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TRAINING MANUEL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N° 20 : FAIR TRIAL – DURING THE TRIAL

➤ *The right to an independent and impartial tribunal*

These guarantees focus on the organisation and jurisdiction of the tribunal. The tribunal must be established by law.

- **What is an independent tribunal?**

Texts: art. 10 of the UDHR, art. 14 §1 of the ICCPR, art. 6 §1 of the ECHR, art. 8 §1 of the ACHR, Point A.4 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.

Case-law : ECHR, *Smareck v/ Austria (1)* ; ECHR, 25 Feb.1997, *Findlay v/ United Kingdom (2)* ; IACHR, 30 May 1999, *Castillo Petruzzi et al v/ Peru* ; IACHR, 31 Jan. 2001, *Case Tribunal Constitucional, Aguirre Roca, Rey Terry, Revoredo Marsano v/ Peru* ; ACHPR *Case International Pen, Constitutional Rights, Interights on behalf of Ken Saro - Wima Jr. and Civil Liberties Organisation v/ Nigeria*.

The members of the tribunal must deliver their decision without being subjected to any external influence.

This guarantee is assessed according to objective criteria with regard to the status of the judge (method of appointment, and tenure of office, irremovability or quasi-irremovability ; inability to give instructions in the exercise of functions, existence of protection against external pressures) ; (1) but also a subjective criterion with regard to the appearance of independence in the eyes of the litigant (2).

This involves receiving no pressure or instruction in the exercise of functions, whether from an executive power or legislative power.

- **What is an impartial tribunal ?**

Texts: art. 10 of the UDHR, art. 14 §1 of the ICCPR, art. 6 §1 of the ECHR, art. 8 §1 of the ACHR, art.7 §1 of the ACHPR, Point A.4 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.



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Case-law: IACHR, 30 May 1999, *Castillo Petruzzi et al v/ Peru* ; ACHRP, *Case International Pen, Constitutional Rights, Interights on behalf of Ken Saro - Wima Jr. and Civil Liberties Organisation v/ Nigeria*.

This means that the members of the tribunal must not favour either party during the trial, that the parties have equal opportunities to present their arguments, and finally, that the tribunal makes a decision free from bias based on the evidence brought before it.

Impartiality is assessed both subjectively, and presumed as such until proved otherwise, and objectively, and consists in questioning whether, independently of the supervision of the judge, certain verifiable facts give grounds for suspecting the impartiality of the latter.

➤ **Equity of the procedure**

Texts: art. 10 of the UDHR, art. 14.1 of the ICCPR, art. 6 §1 of the ECHR, Point A.2 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.

- **Equality of arms**

Case-law: ECHR, 27 Oct. 1993, *Dombo Beheer B.V. v/Netherlands* (1)

This involves the obligation to offer each party a reasonable opportunity to present their case in conditions which do not place them in a situation of clear disadvantage in relation to their adversary (1): to participate equally in seeking proof, and having the same means to state their arguments.

This principle must also be guaranteed in the exercise of legal recourse.

It is applicable to parties to the dispute.

- **Observance of the adversarial nature of the proceedings**

Case-law: ECHR, 24 Feb. 1995, *McMichael v/ United Kingdom* (1)

This involves, for each party, the right to have communicated any observations or documents submitted to the judge, as well as the right to debate them (1).

This principle concerns the parties between themselves, as well as the parties and the public prosecution, independent courts or third parties, and covers all stages of the procedure.

➤ **Publicity and promptness of proceedings**

These guarantees are aimed at ensuring the proper conduct of the procedure.

- **Publicity**

Texts: art. 6 §1 of the ECHR, Point A.3 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.

Case-law : ECHR, 24 Nov. 1997, *Werner v/ Austria* ; ECHR, 8 Dec. 1983, *Axen v/Germany*.

-Public conduct of the proceedings: the right to be heard publicly, which involves the right to a public hearing, except in certain circumstances.

-Public pronouncement of judgement: publication of the court decision in an official report and opportunity for the party concerned to obtain the text from the court registrar.

- **Promptness**

Texts: art. 14 ICCPR, art. 6 §1 and § 3a of the ECHR, art. 7 §1 of the ACHPR, Point N. 5 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.

Case-law : ECHR, 6 May 1981, *Bucholz v/ Germany* (1), ECHR, 19 March 1997, *Hornsby v/ Greece* (2). ECHR, 6 May 1981, *Eckle v/ Germany* (3). ECHR, 24 Oct. 1989, *H. v/ France* (4) ; IACHR, 29 Jan. 1997, *Case Genie Lacayo* (5), IACHR, 27 Nov. 2008, *Case Valle Jaramillo et al v/ Colombia*.

This concerns the right to be judged within a reasonable period of time, and covers the entire procedure.

What is the deadline ?

- *in civil matters* : between the date of referral to the competent court (1) and the date of final execution of the decision (2).

- *in criminal matters*: from the date on which the charge has been brought (3) until the date of the legal decision which is considered final (2).

How is the reasonable nature of the deadline assessed ?

This is assessed in accordance with the circumstances of the case and according to various criteria : complexity of the case, the conduct of the petitioner, the conduct of the national legal authorities, taking into consideration the political environment (5).

Specific notification of promptness in criminal matters :

- promptness for arrest measures or detention measures (art. 5 §2 of the ECHR)

- promptness for information procedures and procedures for judging the merits of the case for a criminal charge (4)

➤ **The presumption of innocence**

Texts: art. 11 of the UDHR, art. 14 §2 of the ICCPR, art. 6 §2 of the ECHR, art. 26 of the ADRDM, art. 8 §2 of the ACHR, art. 7 §1 of the ACHPR, Point A.2 of the Directives and Principles on the right to a fair trial and legal assistance in Africa.

Case-law: IACHR, 12 Nov. 1997, *Case Suárez Rosero* ; ACHPR, *Case International Pen, Constitutional Rights, Interights on behalf of Ken Saro - Wiwa Jr. and Civil Liberties Organisation v/ Nigeria*.

The accused is presumed innocent insofar as his or her guilt has not been legally established.

➤ **Rights of the defence during the trial**

- **The right to remain silent and not incriminate oneself**

Texts: Art. 14 §3 of the ICCPR, art. 8 §2. g of the ACHR.

Case-law : ECHR, 8 October 2002, *Beckles v/ United Kingdom*.

The right to remain silent and not contribute to one's own incrimination entails that remaining silent does not result in condemnation or acknowledgement of the facts complained of.

- **The right to call and question witnesses**

Texts: Art. 14 §3 of the ICCPR, art. 6 §3 of the ECHR, art. 8 §2.f of the ACHR.

The accused must be able to :

- contest testimony for the prosecution and question witnesses
- call witnesses for the defence

- **The right to have an interpreter and translated documents**

Texts: art. 8 §2. a of the ACHR

➤ **Delivery of a court decision ; reasoned decision and one which definitively settles the dispute**

Case-law: ECHR, 9 Dec. 1994, *Ruiž Tonja and Hiro Baleni v/ Spain* ; ECHR 19 Feb. 1998, *Higgins v/ France* (1) ; ECHR, 28 Oct. 1999, *Brumarescu v/ Romania* (2).

The parties to the trial have the right to present their arguments. The court is obligated to carry out an effective examination of the elements presented by the parties and appropriate grounds for decisions. An element whose impact may be decisive for a solution having regard to the circumstances requires a specific and explicit response (1).

The principle of legal certainty supposes that the solution applied definitively to any dispute by the courts is not called into question (2).

Sources:

- Frédéric SUDRE, *Droit européen et international des droits de l'Homme*, Puf, 2008
- Amnesty International Section française, *Protéger les droits humains. Outils et mécanismes juridiques internationaux*, Litec, 2003
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