

RIGHTS OF AN ACCUSED: INTERNATIONAL CRIMINAL LAW

Written by Pooja P O

4th Year, BA LLB (Hons.) Student, The National University of Advanced Legal Studies

ABSTRACT

“It is better thousand guilty persons should escape than one innocent person should suffer”ⁱ, the famous word of Benjamin Franklin that has been long accepted as a general rule throughout the world. In the interest of this widely accepted theory, it is vital that the law must provide all the means to prove the innocence of an accused. This means are guaranteed through several statutes today.

In this day and age, the judicial system should ensure that these rights are entirely accessible to them, not when he is proclaimed an accused but right from the moment when he is declared a suspect. With the media and society pushing the system, there is a lot of pressure on the judiciary to go in the way it desires. Even when we all have the hankering not to let a guilty person walk, we must also give him every opportunity to tell his story and prove it.

A FAIR TRIAL

The right to a fair trial is the most basic simple right that must be granted to every single accused. Through different cases that happen around the world, we cannot wholeheartedly say that this right is granted to every accused human being. Now, what is this fair trial? In my opinion, it is an unbiased system giving every single opportunity prescribed in the law for an accused to prove his innocence. Let us take a glance at the Universal Declaration of Human Rights (UDHR), as in its introduction itself; it claims that it has secured freedom from torture, unjustified imprisonment, summary execution, enforced disappearance, persecution and unjust discrimination for the countless number of people around the world.

Article 10 of the UDHR states that everyone is entitled to have complete “equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him.” It is the elementary document to have discussed the right of a fair hearing.

In 1976, when the International Covenant on Civil and Political Rights (ICCPR) came into force, it expanded the scope of the fair trialⁱⁱ guaranteed under Article 10 of the UDHR. Apart from ensuring a fair trial before a competent, impartial court, it widened its coverage to protect the interests of private lives of the parties, morality, public order, and national security in a democratic country and most importantly to prevent anything which causes prejudice to the interests of justice, by barring the presence of press and public from the trial.

Any judgment imparted in a criminal case or a suit at law shall be made public, but again when the interests of a juvenile person are concerned or if the proceeding pain points a matrimonial dispute or guardianship of children, it shall not be made public.

The common elements found in both these documents were public hearing and independent and impartial trials. In-State legislations, regardless of whether the state is a party or not to these conventions, contain many of these elements in different statutes. For instance, the Sixth Amendment of the United States Constitution guarantees a trial by an impartial jury; Article 6 of the Human Rights Act, 1998 of United Kingdom ensure a fair trial which includes the trial to be held within a reasonable time, giving all relevant information to the accused, which must be heard by an independent and impartial decision-maker, allowing legal assistance and

interpreters followed by a public decision. Moreover, the accused has a right to an explanation on how the Court reached its decision.

In *Begum v. Tower Hamlets LBC*ⁱⁱⁱ, the applicant declared herself as homeless to the Tower Hamlets LBC. An offer of accommodation was put forth by the council, which she rejected. Later, when the rehousing manager concluded her review was saying that the applicant should have accepted the accommodation offered, the applicant moved an appeal saying that her hearing was not in front of an impartial tribunal since the rehousing manager was not independent and thus impartial. The House of Lords held that “the housing allocation decision was a ‘determination of civil rights,’ but that she had a fair hearing before an independent tribunal,” as the whole review process provided the protection required by Article 6 of ECHR, even though the rehousing manager was not independent^{iv}.

In the *Prosecutor v. Anto Furundžija*^v, the accused was found guilty by the ICTY for violation of customs of war for the commission of crimes against Bosnian Muslims who were interrogated, which included women, to obtain information. In his interrogation, another accused raped and did unspeakable acts on women and forced people to watch it. When he was sentenced to 10 years imprisonment, he appealed on several grounds, including the one that he was denied the right to a fair trial in violation of the statute. The Appeals Chamber “unanimously rejected each ground of appeal, dismissed the appeal, and affirmed the convictions and sentences.” Accordingly, Anto Furundžija’s sentence of 10 years’ imprisonment remained unchanged. Further, the Court held that an independent and impartial tribunal before which the accused is tried is a fundamental human right and an integral element of the right to a fair trial.^{vi}

Principle of Equality of Arms

The rights given to both the parties must weigh equally. Equal rights to the accused must not only be guaranteed in proceedings before the tribunal but must also ensure that he gets results of the investigation conducted by the Prosecutor. The Prosecutor is entitled under Article 18 of ICTY to initiate investigations based on information received from sourced like Government, United Nations Organs, etc. He shall receive the assistance from state authorities to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. The

Prosecutor thus has sufficient tools at his disposal that enable him to conduct a professional investigation on a mass scale.

On the other hand, the defence lawyers do not have any such power earmarked under any statute. Therefore, the results of the Prosecutor's investigation should be revealed to them to mitigate the disproportion between the positions of the parties^{vii}.

For playing fields to be equally levelled, one of the solutions is in the Rome Statute^{viii}, which aims to provide a fair hearing conducted impartially to the accused by giving a sufficient amount of time and means to prepare the defence. He can communicate freely with his counsel in confidence. The same right is ensured under Article 14 (3) of ICCPR also. However, the interpretation of "adequate time and facility" ensured under these articles are left wide open to the International Criminal Court (ICC).

Principle of Public Hearing

Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic^{ix}, the Prosecutor has requested protective measures for witnesses and has been carefully granted by the Court in each situation. So, the request for further protective measures in the case was denied saying that the measures already provided for protection are sufficient. Here, as per the rules, a public trial of this case would not affect public order or morality. It held that "Over and above the reasons that public proceedings facilitate public knowledge and understanding and may have a general deterrent effect, the public should have the opportunity to assess the fairness of the proceedings. Justice should not only be done, but it should also be seen to be done." The public knowledge about such criminal cases are served in the hope that it will deter another person from making the same mistake. The public also gets an opportunity to assess the fairness of proceedings.

Rome Statute states that it shall do everything in its capacity to protect the safety, dignity, and privacy of the witnesses and victims^x. The Prosecutor shall take the measures to give such protection during the investigation and prosecution. Nevertheless, these measures should not be incompatible with the rights of the accused to a fair and impartial trial.

PRESUMPTION OF INNOCENCE

Universal Declaration of Human Rights is the document where this right of an accused is laid down in the simplest terms. According to UDHR, the accused enjoy the right to be presumed innocent until proved guilty, where all that is necessary for defending himself is guaranteed^{xi}. Further, ICCPR also guarantees this right according to the law.^{xii}

The presumption of innocence is set out in many national laws also. For instance, the ECHR also states, “Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law^{xiii}.”

Even though all of these statutes proudly presented the “innocent until proven guilty” principle, it was adequately set out only in Article 66 of the Rome Statute. In addition to specifying one is innocent until proven guilty, it also provided that the burden of proof to establish the guilt of an accused is on the prosecution, and to convict him, his guilt should be proved “beyond reasonable doubt.” One striking feature of this Article is that it is not only the accused, but everyone is presumed to be innocent until guilty before the Court.

The other statutes, namely ICTY and ICTR, strips of the right of a potential accused to be presumed innocent. The modus operandi of the Rome statute serves best in a civilized society, protecting everyone involved in a suit.

Article 66 (1) of the Rome Statute, as quoted above, clarifies that it is not only the accused who needs to be presumed innocent. The quoted Article states that ‘everyone’ shall be treated in such a way, establishing that this is a right which should be attributed to every person. Therefore, it is clear that the rules of international criminal law go further than those of human rights law, encompassing the suspect with protection as well as each other person involved in the criminal proceedings^{xiv}.

The onus of proving the guilt of the accused is on the prosecution, as we discussed above. The only exception to this is when the accused pleads insanity, proving which is on his own shoulders. The Rome Statute further protects the accused by “not imposing on him or her any reversal of the burden of proof or any onus of rebuttal.^{xv}” From this, we can draw a conclusion that the Rome Statute serves a better purpose than all the other statutes, including UDHR. It protects the accused with great honour and glory.

CONTENTS OF THE CHARGES

A person charged with an offense deserves to know for what act he is being tried, and he needs to know them in a language he understands. Since a common man might not understand the meaning of legal provisions and what actions lead to the filing of such charges, the content must include all these details.

ICCPR ensures every accused's right to be informed of the charges against him. It must be done "promptly and in detail"; informing him of the nature and cause of such charges in a language which he understands^{xvi}.

The same is repeated in the ICTY Statute^{xvii} whereas, the ICTR Statute, made a difference by taking a gender-neutral stand in its language, stating the right "to be informed in a language which he or she understands^{xviii}."

The Rome Statute^{xix} deviated a bit while granting this right, stating that the accused must be made aware of the "nature, cause and content of the charge," communicated in a language not only in which he understands, but which he can also speak fluently. As always, it is more detailed than the other statutes, including words like "content" and "speaks" in the provision. By this, the accused has a right to know the contents of the charges against him in a language that he speaks and understands.

Moreover, the Rome Statute aims to provide the accused with a copy of the document, which contains all the charges against him on which the Prosecutor plans to conduct the trial. Further, he must be informed on which all evidence the Prosecutor is going to confide in for the hearing. An even higher benchmark is set in providing information to the accused by this Article when it allows the Pre-Trial Chamber to issue orders regarding the disclosure of information, which is used for the hearing procedures^{xx}.

ICC regulations are broader and more comprehensive than the law of the ad hoc tribunals and human rights law. As with other rights of the accused, the ICC places much attention to his understanding of the charges and proceedings. Therefore, I believe that, especially in this area, the protection of the accused has been enormously expanded within international criminal law. Obviously, the regulations provided in the law of the ICC result from the experience of trials held before the ICTY and ICTR.

National statutes like The Canadian Charter of Rights and Freedoms, which is the part of the Canadian Constitution, deals with a person's right in Criminal matters; Section 11 of this Charter safeguards the right of an accused to be informed of the offense for which he is charged.

EXPEDITIOUS TRIAL AND PREPARATION OF A DEFENCE

The right to prepare a defence is a fundamental right of an accused, and this cannot be done without giving an ample amount of time to him; otherwise, it just beats the purpose of the judicial system. Whereas the right to an expeditious trial, in my opinion, should not confine just as a right of the accused. It is the right of everyone involved in a proceeding. It is the right of a mere spectator of the society to see justice being served at its earliest

The ICCPR secures the right of an accused “to have adequate time and facilities for the preparation of his defence^{xxi},” including assistance from his counsel. Coupled with this, the right “to be tried without undue delay^{xxii},” in the same Article satisfies the right of an accused under this head. The ICTY and ICTR also guarantee the same right quite literally^{xxiii}, and oddly the Rome statute also stated the same, word to word, without adding anything further.

The Canadian charter under section 11 monitors the right to be tried within a reasonable time. The US Constitution also assures the right to a speedy trial in its sixth Amendment.

There are instances where the accused would try to delay the trial also. He might take advantage of “time for preparation of defence” granted under these statutes. Therefore as we discussed in the beginning, this right may not be a right of the accused but a right in the public interest.

A speedy trial may not be possible when there is a long list of witnesses to be questioned. At the same time, when a speedy trial is essential for serving justice to the accused, rushing through the same will result in a human rights violation. In fact, the outcome of both might result in a significant human rights violation.

PROHIBITION OF TRIAL IN ABSENTIA

ICCPR guarantees the right of an accused to be tried in his presence^{xxiv}. A contrary understanding of this can be seen in the Report of the Secretary-General of the United Nations^{xxv}, which states, “There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with the ICCPR.”

Whereas ad hoc tribunals through the ICTY and ICTR Statute prohibits trial in absentia^{xxvi}. Further Rome Statute, which states that “the accused shall be present during the trial^{xxvii}.” In exceptional circumstances where the accused disrupts the trial during his presence in the Court, he may be removed from the Court for such duration as “strictly required.” On such occasions, he or she can observe the trial and instruct the counsel using any communication devices, from outside the courtroom.

RIGHT TO COUNSEL

For serving the ends of justice, this is an irrevocable right, safeguarded by most of the countries through its statutes. It is not possible to conduct a fair and impartial trial without giving legal assistance to the accused. A person facing a trial without knowing his rights, without getting information that he is supposed to, without defending himself properly, cannot be called as a trial as such.

ICCPR assures the right of the defendant “to defend himself in person or through legal assistance of his own choosing^{xxviii}.” In case he does not have legal assistance, he must be informed of his rights. Legal assistance must be assigned to him where he cannot pay for a counsel himself and to secure the interests of justice. Moreover, he shall be given adequate time and facilities with his counsel for defence preparation, as discussed previously in this Article.

ICTY and ICTR also safeguard this right^{xxix}. However, unlike in the ICCPR, where a suspect and an accused are assured this right together in the same Article, ICTY and ICTR guarantee this right to the suspect separately, protecting anyone who is “questioned” as a part of the investigation^{xxx}. Surprisingly, the Rome Statute does not talk about this right explicitly, except

for, in the right to prepare a defence, in Article 67 (1) (b), it briefly mentions the right to communicate with his counsel of choice in confidence.

In other international human rights treaties like European Convention on Human Rights (ECHR), Article 6 (3) (c) also guarantees the right to defend himself in person or through legal assistance of his own choosing. Additionally, it assures to provide free legal assistance if he cannot pay for it.

The US Constitution again in its sixth Amendment ensures the right of an accused to “have the assistance of counsel for his defence.” This right can be seen in many national laws irrespective of the fact whether it is a civil law legal system or a common law legal system.

Since the media has a tendency to deliver a judgment of its own declaring a suspect as a convict before even the trial starts, it is crucial to have a counsel of his own from step one, when he is proclaimed as a suspect.

Nevertheless, neither human rights law nor the historical tribunals have contributed much to the question of the level of education and experience a lawyer ought to possess in order to practice before courts and tribunals^{xxxii}.

RIGHT TO EXAMINE OR HAVE EXAMINED WITNESSES

The ICCPR guarantees the right of an accused, where he can examine a witness against him and one on his behalf under the same conditions, and the attendance of witnesses on his behalf is also ensured^{xxxiii}. The ICTY and ICTR Statute reiterate precisely the same under Article 21 (4) (e) and Article 20 (4) (e), respectively.

The Rome Statute assures this right constructed in the same way as that of the statutes above^{xxxiii}. Additionally, it states that “the accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.” Thus, the right of cross-examination by the accused is also set out in this Article.

In *Kostovski v The Netherlands*^{xxxiv}, the accused was convicted of armed robbery based on statements given by a few witnesses, but he was not given the basic right to cross-examine him

at any stage of the proceeding. Not even the identity of the witnesses was revealed to him, depriving him of any opportunity to prove their unreliability.

The ECHR assures the right of an accused to examine a witness on his behalf and against him under the same conditions. He can also make sure that the witnesses appear for questioning.^{xxxv} The Court held that, for coming up with adversarial arguments, the evidence must be produced in a public hearing in front of the accused. Although there are cases where statements are obtained from witnesses in the absence of the accused and still would not violate this right of the accused-- For instance, the statements recorded at the pre-trial stage^{xxxvi}, provided the rights of the defence have been respected. Namely, the right of the defence to have a proper opportunity for interrogation of the witness, at some stage of the proceedings. Thus, held the case to be in violation of the right of the accused to examine witnesses.

As we discussed earlier in the principle of public hearing, it is difficult for every international Court or tribunal to establish an equilibrium between the right of an accused and protection of a witness.

RIGHT TO AN INTERPRETER

This right is relevant mostly in international disputes only, where the accused, witness, or victim cannot speak or understand the language in which the proceedings are conducted.

The ICCPR shields the right of an accused to have the assistance of an interpreter free of cost in such cases^{xxxvii}. The Rome Statute, as usual, provided a far more elaborate version of this right. It requires a competent interpreter, and the translations made by him must meet the “requirements of fairness.” Also, it talks explicitly about translating documents presented at Court, which is in a foreign language to the accused^{xxxviii}.

Whereas the ICTR and ICTY precisely repeats the provision in ICCPR^{xxxix}. Additionally, The Rules of Procedure and Evidence in Rule 42 states that “the Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules.”

RIGHT TO REMAIN SILENT

The right to remain silent is a privilege against self-incrimination. The accused has the right “not to be compelled to testify against himself or to confess guilt^{xli}”. Unfortunately, it only ensures this right to an accused, not a witness or victim.

In *Murray v UK*^{xli}, the accused taken into custody was not provided legal assistance for two days. The Court held that the impression made by the concept of fair procedure guaranteed by the ECHR includes the right to remain silent during police interrogation and privilege against self-incrimination. It also said that this right against self-incrimination is not absolute, and drawing inferences from the silence is not a human rights violation.

At the same time, drawing a negative or adverse inference from the silence of an accused during trial is a violation of the right against self-incrimination^{xlii}.

The Rome Statute protects the right of a suspect also from confessing guilt or incriminating themselves under compulsion. The ICC derives the right of accused to remain silent, from the presumption of innocence and the fact that the burden of proof lies on the Prosecutor as per this principle^{xliii}.

CONCLUSION

For the efficient working of the judicial system, there must be a safe balance between the rights of the parties standing on both ends. All rights guaranteed on paper to an accused, might not come into action during the broad daylight. Also, as we can see in this article, most of the rights guaranteed to an accused does not extend to a suspect. A suspect must also enjoy such protection under required circumstances.

There is still no remedy to the fact that the media and television sends out a verdict even before a person is declared an accused. The least we can do is to ensure that the rights encompassed in these statutes and treaties we discussed above are complied with, so that it does not result in a more significant human rights violation.

BIBLIOGRAPHY

- Universal Declaration of Human Rights, 1948.
- International Covenant on Civil and Political Rights, 1976.
- Rome Statute of the International Criminal Court, 2002.
- Statute of the International Tribunal for Rwanda, 1994
- Updated Statute of The International Criminal Tribunal for The Former Yugoslavia, 2009.
- European Convention on Human Rights, 1994.
- The Constitution of The United States, The Bill of Rights & All Amendments.
- Rules of Procedure and Evidence, 2002.
- Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)
- Canadian Charter of Rights and Freedoms, 1982.
- KAROLINA KREMENS, *The Protection of The Accused in International Criminal Law According to The Human Rights Law Standard*, Wroclaw Review of Law, Administration & Economics.
- Ministry of Justice, *Human Rights: Human Lives, A Guide to the Human Rights Act for Public Authorities*, Equality and Human Rights Commission, 2014.

Websites

- <https://swarb.co.uk/>
- <https://www.icty.org/>
- <https://casebook.icrc.org/>
- <http://www.internationalcrimesdatabase.org/>
- <https://www.equalityhumanrights.com/>
- <https://www.cascaidr.org.uk/>

REFERENCES

ⁱ Benjamin Franklin, *The Works of Benjamin Franklin, including the Private as well as the Official and Scientific Correspondence, together with the Unmutilated and Correct Version of the Autobiography*, compiled and edited by John Bigelow (New York: G.P. Putnam's Sons, 1904). The Federal Edition in 12 volumes. Vol. XI (Letters and Misc. Writings 1784-1788). 4/23/2020. https://oll.libertyfund.org/titles/2660#Franklin_1438-11_1175

ⁱⁱ ICCPR Art. 14.

ⁱⁱⁱ *Begum v. Tower Hamlets LBC*, [2003] 1 All ER 731.

-
- iv Ministry of Justice, *Human Rights: Human Lives, A Guide to the Human Rights Act for Public Authorities, Equality and Human Rights Commission*, 2014.
- v The Prosecutor v. Anto Furundžija, Case No.IT-95-17/1-A, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).
- vi International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/96>.
- vii KAROLINA KREMENS, *The Protection of The Accused in International Criminal Law According to The Human Rights Law Standard*, W.R.L.A.E., 2013, at 33.
- viii Rome Statute Art. 67.
- ix Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
- x Rome Statute Art. 68
- xi UDHR Art. 11.
- xii ICCPR Art. 14(2), ICTY Art. 21(3) and ICTR Art. 20(3).
- xiii ECHR Art. 6(2).
- xiv KAROLINA KREMENS, *The Protection of The Accused in International Criminal Law According to The Human Rights Law Standard*, W.R.L.A.E., 2013, at 37.
- xv Rome Statute Art. 67(1)(i).
- xvi ICCPR Art. 14(3)(a).
- xvii ICTY Art. 21.
- xviii ICTR Art. 20.
- xix Rome Statute Art. 67 (1) (a).
- xx Rome Statute Art. 61 (3).
- xxi ICCPR Art. 14(3)(b).
- xxii ICCPR Art. 14(3)(c).
- xxiii ICTY Art. 21(4)(b) and ICTR Art. 20(4)(c).
- xxiv ICCPR Art. 14(3)(d).
- xxv UNSC' Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [*Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*], (3 May 1993), S/25704.
- xxvi ICTY Art. 21(4)(d) and ICTR Art. 22(4)(d).
- xxvii Rome Statute Art. 63(1).
- xxviii ICCPR Art. 14(3)(d).
- xxix ICTY Art. 21(4)(d) and ICTR Art. 20(4)(d).
- xxx ICTY Art. 18(3) and ICTR Art. 17(3).
- xxxi KAROLINA KREMENS, *The Protection of The Accused in International Criminal Law According to The Human Rights Law Standard*, W.R.L.A.E., 2013, at 42.
- xxxii ICCPR Art. 14(3)(e).
- xxxiii Rome Statute Art. 67(1)(e).
- xxxiv Kostovski v The Netherlands, Eur. Ct. H.R., 20 (1989).
- xxxv ECHR Art. 6(3)(d).
- xxxvi Ibid.
- xxxvii ICCPR Art. 14(3)(f).
- xxxviii Rome Statute Art. 67(1)(f).
- xxxix ICTR Art. 20(4)(f) and ICTY Art. 21 (4)(f).
- xl ICCPR Art. 14 (3)(g), ICTY Art. 21(4)(g) and ICTR Art. 20(4)(g).
- xli Murray v. UK, Eur. Ct. H.R., 22 ECHR 29 (1996).
- xlii Prosecutor v Kupreskić et al., Case No. IT-95-16-T (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).
- xliiii Rome Statute Art. 55(1)(a).