine or have examined witnesses against him or her under the same conditions as the prosecution. In order to guarantee a fair trial the domestic court must consequently provide an opportunity for adversarial questioning of witnesses.

The right to call witnesses does not mean that an unlimited number of witnesses may be called. Witnesses to be called must be likely to be relevant to the case.

### What it means II

Domestic courts must give the accused and his or her lawyer adequate time to prepare for the questioning of witnesses.

The judge must be attentive to manifest deficiencies in the defence lawyer's professional conduct, and, where necessary, intervene to ensure the right to a fair trial, including the equality of arms.

## The resort to anonymous witnesses: Is it lawful?

Testimony of anonymous victims and witnesses during trial is unlawful, but can in exceptional cases be used in the course of criminal investigations. The identity of anonymous victims and witnesses must be disclosed at such time before the beginning of the court proceedings as to ensure a fair trial.

#### Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

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

[...]

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

[...]

(f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court.

### Key legal texts II

The American Convention on Human Rights, article 8:

- 2. . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - (a) The right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court.

### Key legal texts III

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:

 $[\ldots]$ 

(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

### **Key legal texts IV**

The Statute of the International Criminal Court, article 67:

1. In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:

 $[\ldots]$ 

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.

### What it means

An accused person not able to speak and understand the language used by the authorities in the course of criminal proceedings against him or her has the right to free interpretation and translation of all documents to these proceedings. This right is independent of the final outcome of the trial and applies to aliens as well as nationals.

### The right to a reasoned judgement

#### What it means

Courts must at all times give reasons for their decisions, although they may not have to answer each argument made by the accused.

The convicted person is entitled to receive a reasoned judgement within a reasonable time; such judgement is essential for the purpose of lodging appeals.

The strict enforcement of these rights is particularly important in capital punishment cases.

### The freedom from ex post facto laws

#### What it means

Everyone has the right not to be convicted for conduct that did not constitute a criminal offence, under national or international law, at the time it was committed. This right applies at all times and can never be derogated from.

The prohibition on ex post facto laws is essential in order to ensure legal predictability, which means that laws must be clear enough to guide the conduct of the individual who must be able to know, possibly with some legal help, what conduct is criminal and what is not.

### The principle of ne bis in idem

### What it means

The right not to be tried twice for the same criminal offence is guaranteed by international law, as a minimum within one and the same State.

### Limits on punishment I

A heavier penalty cannot be imposed than that applicable at the time of the commission of the offence. If a lighter penalty has been introduced since, the convicted person shall benefit from it.

Punishment must be consistent with international human rights standards and must in no circumstances amount to torture, or to inhuman, cruel or degrading treatment or punishment. Corporal chastisement is unlawful to the extent that it amounts to such treatment. Such chastisement is in general considered inappropriate by the international monitoring organs.

## Limits on punishment II

The use of the death penalty is strictly circumscribed under human rights law. In countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes.

A sentence of death shall not be imposed for crimes committed by persons below the age of 18 nor carried out on pregnant women. The death penalty can be carried out only pursuant to a final judgement rendered by a competent court.

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, and amnesty, pardon or commutation of the sentence may be granted in all cases.

### Key legal texts I

According to article 14 (5) of the International Covenant on Civil and Political Rights: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Article 18 (5) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that: "Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law."

Article 8 (2) (h) of the American Convention on Human Rights provides for: "the right to appeal the judgement to a higher court."

### Key legal texts II

Article 2 of Protocol No. 7 to the European Convention on Human Rights stipulates that:

- Everyone convicted of a criminal offence by a tribunal shall have the right to have his 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 first instance by the highest tribunal or was convicted following an appeal against acquittal.

### What it means I

The international law of human rights guarantees the right to appeal against a conviction. The appeal proceedings must provide a full review of the facts and the law. The effective exercise of the right to appeal requires, as a minimum, access within a reasonable time to the written judgement. It may also require the transcript of the trial, access to evidential material, and the granting of free legal aid.

### What it means II

It is not sufficient that the right to appeal is exercised before a higher court; this court must be independent and impartial and administer justice in accordance with the rules of due process of law.

# The right to compensation in the event of a miscarriage of justice

### What it means

Under the International Covenant on Civil and Political Rights a person has the right to compensation in case of conclusive evidence that he or she has been the victim of a miscarriage of justice. The victim concerned must not have contributed to the miscarriage of justice. Pardons based on equity do not give rise to any ground for compensation.

## The right to a fair trial and special tribunals

### What it means

All courts trying civilians, whether ordinary or special courts, must at all times be independent and impartial and respect the due process guarantees flowing from human rights law, according to the Human Rights Committee (general comment No. 32 (2007)).

# The right to a fair trial in public emergencies

### What it means

The right to enjoy a fair trial must be guaranteed also in public emergencies threatening the life of the nation, although possibly some aspects of it may be subjected to limited enforcement.

The right to be tried by an independent and impartial tribunal and the principle of the presumption of innocence must be guaranteed at all times, even in public emergencies threatening the life of the nation.