

# THE RIGHT TO BE PRESUMED INNOCENT IN THE INTERNATIONAL HUMAN RIGHTS LAW AND ITS REFLECTION IN VIETNAM

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## 1. The right to be presumed innocent in the International Human Rights Law (IHRL)

Human Rights in the criminal proceedings is essentially a set of procedural guarantees that is very important in IHRL which aims to: Firstly, protecting the safety of life, body, honor, dignity and freedom of man. Secondly, ensuring the fair trial. This set of guarantees includes several different aspects and contains many explicit and implicit rights, in which the right to be presumed innocent (or presumption of innocence) is a very important human right that is recognized as a norm of customary international law and enshrined in many other international legal documents.<sup>1</sup>

In IHRL, the right to be presumed innocent is enshrined for the first time in the Universal Declaration on Human Rights (UHDR, 1948): “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 defense” (Art. 11(1)).<sup>2</sup> The International Covenant on Civil and Political Rights (ICCPR, 1966) continues to reaffirm this right in a more concise manner: “Everyone charged with a criminal offence shall have **the right to be presumed innocent** until proved guilty according to law” (Art. 14(2)).<sup>3</sup>

In the International Criminal Law (ICL), specifically in the Statutes, the right to be presumed innocent is provided as follows: “1. Everyone shall **be**

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<sup>1</sup> Amnesty International (2014), *Fair Trial*, p.125, at: <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>, [accessed: 18/6/2020].

<sup>2</sup> *Universal Declaration of Human Rights* (1948), at: <https://www.refworld.org/docid/3ae6b3712c.html>, [accessed: 18/6/2020].

<sup>3</sup> *International Covenant on Civil and Political Rights* (1966), at: <https://www.refworld.org/docid/3ae6b3aa0.html>, [accessed: 18/6/2020].

**presumed innocent** until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”. (Art. 66 Rome Statute of the ICC);<sup>4</sup> “The accused shall **be presumed innocent** until proved guilty according to the provisions of the present Statute” (Art. 21(3) ICTY Statute);<sup>5</sup> “The accused shall **be presumed innocent** until proven guilty according to the provisions of the present Statute” (Art. 20(3) ICTR Statute).<sup>6</sup>

The right to be presumed innocent is often analyzed in relation to fair trial standards. In this regard, Amnesty International believed that, every one has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of a fair trial.<sup>7</sup>

According to Human Rights Committee (HRC)’s explanation in General Comment (GC) No.32, a fair trial must meet many requirements that, in addition to the right to be presumed innocent, other elements including:<sup>8</sup> (1) equal before the courts and tribunals (para. 7, 9, 10, 11, 13 GC No.32); (2) a competent, independent and impartial tribunal established by law (para. 19 to 21 GC No.32); (3) fair and public hearing (para. 25, 28 GC No.32); (4) the right not to be compelled to testify against oneself or to confess guilt (para. 41 GC No.32); (5) the prohibition of retroactive application of criminal laws and of double jeopardy (para. 54 to 57 GC No.32); (6) the right to be tried without undue delay (para. 35 GC No.32); (7) the right to defend oneself in person or through counsel (para. 37 GC No.32); (8) the right to be present at trial and appeal (para. 31, 36, 54 GC

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<sup>4</sup> *Rome Statute of the International Criminal Court*, at: <https://www.refworld.org/docid/3ae6b3a84.html>, [accessed: 18/6/2020].

<sup>5</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, at: <https://www.refworld.org/docid/3dda28414.html>, [accessed: 18/6/2020].

<sup>6</sup> *Statute of the International Criminal Tribunal for Rwanda*, at: <https://www.refworld.org/docid/3ae6b3952c.html>, [accessed: 18/6/2020].

<sup>7</sup> Amnesty International (2014), *Fair Trial*, p.125.

<sup>8</sup> CCPR General Comment No.32 (CCPR/C/GC/32 23 August 2007); Amnesty International (2014), *Fair Trial*.

No.32); (9) the right to call and examine witnesses (para. 39 GC No.32); (10) the right to an interpreter and to translation (para. 32, 40 GC No.32); (11) the right to a public judgement (para. 29 GC No.32); (12) the right to a fair punishment; (13) the right to appeal and retrials (para. 45, 47 GC No.32).

As recommended by the HRC, the right to be presumed innocent is considered as a norm of customary international law, and therefore it applies at all times and in all circumstances (para. 11 CCPR GC No.29; para. 6 GC No.32).<sup>9</sup> In other words, the right to be presumed innocent shall apply at all stages of the criminal proceedings, even before the suspects are charged with a crime until a conviction is confirmed following a final appeal.<sup>10</sup> The right-holders of this right includes detainees, suspects and accused persons. The State institutions conducting investigating, prosecuting and adjudicating activities are duty-bearers that are responsible to respect and protect this right.

The right to be presumed innocent is legally related to the issues of the burden and standard of proof. In this aspect, HRC explains in GC No.32 as following: “The presumption of innocence, which is fundamental to the protection of human rights, **imposes on the prosecution the burden of proving charge**, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle” (para. 30 GC No.32).<sup>11</sup> In the Rome Statute, this aspect is provided as following: “2. The onus is on the Prosecutor to prove the guilt of the accused; 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt” (Art. 66(2)-(3)); the accused person has the right “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal” (Art. 67(1)(i)).<sup>12</sup>

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<sup>9</sup> CCPR General Comment No.29 (CCPR/C/21/Rev.1/Add.11); CCPR General Comment No.32.

<sup>10</sup> Amnesty International (2014), *Fair Trial*, p.125.

<sup>11</sup> CCPR General Comment No.32.

<sup>12</sup> *Rome Statute of the International Criminal Court* (art. 66(2)-(3), art. 67(1)(i)).

Thus, according to IHRL and ICL, the burden of proving the crime is on the prosecution. The accused person is not responsible for proving his innocence. Proving of crime must be without reasonable doubts. If any reasonable suspicion exists, it must be explained (presumed) in favor of the accused person. In this case, the court may not convict, and the accused must be acquitted.<sup>13</sup>

In this aspect, IHRL also recognized *the right [of the accused person] not to be compelled to testify against himself or to confess guilt* (Art. 14(3)(g) ICCPR, Art. 55(1) and Art. 67(1)(g) Rome Statute). Agencies conducting criminal proceedings must not intervene directly or indirectly or cause psychological pressure on suspects or accused persons to compel them to confess guilt. Prohibiting torture and other cruel, inhuman or degrading treatment to compel the accused person to confess guilt. Any statement which is established to have been made as a result these actions shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made (Art. 15 CAT).<sup>14</sup>

Another implicit right of *the right to be presumed innocent* and *the right not to be compelled to testify against oneself or to confess guilt* which is very important is *the right to remain silent* (expressly recognized in Art. 55(2)(b) and Art. 67(1)(g) Rome Statute). The accused person has the right to speak or remain silent during an investigation and in court, and the silence is not considered as a reason to determine their guilt or innocence. However, the right to remain silent is not an absolute right, and in particular circumstances, the court may make a judgement unfavorable to the accused persons if they keep quiet. In this case, in order to determine whether a court decision is considered a violation of the fair trial rights based on factors:<sup>15</sup> (1) the individual's access to their lawyer and the assistance of their lawyer during questioning; (2) warnings given to the accused

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<sup>13</sup> Amnesty International (2014), *Fair Trial*, p.125.

<sup>14</sup> *Convention against Torture* (CAT, art. 15).

<sup>15</sup> Amnesty International (2014), *Fair Trial*, p.131.

about the consequences of silence; (3) the permissible weight afforded to the silence when evaluating the evidence.

*Thirdly, protecting the presumption of innocence in practice.* In this aspect, HRC explains in GC No.32 as following: “It is a duty for 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. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence” (para. 30 GC No.32).<sup>16</sup>

Moreover, with regard to the detention issue, HRC further explains in the other General Comments as following: the accused should not be detained while awaiting trial unless there are permissible reasons for detention (see also Art. 9(3) ICCPR and para. 3 CCPR GC No.8);<sup>17</sup> detention and its length should not be taken as a sign of crime and must be consistent with the presumption of innocence (see also *the right to be tried without undue delay* in Art. 9(3)-(4) and Art. 14(3)(c) ICCPR); conditions of detention must be treated in an appropriate manner and separately from those who have been convicted (see also Art. 10(2)(a) ICCPR and para. 9 CCPR GC No.21).<sup>18</sup> Hence, according to HRC’s explanation, during the investigative stage and trial in court, the decisions on detention, its length and conditions, and the treatment of accused in practice must be consistent with the

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<sup>16</sup> CCPR General Comment No.32.

<sup>17</sup> Amnesty International (2014), *Fair Trial*, p.61-62. Art 9(3) ICCPR: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. CCPR GC No.8: “Pre-trial detention should be an exception and as short as possible” (para. 3).

<sup>18</sup> Art. 10(2)(a) ICCPR: “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons”. CCPR GC No.21: “Such segregation is required in order to emphasize their [accused persons] status as unconvicted person who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2” (para. 9).

presumption of innocence. The state authorities and the public should not have prejudices against the accused before the criminal proceedings ended or after an acquittal by a court. If a person is acquitted by final judgment of a court (including on procedural grounds, such as expiry of a time limit for prosecution), the judgment is binding on all state authorities. Therefore, the public authorities, particularly courts, prosecutors and the police, should refrain from implying that the person may have been guilty, so as not to undermine the presumption of innocence. The public authorities should not voice suspicions about the individual's innocence to refuse compensation, or when the case is transferred to civil courts but using a different lower standard of proof.<sup>19</sup>

In this aspect, IHRL also recognizes two important rights or principles:<sup>20</sup> *The prohibition of double jeopardy* (the principle of *ne bis in idem*): No one shall be tried or punished more than once in the same jurisdiction for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure (see also Art. 14(7) ICCPR and Art. 20 Rome Statute). However, the prohibition against double jeopardy is not violated in the case a higher court dismisses a [lower court] judgment and orders a re-trial. The prohibition also does not prevent the re-trial in some exceptional circumstances such as discovering new facts or evidence that can acquit the accused. Moreover, in some cases, a person who has been tried by national courts may be tried again for the crimes under the jurisdiction of ICC or other international criminal tribunals without violating the principle of double jeopardy. However, those who have been tried by ICC or other international criminal tribunals may not be subsequently be tried again (see also Art. 101(1) and Art. 108(1) Rome Statute).

*The prohibition of retroactive application of criminal laws* (the principle of *nillem crimen sine lege*): This principle stems from the two basic principles of criminal law existing since ancient times: “no crime without law” and “no

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<sup>19</sup> Amnesty International (2014), *Fair Trial*, p.128.

<sup>20</sup> Amnesty International (2014), *Fair Trial*, p.138-142.

punishment without law” (see also Art. 11(2) UDHR, Art. 15 ICCPR, Art. 22 to 24 Rome Statute). This principle may not be restricted in any circumstances, including during states of emergency.

Through the above analysis, it can be seen that the right to be presumed innocent is a very important human right in criminal proceedings, considered as a norm of customary international law and applied in all times and circumstances. The content of this right is broad, requires guarantees in many aspects, both formal and practical, and this is also an important requirement of the right to a fair trial.

## **2. Reflection of the right to be presumed innocent in Vietnam**

Vietnam accessed the International Covenant on Civil and Political Rights (ICCPR, 1966) on 24 September 1982.<sup>21</sup> Since 1988, the Criminal Procedures Code has provided: “No one is regarded as guilty and subject to punishment, before the conviction of court has taken legal effect.” (Article 10), and in 1992, the principle of presumption of innocence was firstly recognized in the Vietnamese Constitution. Specifically, the Article 72 of Constitution 1992 of Vietnam stipulated that: “*No one shall be considered guilty nor be punished until there is a final and conclusive judgement from the court*”. The Criminal Procedure Code of 2003 repeated the presumption of innocence in its Article 9, and emphasised it is as a basic principle of the criminal proceedings of Vietnam.

Inheriting the Article 72 of the 1992 Constitution, the current 2013 Constitution of Vietnam continues to assert the principle of presumption of innocence, but has adjusted the wording to make it more accurate. Specifically, Article 31.1 of the 2013 Constitution states: “*The accused is considered innocent until proven guilty under a legal procedure and by a court verdict that has taken legal effect*”.

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<sup>21</sup> See, Ratification of International Human Rights Treaties – Vietnam, <http://hrlibrary.umn.edu/research/ratification-vietnam.html>

The current 2015 Criminal Procedure Code of Vietnam, at the Article 13, reaffirms and concretizes the Article 31 of the 2013 Constitution, which reads:

*“A accused person is deemed innocent until his guilt is evidenced according to the procedures and formalities as defined in this Law and a Court passes a valid conviction.*

*If grounds for conviction, as per the procedures and formalities in this Law, do not suffice, competent procedural authorities and persons shall adjudge the accused person to be not guilty”.*

In addition to the Article 13, there are some other Articles in the 2015 Criminal Procedure Code of Vietnam stipulating other aspects related to the principle of presumption of innocence, including:

- Relating to general procedural requirements: Article 7 holds that, “All criminal proceedings must be carried out in accordance with the procedure established by this Code; the dealing with sources of information on any alleged offence, and the initiation of legal proceedings, investigation, prosecution and trial cannot be otherwise than on such bases and in accordance with such procedure and formalities as are specified in this Code”.
- Relating to the responsibility to prove : Article 15 provides: “Competent procedural authorities are held liable for proving guilt. A accused person is entitled to but is not obliged to prove his innocence. Competent procedural authorities, within their duties and authority, must use legitimate measures to determine the facts of a lawsuit in unbiased, thorough and complete ways, to clarify the evidences of guilt and innocence, aggravation and mitigation of criminal liabilities of the accused person”.
- Relating to evidence: According to Articles 86 and 87: “Evidences are de facto and collected as per the sequence and formalities defined by this Law. Evidences are grounds for the determination of a crime, perpetrators of such crime and other valuable facts for the settlement of the case”, and “Palpable things not collected as per the sequence and formalities as per this Law bear no legal effect and are not evidences for the settlement of



criminal lawsuits”. As provided in the Article 98: “The admission of crimes by suspects or defendants shall not be the sole evidence for conviction”. According to Article 10, all forms of maltreatment, torture and other illegal practices in the process of collecting evidences and taking other procedural activities are strictly prohibited.

From the above-mentioned provisions, it can be said that, the right to be presumed innocent has been recognized in Vietnamese law. The legal framework of Vietnam on this right is formally compatible with relevant provisions of ICCPR and other international human rights treaties.

However, there are some problems occurred in protection of the right to be presumed innocent in practice in Vietnam, as follows:

*Firstly*, as indicated in the Article 13 of the 2015 Criminal Procedure Code of Vietnam: “*If grounds for conviction, as per the procedures and formalities in this Law, do not suffice, competent procedural authorities and persons shall adjudge the accused person to be not guilty*”. This provision requires competent procedural authorities, if a legal provision is unspecified, *inter alia*, it must be explained in favor of the accused person.

Nevertheless, in practice, the competent procedural authorities in Vietnam tend to explain unspecified legal provisions in a way that is detrimental to the accused. This leads to wrongful convictions and undermines the right of every person accused of a crime is presumed to be innocent unless and until his or her guilt is established beyond a reasonable doubt.

*Secondly*, as mentioned earlier, presumption of innocence requires the prosecution must prove, beyond a reasonable doubt, each essential element of the crime charged. In this regard, “reasonable doubt” is the factor that triggers or ends the presumption of innocence, and presumption of innocence is closely associated with the issues of collection and evaluation of evidence.

However, in Vietnam, it is still not clear what is the “reasonable doubt”. The Criminal Procedures Code and the competent procedural authorities have

never determined specific criteria to satisfy the reasonable doubt. Consequently, there were cases where the defendants were convicted when the adequate evidence was not fully gathered. In fact, the competent procedural authorities of Vietnam divided the evidence into many types in criminal proceedings, such as direct and indirect evidence. The problem is that, in many cases, only indirect evidence were used for conviction, which is contrary to the principle of presumption of innocence.

*Thirdly*, also as mentioned earlier, for the presumption of innocence, a person cannot be compelled to confess guilt or give evidence against him/herself. It is for the state to produce evidence of guilt, not for the defendant to prove innocence. Therefore, a suspect's silence should not be used as evidence of guilt. And, because of the serious consequences of conviction, the state must prove guilt to a high standard. If doubt remains, the defendant must be given the benefit of the doubt and cleared because the state's "burden of proof" has not been met.

In Vietnam, the right to silence is specified in some provisions of the current 2015 Criminal Procedures Code, but not explicitly. Specifically, a suspect has the right ".to present statements, to express opinions.", or the right "do not have to give testimonies against themselves or be forced to plead guilty (Articles 58, 59, 60 and 61). In addition, the 2015 Criminal Procedure Code also provides that the arrested have the right to be informed and explained about their rights and obligations. But unfortunately, the Code does not provide for the legal consequences of a breach of the responsibility to notify the detainee of the right to silence. Because of that, this legal right of silence was not guaranteed to be enforced if the detainee did not know they had that right. In comparison, in many other countries, for example, in the United States, there have been typical cases of violating the notice of silence to the detainee, which subsequently resulted in all their statements, including the pleading guilty to being found guilty is no longer sufficient evidence to convict them in court.

In relation to the state's "burden of proof", in Vietnam, there has been a particularly serious case recently, in which at the trial the accused pleaded guilty and said he was not given a bow or corporal punishment (torture), so he was the court sentenced to death. However, the procuracy body protested that case, arguing that it was necessary to re-investigate because the evidence that the court used to give a sentence is mainly the defendant's testimony and there is no direct evidence. In addition, in the process of investigating the defendant's testimonies were inconsistent and contradictory (pleading and refusing) and in conflict with many other pieces of evidence. This shows that the principle of state's "burden of proof" has not yet fully and properly applied in Vietnam.

*Fourthly*, the right not to be compelled to testify against himself or to confess guilt is closed linked with "forced confession", which may have been extracted through torture or other ill-treatment were used to convict and an accused. In Vietnam, forced confession is legally prohibited but in forced confession is prohibited by law but still happens in practice and has led to some famous wrongfull conviction cases that "shorked Vietnamese society" including Huynh Van Nen case, Nguyen Thanh Chan case, Nguyen Minh Hung case, Han Duc Long case, in which all the victims reported being tortured by investigators.

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