



## **Human Rights Law Clinic Papers 2017**

# **FAIR TRIAL RIGHTS DURING STATES OF CONFLICT AND EMERGENCY**

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## Introduction

The fight against terrorism has been used as a basis to, amongst others, suspend and derogate from fair trial rights. Participating States of the Organization for Security and Co-operation in Europe (OSCE) have similarly resorted to derogation from fair trial rights in times of states of emergency. This is happening despite the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) having both provided for the right to fair trial. Further, OSCE participating States, through the Copenhagen and Moscow Documents, have solemnly declared that fair trial guarantees are among those elements of justice that are “essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings”, including by ensuring “the independence of judges and the impartial operation of the public judicial service”.<sup>1</sup>

The main challenge seems to lie in the fact that fair trial rights have not been unequivocally declared as non-derogable rights in times of emergency for purposes of guiding Participating States when adopting derogation measures. This is so because fair trial rights are conspicuously missing from the list of non-derogable rights under ICCPR and ECHR. This may explain the arbitrary suspension of fair trial rights during times of conflicts or emergency, even those that are so fundamental like the independence of the judiciary and legal profession. Against this backdrop, this memorandum makes a case for fair trial rights that are not capable of derogation even during states of emergency or conflicts with a view to supporting any possible standard setting within the OSCE. It is the position of this memorandum that there is a minimum protection of fair trial rights that cannot be suspended even in times of emergency that States must respect.

## International and OSCE framework for protection of fair trial rights

Fair trial rights in international law are primarily found under Article 14 of the ICCPR. In a summary, Article 14 of the ICCPR sets out in the first paragraph a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The same paragraph articulates the individual’s right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14(2) stipulates the right of every person charged with a criminal offence to be presumed innocent until proved guilty. Paragraphs 3 to 5, entrench procedural guarantees available to persons charged with a criminal offence, such as to be informed promptly of the nature of the charge against him or her in a language which he or she understands, to have adequate time for preparation of defence, to communicate with counsel of his or her own choosing, to be tried without undue delay, to examine witnesses against him or her, to have the free assistance of an interpreter if he cannot understand or speak the language used in court and not to be compelled to testify against himself or to confess guilt. Article 14(6) secures a substantive right to compensation in cases of miscarriage of justice. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted.

These fair trial rights are augmented by procedural guarantees applicable to proceedings concerning the expulsion of aliens under Article 13 of the ICCPR and the principle of non-retroactive application of penal laws under Article 15 of the ICCPR.<sup>2</sup> The various elements of the right to a fair trial set out in the ICCPR are also to be found within the Universal

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<sup>1</sup> OSCE ODIHR, Fair trial rights during states of conflict and emergency, Expert meeting 27-28 October 2016, Background Note

<sup>2</sup> UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on protecting human rights while countering terrorism, ‘Basic Human Rights Reference Guide. Right to a Fair Trial and Due Process in the Context of Countering Terrorism’ October 2014, available at URL <<http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>>

Declaration of Human Rights,<sup>3</sup> customary international law norms and other international treaties, including treaties pertaining to international humanitarian law and international criminal law.

In similar terms to Article 14 of the ICCPR, the right to a fair trial is guaranteed by Article 6 of the ECHR as well as Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and Peoples' Rights, Article 13 of the Revised Arab Charter on Human Rights and Article 20 of the ASEAN Human Rights Declaration.

Further, under international humanitarian law, the Third and Fourth Geneva Conventions of 1949 provide judicial guarantees for prisoners of war and civilians detained for criminal offences in relation to international armed conflicts.<sup>4</sup> Article 75(4) of Additional Protocol I to the Geneva Conventions provides additional fair trial rights, applicable to any person facing criminal charges in relation to this type of armed conflict.<sup>5</sup> Common Article 3(1)(d) of the Geneva Conventions, governing both international and non-international armed conflicts, prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.<sup>6</sup> Specific additional fair trial guarantees relevant to non-international armed conflicts are to be found in article 6 of Additional Protocol II. The Rome Statute of the International Criminal Court also includes the basic requirements for a fair trial in the context of international criminal law.<sup>7</sup>

## A Case for non-derogable fair trial rights

Although fair trial rights are not included on the lists of non-derogable rights under Article 4 para 2 of ICCPR and under Article 15 para 2 of the ECHR, there is consensus amongst international jurists that a minimum guarantee of protection of fair trial standards exists even in times of emergency.<sup>8</sup> There are various justifications that have been made in support of this position, but for purposes of our discussion the following three have been isolated.

Firstly, the UN Human Rights Committee has observed that a right to a fair trial may not be subject to derogation where this would circumvent the protection of non-derogable rights under Article 4(2) of ICCPR.<sup>9</sup> In this scenario, therefore, a fair trial right will become non-derogable even in times of emergency if its suspension will result in the suspension or infringement on an expressly non-derogable right. The Human Rights Committee gave the example of Article 6 of the ICCPR, setting out the non-derogable right to life. The Committee observed that any trial leading to the imposition of the death penalty during a state of emergency must strictly conform with the provisions of the Covenant, including all the requirements of Article 14, even though they are not listed as non-derogable rights. The Committee went further to give an example of Article 7 of the ICCPR on the prohibition against torture, noting that no statements or evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14. Clearly, fair trial rights are non-derogable if their suspension would result in, or risk, suspension of clear non-derogable rights.

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<sup>3</sup> UN General Assembly 'Universal Declaration of Human Rights' (10 December 1948) 217 A (III) art 11(2)

<sup>4</sup> UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on protecting human rights while countering terrorism, (n2)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Stavros S., 'The right to a fair trial in emergency situations' (1992) 41 *International and Comparative Law Quarterly* 343.

<sup>9</sup> UN Human Rights Committee (HRC) 'General comment no. 32, Article 14 of ICCPR: Right to equality before courts and tribunals and to fair trial' (23 August 2007) CCPR/C/GC/32, para 6. And UN Human Rights Committee, 'General Comment 29: Article 4 of ICCPR: States of Emergency' (2001) UN Doc CCPR/C/21/Rev.1/Add.11

Secondly, the UN Human Rights Committee has observed that deviation from certain fundamental principles of fair trial is prohibited at all times, including during states of emergency.<sup>10</sup> The Committee has observed that even in situations when derogation from Article 14 is permissible, the principles of legality and the rule of law require that certain fundamental requirements of fair trial must be respected, i.e. those principles which, if taken away, would render the process not a trial at all. The Committee has interpreted this to mean among other things that: only a court of law may try and convict a person for a criminal offence; and that the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by any derogation from the ICCPR.<sup>11</sup>

Thirdly, under international humanitarian law, as shown above, certain fair trial rights are to be applied in times of armed conflict. The different Geneva Conventions and their Additional Protocols that regulate the behaviour of parties to an armed conflict all contain references to the right to a fair trial. Most importantly, under Common Article 3, each High Contracting Party to an armed conflict is under an obligation not to pass any sentence against both combatants and non-combatants unless a judgment is previously pronounced by a regularly constituted court affording all the judicial guarantees that are recognized as indispensable by civilized peoples. This was discussed in the judgment of the International Court of Justice in *Nicaragua v. USA* (Merits),<sup>12</sup> where the Court considered Common Article 3 to be a "minimum yardstick" to be applied in any kind of armed conflict.<sup>13</sup> Furthermore, Article 75 of the first Additional Protocol and Article 4 of the second Additional Protocol prohibit collective punishment, thus also enshrining one basic aspect of a fair trial standard. Article 99 of the Third Geneva Convention concerns treatment of prisoners of war and prohibits *ex post facto* laws. It obliges the detaining power to grant a prisoner of war the possibility to present his defence with the assistance of a qualified counsel and guarantees the right to a trial as soon as circumstances permit. The Fourth Geneva Convention regulating the legal status of civilians in occupied territories contain similar guarantees, which include, inter alia, the prohibition of retroactive criminal laws,<sup>14</sup> the right to have a regular, speedy trial and to be informed about the pending charges,<sup>15</sup> and finally the right to call defence witnesses, to be advised by appropriate counsel and to be provided with an interpretation of the proceedings.<sup>16</sup> Article 75 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts has extended guarantee of fair trial rights to everybody affected by the conflict including citizens of the state.

These provisions were crafted specifically for situations of armed conflict, yet it has been argued that it is difficult to imagine that these standards can be derogated from merely because conditions for declaring a state of emergency exist.<sup>17</sup> In other words, given that these rights are applicable in times of war (which normally constitute the gravest situations of emergency), they should *a fortiori* be generally considered non-derogable in all states of emergency.<sup>18</sup> Or at least they should serve as indicators of the standards applicable in all

<sup>10</sup> UN Human Rights Committee 'General Comment No 32. Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) UN Doc CCPR/C/GC32 para 6.

<sup>11</sup> Ibid.

<sup>12</sup> ICJ Rep 1986, p. 113 -114

<sup>13</sup> Stavros S., (n8), pp 349

<sup>14</sup> International Committee of the Red Cross (ICRC) 'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)' (12 August 1949) 75 UNTS 31 Article 65.

<sup>15</sup> International Committee of the Red Cross (ICRC) 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)' (12 August 1949) 75 UNTS 287 Article 71.

<sup>16</sup> Ibid, Article 72.

<sup>17</sup> Zimmermann A., 'The Right to a Fair Trial in Situations of Emergency and the Question of Emergency Courts' <<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwithfv9ptPTAhVGLMAKHSfQAp4QFggzMAM&url=http%3A%2F%2Fhrlibrary.umn.edu%2Ffairtrial%2Fwrrft-az.htm&usg=AFQjCNFbVQpKu4HgizANjSuco5jMXy1kA&sig2=Axks0M5oleq3EkijlsY3KQ>>

<sup>18</sup> Oraá J., *Human Rights in States of Emergency in International Law* (Clarendon Press, 1992) pp.114

kinds of emergencies.<sup>19</sup>The UN Human Rights Committee has therefore explained that, because certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, there can be no justification whatsoever for derogation from these guarantees during other emergency situations.<sup>20</sup>

Clearly, these are strong arguments in support of a minimum guarantee of fair trial rights during states of emergency which OSCE participating States should comply with by taking concrete steps and adopting specific measures for protecting these rights. This will dispel any doubts as to their non-derogable nature in times of emergency. To that end, the next section will use these arguments to isolate some of these fair trial rights and highlight their non-derogable nature.

#### Right to be tried by a competent, independent and impartial tribunal established by law

This is one of the fundamental fair trial rights to come out clearly from the above discussion as a non-derogable right even in times of emergency. Article 14(1) of the ICCPR provides that:

“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*”. (emphasis added)

The Human Rights Committee has defined ‘tribunal’ as any body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.<sup>21</sup> The Committee has even acknowledged that these may even be military tribunals, but has warned that they too must comply with all fair trial standards and must be resorted to in rare circumstances.<sup>22</sup>

The right to a trial before a competent, independent and impartial tribunal established by law basically envisages three principal considerations. Firstly, the tribunal must be established by law, which requires that the judicial system is established and sufficiently regulated by law.<sup>23</sup> Secondly, the tribunal must be competent to decide matters brought before it which has been understood to mean that individual judicial officers are suitably qualified and experienced to act as judicial officers, that the tribunal is able to make binding decisions that cannot be altered by a non-judicial authority to the detriment of an individual party and that the tribunal has sufficient jurisdictional competence to ensure effective access to justice.<sup>24</sup> And, thirdly, that the tribunal must be both independent and impartial. These elements have been held by the Human Rights Committee to be absolute and not capable of limitation.<sup>25</sup>

Independence means that a tribunal must be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties such as the media.<sup>26</sup>This can be achieved by having regard to the manner in which judicial officers are appointed, their security of tenure and the existence of adequate guarantees protecting the tribunal and its members from external pressures.<sup>27</sup>The Human Rights Committee has clearly stated that:

<sup>19</sup> Ibid

<sup>20</sup> UN Human Rights Committee ‘General Comment No 32. Article 14: Right to equality before courts and tribunals and to a fair trial’ (2007) UN Doc CCPR/C/GC32 para 6.

<sup>21</sup> Ibid, para 18.

<sup>22</sup> Ibid.

<sup>23</sup> UN Crime Congress ‘Basic Principles on the Independence of the Judiciary’ (1985) UNGA Resolution 40/32 Principle 10.

<sup>24</sup> Ibid.

<sup>25</sup> *Gonzalez del Rio v. Peru*, (1987) UN Human Rights Committee Communication No. 263 para 5.2.

<sup>26</sup> UN Human Rights Committee, General Comment No 32, (n21)

<sup>27</sup> Ibid.

“A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal”.<sup>28</sup>

Further, Impartiality has been held to mean that everyone should be treated the same and it involves two features. Firstly, that judicial officers exercise their functions without personal bias, prejudice, or preconceptions about a case before them. And secondly, that the tribunal must act in a manner that offers sufficient guarantees to exclude any legitimate doubt of impartiality.<sup>29</sup>

OSCE participating States have in this regard committed to respecting the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service and, in implementing relevant standards and commitments, to ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary.<sup>30</sup> Further, the former UN Special Rapporteur for the independence of judges and lawyers has asserted that the independence and impartiality of the judiciary are cornerstone principles of democratic societies that can be considered among those general principle of law that constitute one of the sources of public international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.<sup>31</sup> The UN Human Rights Committee has further characterized the requirement of independence, competence and impartiality of the judiciary, within the meaning of Article 14(1) of the ICCPR, as an absolute right that is not subject to any exception.<sup>32</sup>

It is, therefore, clear that right to be tried by a competent, independent and impartial tribunal established by law is a foundation of every fair trial. It is a fundamental principle of any trial that it will be difficult to imagine a trial properly so-called without competent, independent and impartial presiding officers. Further, it is understood that suspension of this right will likely affect many rights including those that are *expressis verbis* defined as non-derogable in the ICCPR.<sup>33</sup> It is in times of emergency that non derogable rights like freedom from torture, right to life, freedom from slavery and servitude, freedom of thought, conscience and religion, imprisonment for failure to fulfil a contractual obligation, recognition as a person before the law are at risk of being infringed upon when the independence, impartiality and competence of the judiciary is not guaranteed.<sup>34</sup> If judges are suspended willy-nilly as happened in Turkey in the second half of 2016 or are influenced to act as bedfellows of the executive arm of the government, then it will be difficult for them to act as custodians of these rights. As is if this was not enough, right to a competent, independent and impartial tribunal has also been protected in times of armed conflicts under international humanitarian law. As pointed out in the above discussion, Common Article 3(1)(d) of the Geneva Conventions, governing both international and non-international armed conflicts, prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people. It is inconceivable that a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable

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<sup>28</sup> Ibid, para 19. And *Oló Bahamonde v. Equatorial Guinea* (1981) Human Rights Committee Communication No. 468 UN Doc CCPR/C/49/D/468/1991 para 9.4.

<sup>29</sup> Ibid, para 21.

<sup>30</sup> OSCE ‘Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE’ (1991) paras 19.1 and 19.2.

<sup>31</sup> OHCHR ‘Report of the Special Rapporteur for the independence of judges and lawyers’ (1995) UN Doc E/CN.4/1995/39 para 34.

<sup>32</sup> Human Rights Committee, (n20), para 19,

<sup>33</sup> Ibid, para 6

<sup>34</sup> UN General Assembly ‘International Covenant on Civil and Political Rights’ (16 December 1966) UNTS vol. 999 Articles 6, 7, 8(1) &(2), 11, 16 and 18



by civilized people would be without elements of competence, independence and impartiality.

Further, the role of justice sector is so pivotal in times of emergency. The Paris Minimum Standards of Human Rights Norms in a State of Emergency affirm that members of the legal profession, including judges, lawyers and prosecutors, have a duty to safeguard and uphold human rights and the rule of law in times of crisis.<sup>35</sup> In the words of the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis:

“The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, international humanitarian law.

For the judiciary to carry out this function successfully; to act as a check and balance on the other branches of government and to ensure that laws and State conduct comply with the rule of law and international human rights, it definitely needs to be competent and independent, and capable of functioning effectively. As well observed under Principle 5 of the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis:

“In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions.”

All this simply buttresses the importance of recognizing this right as non-derogable even during states of emergency. There cannot be any justification whatsoever for suspension of the right to competent, independent and impartial tribunal even during states of emergency.

### Presumption of innocence

Second on the list of the endangered rights during states of emergency is the right to be presumed innocent until proven guilty by a court of law. In a nutshell, this right as reflected in Article 14(2) of the ICCPR is essential in upholding the right to a fair trial. It involves questions of the burden and standard of proof in criminal proceedings as well as the treatment of an accused person that is consistent with being innocent.<sup>36</sup> The right applies to all stages of criminal proceedings, from the time a person is suspected of having committed a criminal offence until and if convicted.<sup>37</sup> It imposes a burden of proof on the prosecution to prove the guilt of a person accused of a criminal offence; and it is required that to discharge this burden, the prosecution must prove the guilt of the accused person beyond reasonable doubt.<sup>38</sup> The presumption of innocence guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.<sup>39</sup> It requires that the accused has the benefit of doubt, and is treated in accordance with this principle.<sup>40</sup>

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<sup>35</sup>Chowdhury R.S., ‘Rule of law in a state of emergency: The Paris minimum standards of human rights norms in a state of emergency’ (London, 1989) Principle B.3(c)

<sup>36</sup> UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on protecting human rights while countering terrorism, ‘Basic Human Rights Reference Guide. Right to a Fair Trial and Due Process in the Context of Countering Terrorism, October 2014, available at URL <<http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>> p.20

<sup>37</sup> *Alленet de Ribemont v. France*, (1995) ECtHR Application No. 15175/89 para 37

<sup>38</sup> Human Rights Committee (n21) para 30.

<sup>39</sup> Ibid.

<sup>40</sup> UN Human Rights Committee (n20) para 30.

The Human Rights Committee has commented that a hearing would not be fair, for example, if a defendant was faced with “the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence”.<sup>41</sup> Prolonged pre-trial detention, for example, may also result in a violation of the presumption of innocence, particularly where it has the effect of punishing the accused prior to trial.<sup>42</sup> The presumption of innocence is also linked to the requirement that the court determining a criminal case must act impartially, without bias and without prejudging the case. It binds third parties to refrain from expressing views as to the guilt of the accused that would serve to prejudge a case.<sup>43</sup> While respecting freedom of expression the media must not become inflammatory so as to negatively impact upon an accused’s presumed innocence.<sup>44</sup> It imposes a duty on all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.

Despite international law’s clear elaboration of this right, states of emergency that have been declared recently within OSCE as a response to the terrorist’s threat have *de facto* undermined the essence of the right to presumption of innocence. Questioning one of the old adages of presumption of innocence that it is “Better that ten guilty persons escape, than one innocent person suffers”, the German Minister of the Interior, Wolfgang Schäuble, said in an interview that:

“the ten-to-one rule does not apply to the threat of terrorism. It is untenable to say, ‘we would rather allow ten attacks to take place than restrain one person who might not want to carry out an attack’”<sup>45</sup>

These sentiments, have also been shared by the former British prime minister Tony Blair, in his speech at the annual Labour Party conference in 2005 doubting the essence of presumption of innocence in light of the terrorist’s attacks in the world.<sup>46</sup> The above notwithstanding, it is the argument of this paper that presumption of innocence is one of the fair trial rights that is or should still be considered non-derogable.

In the first place, the Human Rights Committee in its General Comment Number 32 has categorically held that presumption of innocence is a fundamental principle of any fair trial. In the same General Comment, the Committee further observed that deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.<sup>47</sup> Meaning if any trial is to be deemed fair, it must guarantee the presumption of innocence. In General Comment No. 29 (2001) on article 4: Derogations during a state of emergency, under para. 11 the Committee stated that:

“states parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective

<sup>41</sup>UN Human Rights Committee, (n20) para 25. And *Gridin v. Russian Federation*, Human Rights Committee Communication No. 770/1997, UN Doc CCPR/C/770/1997 (2000), para 8.2.

<sup>42</sup> UN OHCHR, ‘Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism’ (2012) UN Doc A/HRC/22/26 para 35.

<sup>43</sup>UN Human Rights Committee (n20) para. 30 and *Gridin v. Russian Federation*, para. 8.3

<sup>44</sup> *Gridin v. Russian Federation*, op cit, para 8.3; *Mwamba v. Zambia*, Human Rights Committee Communication No. 1520/2006, UN Doc CCPR/ C/98/D/1520/2006 (2010), para 6.5; and *Kovalev v. Belarus*, Human Rights Committee Communication No. 2120/2011, UN Doc CCPR/C/106/D/2120/2011 (2012), para 11.4.

<sup>45</sup> Sliedregt S., ‘A Contemporary Reflection on the Presumption of Innocence’ (2009) 80(1) *International Review of Penal Law* P.248

<sup>46</sup> Ibid

<sup>47</sup> Para.6

punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”.

In light of this, Amnesty International has strongly advocated for the presumption of innocence as one of the fundamental fair trial rights that is non-derogable<sup>48</sup>

Further, suspensions of this right may definitely result in suspension of other rights including clearly non-derogable rights. As already discussed above, presumption of innocence encompasses a lot of elements including treatment consistent with being innocent. If presumption of innocence is dispensed with then the opposite will prevail. It may result in treating suspects as criminals. The police and even the public may feel justified to use violence on the suspects. Even the court may act with bias if it views the suspects as already guilty before conviction. This will likely impinge upon some of the non-derogable rights like freedom from torture. In light of this, using the argument by the Human Rights Committee, the presumption of innocence should be regarded as a non-derogable right.

Lastly, it is pertinent to note here that presumption of innocence has been laid down in regional human rights instruments like the ECHR, EU Charter of Human Rights, the African Charter on Human and Peoples' Rights and the Asian and Arab Human Rights Charters.<sup>49</sup> It has also been laid down in global human rights instruments such as the ICCPR and in conventions that guarantee rights of vulnerable groups, such as children, migrants and detainees.<sup>50</sup> But in none of these has the presumption of innocence been formulated as a qualified right, or a right that can be limited if this is necessary in a democratic society.<sup>51</sup> This has been taken up as an indication of the non-derogable nature of the right to presumption of innocence.<sup>52</sup>

It is during state of emergency that the upholding of the presumption of innocence matters the most. It is when certain guarantees for a fair trial are curtailed as a result of states of emergency that defendants are more at risk of state abuse. This is the time when preserving the defendant's presumption of innocence may help counterbalancing the impact of restrictive measures adopted for security purposes. There cannot be any justification whatsoever for suspension of presumption of innocence even during states of emergency or in the fight against terrorism.

## Conclusion

Similar arguments can be made for other fair trial rights like the right not to be compelled to testify against oneself, the right to be informed of the charges promptly, in detail and in a language understood by the defendant, the right to have adequate time and facilities to prepare the defence, including the right to communication confidentially with legal counsel, to mention but a few. In a nutshell, it is clear from the above discussion that there are strong arguments in support of non-derogable fair trial rights which must be immediately addressed if their protection in times of emergency is to be guaranteed. These fair trial rights are sacrosanct despite the fact that they have not been included as non-derogable rights in ICCPR and ECHR. OSCE Participating States can set the pace for others to follow by taking

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<sup>48</sup> Amnesty International Response to the European Commission Green Paper on The Presumption of Innocence, COM (2006) 174 (final), p. 6, with reference to General Comment 29 by the Human Rights Committee.

<sup>49</sup> Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14' (4 November 1950) ETS 5 Article 6(2), European Union, 'Charter of Fundamental Rights of the European Union' (26 October 2012) 2012/C 326/02 article 48, Organization of African Unity (OAU), 'African Charter on Human and Peoples' Rights ("Banjul Charter")' (27 June 1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 Article 7(1)(b)

<sup>50</sup> Article 14(2) of the International Convention for Civil and Political Rights (ICCPR), Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 18(2) of the International Convention on the Protection of the Rights of Migrant Workers, Principle 36 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.

<sup>51</sup> Sliedregt S. (n45) 259

<sup>52</sup> Ibid, 259

a stand on this area through recognizing these rights as non-derogable during states of emergency or conflicts.