

*Direct summary
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FOUNDATION FOR LEGAL AID IN CHILE
(STICHTING RECHTSHULP CHILI)

"THE PROTECTION OF HUMAN RIGHTS AND THE IMPACT OF
EMERGENCY SITUATIONS UNDER INTERNATIONAL LAW: THE
CHILEAN CASE"

FIRST SPECIFIC REPORT:

"FAIR TRIAL"

FOUNDATION FOR LEGAL AID IN CHILE
(STICHTING RECHTSHULP CHILI)

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This report has been drawn up within the framework of the Foundation for Legal Aid in Chile. This Foundation sets itself to the granting of legal aid - in the broadest sense of the word - to victims of violations of human rights, in particular to political prisoners in Chile.

For this purpose the Foundation undertakes the drawing up of scientific reports concerning the international legal status of political prisoners with particular emphasis on the international protection of human rights. These reports purport to analyse the legal status of political prisoners in Chile under international and chilean law, reviewing the conformity of the treatment of political prisoners in Chile with these standards of law.

The reports are made available to persons and institutions engaged in the defending of political prisoners in particular political prisoners in Chile.

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FAIR TRIAL

I. GENERAL REMARKS.

The principle of fair trial is a necessary condition for effecting human rights. The right to life, the right of habeas corpus, can only be invoked in an adequate, fair procedure guaranteeing basic rights and principles of procedure, which make an examination possible.

This examination can be conducted on the basis of two systems:

- a) the continental system, in which all rules are laid down in a codification; and
- b) the Anglo-American system, where principles are laid down which are elaborated further in jurisprudence and doctrine.

The starting-point of international treaties is the Anglo-American system.

In a great number of conferences, the International Commission of Jurists (ICJ) has worked out principles with regard to Fair Trial.¹ Comparative legal science demonstrates not only the recognition of the Fair Trial-principle in international treaties, but also its presence in the legislation of every self-respecting country.²

II. INTERNATIONAL TREATIES LAYING DOWN THE PRINCIPLE OF FAIR TRIAL.

a) On world level:

- United Nations:

1. *Universal Declaration of Human Rights* (UD), art. 10 and 11,1. The UD was adopted by the General Assembly of the UN, with 48 votes in favour, including Chile, none opposed, and 8 abstentions. The moral authority of the UD is great. Furthermore, through its UN delegate, Chile interpreted this declaration as an authoritative interpretation of the UN-Charter, that is, as implying a legally binding obligation.
2. *The International Covenant on Civil and Political Rights* (ICCPR), art. 14. The ICCPR came into effect on March 23, 1976, and was also ratified by Chile, which is therefore, based on art. 49,2 bound to it.

3. *Geneva Conventions of 1949* (GE), art. 3, 1d. Of all conventions, these are the ones signed by the greatest number of countries (117). Chile too signed the conventions without any reservation; they were ratified by Chile on October 12, 1950, making them effective for Chile on April 12, 1951, according to art. 58, 57, 138 and 153 of the various conventions.

According to the common art. 1 of the conventions, the contracting parties are obliged to respect the conventions at all times, and to effect their observance.

4. *Draft Protocol Additional to the Geneva Conventions of August 12, 1949*, relating to the protection of victims of non-international armed conflicts (Prot.), art. 9,5. This protocol was drafted as a confirmation and extension of art. 3 of the above-mentioned conventions

b) On a regional level:

1. *The American Convention (AC)*, art. 8.

This convention was signed by Chile on Nov. 22, 1969. Even though Chile did not ratify it, Chile cannot simply ignore this convention. States who have signed a treaty, but have not yet ratified it, must refrain from actions contrary to the purpose and subject of the treaty, until they declare that they will not ratify it. See Vienna Law. Furthermore, the convention can be regarded as containing general principles of law and a reflection of the doctrine prevailing in the Western Hemisphere.³

2. *The American Declaration*, art. 18 and 26.

This Declaration was produced as a resolution of the 9th Inter-American Conference in 1948. In the constitution of the Inter-American Commission on Human Rights, set up in 1959, adopted in 1960, the task-description of this commission refers to the Declaration. In the amended OAS-Charter of 1970, the above-mentioned commission is given a basis in the Charter (art. 51 of the Charter).

The AC is referred to in the task-description of the Commission (art. 112). Art. 150 of the OAS-Charter gives transitional law. As long as the said convention is not yet effective, "the present (i.e. set up in 1959) commission (will) ... keep vigilance over the observance of human rights".

3. *The European Convention (EC)*, art. 6.

The EC came into existence in Rome in 1950, and is ratified by most Western-European states.

III. CONSTITUENT RIGHTS CONTAINED IN THE PRINCIPLE OF FAIR TRIAL.

The principle of fair trial consists of the following rights.

Respectively:

1. the right to an independent, impartial, lawful, competent judge.
2. a verdict within a reasonable period of time.
3. a public trial and a public, reasoned sentence.
4. the right to review by another tribunal.
5. presumption of innocence.
6. the right of the defendant to be informed immediately of the charge in a language which he understands.
7. the right to counsel.
8. physical integrity of the defense counsel.
9. sufficient time and facilities for the defense.
10. the right of the defense to examine witnesses.
11. the right to free assistance of an interpreter.

This list is not exhaustive, because Fair Trial is understood to be a minimum guarantee. The concept is developing into a much broader principle.

One of the most important developments is that of the principle of equality of arms. This means that in the proceedings prosecution and defendant (or his counsel) can operate on equal terms and with the same facilities. On this point, see also the doctrine and jurisprudence of the European Commission for Human Rights.^{4/5/6}

In general terms, this principle is laid down in art. 10 of the Universal Declaration. Particularly the jurisprudence of the European Commission for Human Rights⁷ elaborated it in a rather detailed way. Because of the accusatorial nature of the fair trial principle, equality of arms is very important, and for that reason it is recognized by all countries accepting the principle of fair trial.

On the basis of Rule of Law, the principle of fair trial must be applied to all phases of the trial, including the pretrial phase. Here,

the right not to be arrested arbitrarily, and the right to Habeas Corpus apply. These two rights, which are also internationally recognized human rights, are not discussed here. This paper is limited to the time between the indictment and the final judgment.

The principle of fair trial must be applied not only in a normal situation, fair proceedings must be guaranteed in a state of emergency as well. In GE art. 3, 1d the fair trial principle is described specifically for cases of internal armed conflict. This signifies a development in legal thinking about the fair trial principle and particularly about its character as a minimum guarantee.

If the principle should be effected in the case of an internal armed conflict, it should definitely be effected in a state of emergency and of course in a normal situation. Derogation in an exceptional situation should necessarily always be proportional and temporary. Measures to be taken in an emergency situation should, according to art. 4 of the ICCPR, not go beyond what is "strictly required by the exigencies of the situation". This means that the restriction must be limited to those rights for which it is, in view of the emergency situation, absolutely necessary, and then only to the extent required by the emergency situation, a requirement of necessity as well as proportionality. Also, it must be a temporary measure.

In short, it can be said that the principle of Fair Trial, according to international sources such as international treaties, international custom, general principles of law recognized by civilized nations, judicial decisions and the views of a number of important authors, can be considered to be one of the most fundamental human rights.

Constituting parts of the Fair Trial principle:

1. *The right to an independent, impartial, lawful and competent judge.* (when the word "judge" is used, this includes the tribunal as well)⁸
This right is laid down in art. 10 of the UD and art. 14 ICCPR. On a regional level, it can be found in art. 8,1 AC and art. 6,1 EC and in almost any national legislation.

A. Independent judge. Independence of the judge means first and foremost, that he is not under supervision of the executive and/or legislative

powers, or subordinate to them.⁹ This implies that the judge must be irremovable and even that his salary must be arranged by means of legislation, and that the salary should not be decreased during his term of office.¹⁰ When a judge is dependent upon either the executive or the legislative power, prosecution and defendant no longer have an equal position, a violation of the principle of Equality of Arms.

B. Impartial judge. Impartiality means the absence of personal involvement of members of the judiciary in cases which must be decided, and the absence of any kind of prejudice.¹¹

Decisions may be taken on the basis of law only.

If a judge refuses to accept a certain line of defence on grounds other than the law, he is not impartial.¹²

If Prosecution and witnesses turn out to be partial, the judge must clearly demonstrate his own impartiality.¹³

C. Lawful judge. Rule of Law governs the appointment of the judge and all other decisions taken regarding the competence of the judge.

This is an aspect of legality that will not be discussed further here.¹⁴

D. Competent judge. If, particularly in criminal cases, justice is administered by persons who have insufficient legal training, Rule of Law is violated.¹⁵

In countries which have a jury system, the judge's competence is an important point of scrutiny.

Independence, objectivity and impartiality of the judge are safeguarded best by - among other things - a thorough training and a good education.

2. *Verdict within a reasonable period of time.*

Each accused has the right of his cases being heard within a reasonable time.

This right can be found in ICCPR art. 14,3, and the AC art. 8,1 and in the EC, art. 6,1. In this context, "reasonable" means:

1. not too quickly, as this would violate the right to sufficient time for preparing the defense;
2. not longer than is necessary for a fair hearing of the case.¹⁶

Undue delay occurs for instance, if the criminal procedure is drawn out without the need for any further evidence.¹⁷

If delays occur during the trial which are not reasonable, this constitutes a violation of law.¹⁸

3. *Public trial and public, reasoned sentence.*

These rights are laid down in art. 11,1 UD, art. 14 ICCPR, and art. 6,1 EC.

A. Public trial. Everyone has a right to a fair and public trial. The press and the public can be excluded from the trial as a whole or parts of it, on the basis of morals, public order and national security, the interests and privacy of the defendant in some cases, or when publicity would influence the impartiality of the judge. It is generally accepted that these limitations on publicity must be interpreted as restrictively as possible. Rule of Law commands that criminal cases must be tried in public.¹⁹

The importance of publicity is:

a) to ensure in the interests of the state that justice is not only done, but is seen to be done so that:

- (i) the public may have confidence in the courts of the country,
- (ii) there can be no doubt as to what takes place at the hearing,
- (iii) it cannot be afterwards said that a person who was fairly convicted was unfairly convicted.

b) to ensure the interests of the accused that:

- (i) he receives a fair trial,
- (ii) that trial is conducted according to recognized procedure and both sides are heard,
- (iii) no irregular process such as torture is applied for the purpose of obtaining evidence,
- (iv) the behaviour of the prosecutor and of the judge is fair and above board.²⁰

B. Public, reasoned verdict. Even though the publicity of the trial can be restricted, the verdict must always be given in public, and it must be reasoned. This requirement of a reasoned verdict is based on the principle that "justice must be seen to be done" and that the trial "is seen to be fair".

The citizen must be informed as extensively as possible about the legal ground of the verdict; publicity and the legal grounds are the

only guarantees for the public that justice was done on the basis of Rule of Law and that the trial was fair.²¹

The taking of a motivated decision is also important in view of the possibility of review of the decision.

4. *Hearing by a different court/right to review.*

It is of the utmost importance, that, if the fair trial principle is violated during the proceedings, a possibility of review exists.

Every conviction must be liable to examination by at least one other court. This right is recognized in ICCPR art. 14,5, and AC art. 8,2. Furthermore, it is recognized in almost all national legislation. Review procedures, too, should be governed by the principle of fair trial.²²

5. *Presumption of innocence.*

Everyone charged with a criminal offence has the right to be presumed innocent until his guilt is proven in the course of a public trial with all the guarantees of the principle of fair trial. This right is laid down in UD, art. 11,1 and AD art. 26, in GE art. 3, in Prot. art. 9,5, in ICCPR art. 14,2 and 3,g, in AC art. 8,2,2g, in EC art. 6,2. It is of great importance for a fair trial, particularly with regard to evidence. Judgment about guilt or innocence of the accused should be given solely on the basis of evidence, and then only lawfully acquired evidence.

During the ICJ's congress in Athens,²³ a number of criteria were formulated by the Committee of Criminal Law:

1. No one may be forced to incriminate himself; defendants and witnesses may not be subjected to physical and psychological torture. This would constitute a violation not only of Fair Trial, but also of the right to remain free of inhuman treatment.
2. Checking of mail and telephone may only be undertaken under specific circumstances, formulated by law.
3. Search of the accused's premisses without his consent should only be made under the authority of an appropriate juridical authority.
4. Evidence, acquired in a way contrary to these conditions may not be used against the defendant (exclusionary rule).

With regard to the use of evidence the following applies:

- a) guilt can be proven only if evidence of guilt was presented during the trial;
- b) the accused is not held to prove his innocence; burden of proof lies with the prosecution;
- c) the defendant may refuse to testify, and this refusal may not influence the decision about him.²⁴

The importance of proper evidence is demonstrated, for instance, in the jurisprudence of the US Supreme Court, which concluded that the judge may not make use of evidence which was unlawfully acquired during the investigation.²⁵ Unlawful here means: statements made by the defendant, because he was unaware of his right to the assistance of counsel and of his right to remain silent.

6. *The right of the defendant to be informed of the charges immediately and in a language which he understands.*

This right can be found in UD art. 10, in ICCPR art. 14,3a, in AC art. 8,2b, and EC art. 6,3a and art. 5,2.

The right to be informed immediately of the charges does not only apply to the grounds for the charge, but also to its legal character, which is of great importance to the defence.²⁶

The defendant must be informed immediately, and not piecemeal, for instance during interrogation.²⁷

The right to information about the nature and content of the charge must be granted, because it is necessary for an adequate preparation of the defense.²⁸

7. *The right to defense.*

Everyone has a right to his own defense, or to defense by counsel of his own choosing; if the defendant does not have the necessary means to pay for legal assistance, the state shall pay for it.

An inventory of legislation from various countries shows that the right to a defense of one's own choosing is one of the most-guaranteed rights in the world; it is therefore necessary for the rule "audi et alteram partem".²⁹ The rights in question are therefore laid down in: UD art. 11 (very general), ICCPR art. 14,3b, AC art. 8,2e, EC art. 6,3c.

This right is indispensable for guaranteeing to the defendant a fair trial and equality of arms over against the state. Permissibility and possibility of assistance of counsel are also necessary for this. The rights involved mean that the defendant can conduct (or have someone conduct) the defense which he sees fit. This means: the defense may contain such contents or strategy which, according to the opinion of the defendant or his counsel, are necessary for bringing forward the defendant's point of view.³⁰

The defendant can defend himself or choose counsel; in case he cannot afford it, he has the right to be provided with legal counsel "ex officio".^{31/32/33}

8. *Physical integrity of the defense counsel.*

A trial can only be really fair, when the counsel for the defense is able to operate freely and independently; this means: he must be free, without threats, or influence from state or party authorities.^{34/35/36}

If he should be put under pressure, psychologically or physically, the principles of fair trial in general and equality of arms in particular, come into question. Moreover, this would constitute a violation of another internationally recognized human right, that of the prohibition of inhuman conduct.

Procedurally, counsel has the same rights as the defendant, and has thus access to all information which may be relevant for him. Counsel has the right to bring forward all arguments which he needs for the defense, without any obstruction-

9. *Sufficient time and facilities for the defense.*

If, within the framework of the principles of fair trial and equality of arms, the defense is to have any substance, sufficient time and facilities must be available for the preparation of the trial.

The principles of fair trial are as valid for the defendant as for his counsel.

An adequate defense implies the right to be informed of all relevant data.

This also means, that the defendant and his counsel must be informed in due course of the nature and content of the charges (see under 6).

The defense must have access to all documents, and to his client. Besides, the defense has the right to examine witnesses, and to cross-examine the prosecution's witnesses (see under 10). The defense has the right to be present when the prosecution presents evidence, and the right to present evidence to the contrary.³⁷

10. *The right to examine witnesses of the prosecution and to (have) bring forward one's own witnesses.*

The right involved is internationally laid down in ICCPR art. 14,3e, AC art. 8,2f and EC art. 6, 3d.

The right to fair trial and equality of arms require the right to examine the prosecution's witnesses, and to obtain witnesses on one's own behalf, under the same conditions as witnesses against oneself.³⁸ This is an independent right of the defense (see supra) and a necessary condition to safeguard equality of arms. All legal systems guarantee the right to examine witnesses and to obtain witnesses on one's own behalf.^{39/40} The same applies for expert witnesses.

11. *The right to free assistance of an interpreter.*

This right is laid down in ICCPR art. 14,3f, AC art. 8,2a and EC art. 6,3e.

Only facts may lead to conviction and the principle of fair trial therefore requires full and equal participation of the accused in the trial; so, he should understand the language spoken during the trial.

If this is not the case, he has the right to free assistance of an interpreter (also when his counsel does understand the language of the trial).^{41/42}

Most countries guarantee a free interpreter, if the need arises.

NOTES

1. International Commission of Jurists: "The Rule of Law and Human Rights, Principles and Definitions" (as elaborated at the Congresses and Conferences held under the auspices of the International Commission of Jurists 1955-1966), Geneva 1966.
2. Mohammed Ahmed Abu Rannat: "Study of equality in the administration of Justice". Special reporter of the Subcommittee on prevention of discrimination and protection of minorities. Ed. N.Y. 1972. This Subcommittee was set up by the UN Human Rights Commission.
3. Cf. note 2.
4. European Commission 1963 Doc. 18768: Pataki and Dunshirn vs. Austria.
5. J.E.S. Fawcett: "Application of the European Convention on Human Rights", 1969. Fawcett is chairman of the European Commission on Human Rights.
6. Th. Buergenthal: "Comparison of the jurisprudence of National Courts with that of the European Commission and Court on Human Rights and with that of the Committee of Ministers-rights in Court Proceedings", Vienna 1965. Buergenthal teaches at the Law Faculty of the University of New York at Buffalo.
7. C.C. Morrisson: "The developing European Law of Human Rights. Leiden 1967.
8. Eberhardt Schmidt: "Lehrkommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz". Göttingen 1964, p. 260.
9. Fawcett: cf. note 4.
10. ICJ: cf. note 1.
11. Fawcett: cf. note 4.
12. European Commission on Human Rights: Boeckmans vs. Belgium 1727/62, Yearbook 370.
13. Ibid.: Austria vs. Italia 788/60 Yearbook 166.
14. Cf. note 8, p. 260.
15. ICJ: cf. note 1.
16. Fawcett: cf. note 4.
17. This was a US Supreme Court decision in the Chattin Case (1927), US Mexico Claims Commission 4 IAA 282-292.
18. US Supreme Court decision in the Fabiani Case (1892), Moore Ia 4878, 4895.
19. ICJ: cf. note 1.
20. H.H. Marshall: "The accused, a comparative study". Coutts 1966.
21. Report of the "Committee on Administrative Tribunals and Enquiries" (Franks Committee) 1957. This report, originally intended as an advice to the British government, was an important contribution to the development of the fair trial principle.

22. Fawcett: cf. note 4.
23. ICJ: cf. note 1.
24. Seminar on the "Protection of Human Rights in Criminal Procedures", 1960, Vienna, Austria, ST/TAO/HR/8, under UN auspices.
25. US Supreme Court: Escobedo vs. Illinois, 378 US 478/29/4/64 and Miranda vs. Arizona, 384 US 436/13/6/66.
26. Fawcett: cf. note 4.
27. Buerghenthal: cf. note 5.
28. European Commission on Human Rights: Offner vs. Austria 1954, Comm. 524/1954, Strassbourg 1963, 29 a.f.
29. Cf. note 2.
30. Cf. note 10.
31. Antonopoulos: "La jurisprudence des organes de la Convention Européenne des Droits de l'Homme", Leiden 1967. Mr. Antonopoulos was a member of the European Commission on Human Rights.
32. N. Robinson: "The Universal Declaration on Human Rights", N.Y. 1958.
33. ICJ Athens Congress: cf. note 1.
34. Antonopoulos: cf. note 31.
35. ICJ: cf. note 1.
36. Eur. Comm. on Human Rights: cf. note 10.
37. Ibid.: cf. note 26.
38. ICJ: cf. note 1.
39. Various statements by the Eur. Comm. on Human Rights.
40. Antonopoulos: cf. note 31.
41. ICJ: cf. note 1.
42. Fawcett: cf. note 4.