International Law: The Right to Public Trials

May 2022

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Core Rules on the Right to a Public Trial

Holding trials in public is an important means of allowing public scrutiny of legal proceedings and instilling confidence in the judicial system. Trials should, by default, be open to the public, and media should be free to report on proceedings and to relay information to the public as a whole, consistently with journalists' right to freedom of expression, and both their and the public's right to access information.

The right to a public trial is enshrined in Articles 10 and 11(1) of the *Universal Declaration of Human Rights*, which proclaim: "Everyone is entitled in full equality to a fair and **public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" and: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a **public trial** at which he has had all the guarantees necessary for his defence." [emphasis added]

The right is also guaranteed as part of the fair trial provisions in Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which provides, in part:

> All persons shall be equal before the courts and tribunals. 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 reference to 'criminal charge' does not mean that the right applies only to charges officially designated as 'criminal' under domestic law. Rather, it also applies to charges that are deemed to be penal in nature based on their "purpose, character or severity".[1] The right also applies in a 'suit of law', which includes certain civil and administrative law judicial processes, for example relating to contract, property and tort.

Where oral hearings are required, which is the case under international law for most first-instance criminal matters, trials should presumptively be open to all members of the public

[1] UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, 23 August 2018, CCPR/C/GC/32, para. 15.

and not just certain categories of individuals, such as authorised observers or family members.

The right to public trials applies not only to civilian courts but also to military or special courts (for example where exceptional courts are established to prosecute suspected terrorists). In fact, these courts are subject to all of the fair trial guarantees outlined in Article 14 of the ICCPR. Even in situations of both international and non-international armed conflict, basic fair trial guarantees, including the right to a public trial absent exceptional security justification, are considered a customary norm of international humanitarian law. Trying civilians in military courts presents significant practical challenges to meeting fair trial guarantees, including notably the requirements of impartiality and independence; as a result, these trials are often associated with violations of fair trial guarantees. For this reason, among others, in principle military courts should not try civilians except in highly exceptional circumstances. In addition, the presence of military or security service personnel in or around any courtroom beyond what is needed to run the courtroom safely and smoothly is not legitimate, especially where this is intended to intimidate journalists or other members of the public from attending.

In the absence of a clear domestic legal basis for the establishment of any exceptional courts, resorting to a system of secret courts is also inconsistent with the requirement in Article 14(1) of the ICCPR that the tribunal be 'established by law'.

Holding trials in prisons is not *ipso facto* a restriction on the right to a public trial but can amount to one if members of the public are in fact excluded from access. This can arise due to formal restrictions on getting access to the inside of prisons. But, even if members of the public are formally allowed to enter prisons, this choice of venue may in practice constitute a restriction of this right due to accessibility challenges. Where trials are held in prisons, a sufficient effort should be made to disseminate information to family members and the wider public on the location of and how to access the proceedings. Holding proceedings in remote locations which are inaccessible to public transportation or otherwise difficult to reach is inconsistent with the right to a public trial. It is legitimate to impose appropriate security measures at trials, such as conducting reasonable security searches of attendees, but these should not operate so as to undermine public access in practice. For example, where security risks are high, proceedings should be held at a reasonable time of day so as to allow for security screening before the trial commences. Where the public is excluded, in practice, from attending a trial due its location or any other reason, the authorities who are responsible for the trial will need to justify their choices, for example as to location, based on the permissible exceptions to the right to a public trial.

Quite separately from the question of the public nature of a trial, Article 14(1) of the ICCPR provides that the final decision should always be made public "except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the

guardianship of children." This rule on publicity includes not only the final decision itself but also the evidence, main findings and reasoning relied upon to reach that decision.

Exceptions to the Right to a Public Trial

Article 14(1) of the ICCPR indicates that the right to a public trial is not absolute and can be restricted in certain exceptional circumstances:

> 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.

Any decision to limit the right to a public trial must be exceptional in nature, as opposed to being a routine measure, and be justified by specific exceptional circumstances relating to the trial in question, which fall within the scope of the legitimate interests listed in Article 14(1) of the ICCPR. As noted by the UN's Working Group on Arbitrary Detentions in the context of a secret trial in Insein Prison, Myanmar: "A judicial process in closed sessions, before a Special Court, without explicit reasons, on common criminal charges, did not appear consistent with the principles and norms contained in the Universal declaration of Human Rights nor with the international human rights standards."[2] Procedurally, the burden of justifying the need to hold a trial in secret, whether in whole or in part, or to impose a publication ban on the final decision, lies with the party requesting that measure.

One example of circumstances that have been deemed to justify restricting the public's access to a trial are where a case involves serious sexual violence and the right to privacy of the victim demanded such a restriction. Another example is in terrorism-related proceedings, where the exclusion of the public was required to protect witnesses or maintain the secrecy of very sensitive national security information.

At the same time, courts should aim to restrict the right to a public hearing in as limited a way as practicable and excluding public access should be contemplated only where less intrusive measures to protect legitimate interests are not available. For example, it might be possible to protect the privacy interests of a rape victim testifying during a trial through closing the trial only for the period of that testimony or even by allowing them to testify in ways that prevented them from being identified. Media publication bans are another way of limiting the spread of information from within a courtroom.

The COVID-19 pandemic raised novel challenges to the right to public hearings due to social distancing measures. Courts may legitimately limit the number of physical attendees at a trial if necessary for public health reasons. In such cases, certain categories of individuals, such as

[2] *Kyaw Zaw Lwin a.k.a. Nyi Nyi Aung v. Myanmar*, 2 September 2010, Opinion No. 23/2010, para. 20.

family members and media or independent observers, should be given priority access while alternative means of public access, such as through video streaming, may be implemented to maintain the ability of a wider public to observe the proceedings, thus restricting the right to a public trial as minimally as possible.

Violations Commonly Associated with Closed Trials

Trials that are partially or fully closed to the public without proper justification are often indicative of a lack of independence or impartiality of the judges. In addition, these proceedings are often associated with other violations of fair trial guarantees, including:

- The phenomenon of 'faceless judges', whereby the identity of judges is concealed. This practice is inconsistent with fair trial guarantees, namely the requirements of independence and impartiality under Article 14(1) of the ICCPR and the presumption of innocence under Article 14(2);
- Violations of the rights to "to defend himself in person or through legal assistance of his own choosing" and to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing", as guaranteed by Articles 14(3)(b) and 14(3)(d) of the ICCPR. These rights to participate effectively in proceedings may be impeded in prison facilities where legal counsel is prevented or inhibited from attending or by certain security arrangements, such as physical barriers in courtrooms that impede confidential communications between the accused and his or her lawyer. These same rights also impose an obligation on the State (which is prosecuting the criminal case) to disclose relevant evidence to the accused (or his or her lawyer). While there are exceptions to this, such as where necessary to protect national security, conceal confidential methods of investigating crimes or preserve the rights of others (for example by protecting witnesses from reprisals), over reliance on those exceptions is far more likely in the context of secret trials.
- Violations of the right 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 the witnesses against him", as protected by Article 14(3)(e) of the ICCPR, are also far more common in the context of secret trials. It may be noted that this right does not necessarily require that witnesses be present in the courtroom, for example where it is necessary to protect witness identity, for example through testifying remotely with voice distortion.

Secret proceedings are likely to facilitate these and other violations of fair trial guarantees, including because judges may be more willing to dispense with procedural formalities in the absence of public scrutiny.

Sources and Additional Readings

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