

# Contemporary Challenges to Human Rights Law



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Edited by

Claire-Michelle Smyth, Richard Lang  
and Jack Clayton Thompson

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# CHAPTER 1

## CONTEMPORARY ISSUES IN HUMAN RIGHTS LAW

DR CLAIRE-MICHELLE SMYTH  
AND DR JACK CLAYTON THOMPSON

### **Introduction**

On 1<sup>st</sup> December 2018, the editors of this collection convened a conference at the University of Brighton dedicated to bringing academics at all stages of their careers, along with practitioners and NGOs, together to discuss and examine some of the contemporary challenges facing human rights law and practice today. The conference drew contributors from England, Northern Ireland, Republic of Ireland, France and America with no shortage of issues to discuss.

It was clear from the conference that we live in a time where human rights are in crisis. Following over a decade of austerity measures at the domestic, regional and international levels human rights, budgetary decisions are evidently having a detrimental effect on the protection of human rights. Cuts to social spending has resulted a failing social welfare system, a health service buckling under pressure, unprecedented rises in homelessness and poverty and the emergence of the ‘working poor’ and zero hours contracts. Austerity, famine, civil war, oppressive governmental regimes and climate change have seen vast migrations resulting in a resurrection of far right-wing ideology. In the UK this is seen in can only be described as propaganda and scaremongering during the campaign for Brexit and in subsequent political elections evidenced by the increase in racially motivated hate crime within the UK.

The vast majority of countries around the world have ratified the major human rights treaties. Our moral outrage at the atrocities going on around the world, including political repression, slavery, authoritarianism and extremism, can easily be framed in the language of human rights. In spite

of the proliferation of human rights and the narrative of rights in common discourse, violations remain relatively commonplace. The landscape of human rights is such that it has resulted in some beginning to question, are human rights rights at all?

## Summary of Chapters

We have placed the chapters of this collection into four groups: ‘International Human Rights Issues’, ‘Brexit’, ‘Domestic and Civil Human Rights Issues’ and ‘Theoretical Reflections’. Whilst these groups are fairly loose and each of our contributors adopt mixed approaches to their research, they do provide a rough outline of the focus of different sections of the book.

Narissa Ramsundar and Matthew Rabagliati’s chapter considers the use of translation in the International Criminal Court. They examine whether the standard on fair rights trials applied at the International Criminal Court (ICC) is truly unique, or whether it should be reflected in the interpretation of the right in other courts and tribunals that deliberate on similar issues. They argue that the approach (or formula) used by the Appeals Chamber in *The Prosecutor v Germain Katanga*<sup>1</sup> allows for a full and fair examination of the accused’s language competency. Their chapter builds upon the existing scholarship in this area by proposing fundamental practical changes to the implementation of translation and interpretation as part of one of the central aspects of the right to a fair trial.

Samira Alloui analyses the use of New Public Management Policies by regional human rights bodies in a context of challenges. Have budgetary restrictions changed the way they deal with the litigation process? This analysis that concentrates on preparatory works linked to the reforms and on other documents of the Council of Europe and the Organization of American States concludes that the budgetary restrictions have reformed the system but have strongly created a selection in the processing of cases that may have consequences on potential litigants.

Michelle Coleman considers the impact that Brexit might have on the right to a presumption of innocence. The chapter considers the heightened protections to the presumption of innocence contained in European Directive 2016/343 that will be absent from the post-Brexit legal landscape. Specific focus is drawn to the use of adverse inferences in exercising the right to silence, the use of the dock in the courtroom, and the allowance of

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<sup>1</sup> *The Prosecutor v Germain Katanga (Appeals Chamber) Judgement on the Appeal of Mr Germain Katanga against the decision of Pre Trial Chamber 1 entitled “The Defence Request Concerning Languages”* ICC 01/04-01/07 OA 3 27 May 2008.

Terrorist Prevention and Investigation Measures (TPIMs) against suspects when contrasting the UK approach with that outlined in the 2016 Directive.

Özgür H. Çınar also considers the impact of Brexit on domestic human rights, but focuses on the rights to freedom of religion and belief and how they might be affected. In particular, when considering rise in hate crime following the European Union (EU) Referendum, people are wondering what is happening to the British lifestyle, traditionally founded as it is on tolerance. The chapter seeks to answer the following questions concerning the impact of Brexit on this fundamental freedom: Will Brexit really shake the existential conditions of the freedom in question by its very foundations? Are the Government's plans to counter the rise in hate crimes linked to Brexit sufficient? How should hate crimes be dealt with?

Mary Cosgrove considers the issues of human rights and taxation and how, traditionally, these have seemed to be parts of different worlds. Human rights bodies, experts and NGOs shied away from commenting on the impact of tax policies on States' ability to fulfil their human rights obligations. The global economic downturn seems to have punched a hole in the border between these two worlds. Since 2007 there has been a steady stream of articles, reports and commentary on the connection between tax and human rights. This has coincided with a number of global tax reform initiatives arising from high profile cases of tax evasion and avoidance. However, to date, there has been very little consideration of the overlap of human rights obligations and international tax policy. After detailing the connection between human rights obligations and tax policy, this chapter traces the interventions of the United Nations' human rights machinery in the area of taxation and sets out the reactions of state parties. Focusing on the pronouncements of the Committee on the Elimination of Discrimination Against Women (CEDAW) and ESCRC in their concluding observations to the periodic reports of Switzerland and the United Kingdom in 2016, and in General Comment 24, it finds a lack of engagement by States with human rights when it comes to tax policy.

Gift Sotonye-Frank's chapter focuses on Article 10(c) of the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW') which imposes an obligation on States to take 'all appropriate measures' to ensure 'the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education....' Despite this provision, gender stereotyping remains prevalent in the field of education. The chapter discusses how gender stereotyping is perpetuated in schools through exclusion policies and practices against Adolescent Pregnant Schools Girls (APSG). The CEDAW Committee, which is the body of independent experts that monitor the implementation of CEDAW,

recommends that States review and/or abolish laws and policies that allow the exclusion of pregnant girls and formulate education policies enabling pregnant girls to remain in, or return to school without delay. Despite these recommendations, APSGs are frequently expelled or excluded from schools in sub-Saharan Africa as soon as they are discovered to be pregnant. Using Kenya and Tanzania as case studies, this chapter argues that gender stereotypes often characterise schools, teachers and education officials' response to schoolgirl pregnancy, regardless of the presence or absence of exclusion policies. As a result, harmful gender stereotypes are at the heart of school exclusion policies and practices that disproportionately affect APSGs.

Claire-Michelle Smyth's chapter will examine abortion law in Ireland. This chapter takes a historical approach to examining the law of abortion in Ireland. It takes the reader on a journey beginning with the enactment of the Eighth Amendment in the Irish Constitution which enshrined in law that the right to life of the unborn was on par with the right to life of the mother. The chapter then looks at how this provision was interpreted by the courts and in practical terms what this meant not only for women seeking a termination, but on the provision of maternity care more generally in Ireland. Examining this provision through the lens of Ireland's international obligations it becomes clear that Ireland is in breach of its several international human rights standards. Following a high-profile case in the European Court of Human Rights and the preventable death of Savita Halapanaavar which was reported worldwide, Ireland began the process of re-evaluating this provision. Beginning with a white paper, through to a citizen's assembly which ultimately led to a referendum to remove this provision in May 2018 and the introduction of the Health (Regulation of Termination of Pregnancy) Act 2018. The legislation is not perfect, as identified in the chapter, however, in the current climate of human rights violations, this victory for women's reproductive autonomy in Ireland is to be celebrated.

Brontie Ansell examines the legal protection available to women and mothers following the breakdown of a cohabitation relationship. Comparing the law as exists for the division of property upon divorce it is clear that there is a vast chasm in the levels of protection offered. By comparing the law in other jurisdictions and examining the state's obligations through Fineman's vulnerability theory, this chapter offers a comprehensive argument for the reform of the law on cohabitation.

Edward Mathews tackles the issues surrounding the transmission of HIV and considers whether in fact the criminal law is the appropriate forum to respond to such a public health crisis. This chapter explores the interface between the right to health and HIV and the contradictions in the deployment

of the criminal law response particularly given the possibility that the criminal law could be engaged in relation to the spreading of other infectious pathogens.

Alex Newbury and Gavin Dingwall examine the perceptions of young people towards alcohol, binge drinking and drunkenness, and discuss findings from their research that young peoples' attitudes and responses to their own offending and drunken behaviour can be differentiated largely along gender lines. This finding suggests that a gender-specific policy response could be adopted to take account of these potential differences, and the chapter concludes by proposing some practical examples. In doing so, the chapter will also address whether a gender-specific educational or criminal justice response has the potential to compromise equality and will offer more nuanced approaches focussing on individual personality types. Highlighting gender as a key potential difference is an interesting counterpoint, and challenge, when considering equality as a human right. A general demand for equality (equating to everyone being treated the same, as equals) has to be balanced against a need for recognition of the potential diversity along gender lines in perceptions that young people themselves have regarding their behaviour, and their recognition of the impact of alcohol and binge drinking in relation to this behaviour and its outcomes.

Luke Graham's chapter considers the elements necessary within a human rights-based definition of destitution. He claims that core elements of such a definition are the rights which form such a definition, the component rights, and the point at which these rights come into existence, the destitution threshold. Luke argues that a human rights-based definition of destitution is comprised of the rights to an adequate standard of living; social security; housing; water; sanitation; food; and clothing. This approach, it is claimed, offers an inclusive means of addressing poverty, conceiving of destitution beyond low income alone and depicts the experiences of those living in conditions of poverty.

Finally, Jack Clayton Thompson analyses the use of 'rights talk' in the general discourse around human rights and seeks to challenge the notion that human rights are rights. His central claim is that the conceptual use of the phrase 'Human Rights' does not constitute an assertion to a right. Rather, an assertion to a human right is, generally at least, an assertion to demand some perceived moral good. This is particularly problematic as the moral justificatory framework for said moral good is often absent. Using the Hohfeldian model of rights, this chapter suggests that the conceptual and moral authority of rights cannot be separated and if we are to use the language of rights in a meaningful way, we must make our moral claims clear in order to build a conceptually rigorous right.

## Thanks

Collectively, the editors of this collection would like to thank their colleagues in Brighton Business School for their support. Particularly, the Vice Chancellor of the University, Professor Debra Humphris who gave up her time on a cold December morning to officially open the conference, welcome the delegates to the University and to introduce our first keynote speaker Professor Helen Fenwick; Professor Paul Hunt, our second keynote speaker; Mr Chris Matthews, Senior Research and Events Officer in Brighton Business School for his assistance in the conference organisation; Mr Simon Letchford, Learning Support Technician at Brighton Business School for being on hand to swiftly deal with the inevitable technical glitches; and to the two law students Tanya Beck (LLB) and Rebecca Collison (LLM) who were on hand to provide directions and information to the delegates throughout the day.

In addition, we would like to thank those who delivered papers at the conference. There was a wide variety of topics which sparked discussion and debate throughout the day. This collection provides an insight into some of the issues discussed, and to those authors we thank you for your patience during the editing process.

Finally, we would like to thank Cambridge Scholars Press for providing the prize for the best PhD paper delivered at the conference; won by Luke Graham.

## CHAPTER 2

# REBUILDING BABEL: AN EXAMINATION INTO THE APPLICABILITY OF THE ICC INTERPRETATION OF ARTICLES 67(1) (A) AND 67(1) (F) TO OTHER COURTS AND TRIBUNALS DEALING WITH SIMILAR ISSUES?

NARISSA RAMSUNDAR  
AND MATTHEW RABAGLIATI

### Introduction

The Tower of Babel is a recurring analogy in scholarship relating to the rights of accused persons during trials where the translation of their language is needed.<sup>1</sup> The story goes that to subdue human ambition to reach heaven through the construction of the Tower of Babel, not only did God destroy the Tower, but also the common tongue among men. This act led to the birth of different languages and the inevitable panoply of communication challenges. The story is a compelling metaphor in the context of international criminal justice because the ability to communicate a full and truthful narrative is a much-proclaimed objective of the criminal trial in adversarial legal systems.<sup>2</sup> The criminal trial aims to function as a truth-

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<sup>1</sup> See for instance C Namakula, *Language and the Right to a Fair Hearing in International Criminal Trials* (Springer 2014) vii and M Paz 'The Tower of Babel: Human Rights and the Paradox of Language' (2014) 25(2) *European Journal of International Law* 473, 474-475.

<sup>2</sup> L. K. Griffin 'Narrative, Truth and Trial' (2012-2013) 101 *Georgia Law Journal* 281-335 at 285, 286-289.

seeking exercise,<sup>3</sup> where adversaries are meant to ventilate a case before an impartial court, and the trial processes allow for the reception of evidence to establish conflicting narratives. An impartial judge of the facts then decides which facts are the truth and sanctions the offender appropriately. An accurate understanding of instructions, charges, testimony, questions and decisions are therefore an overriding concern. Although a trial contains procedural mechanisms to ensure fairness, when multiple languages need to be understood and applied, the task of recording evidence truthfully and determining whether it is accurate or not poses significant challenges. The international criminal trial amplifies this challenge as not only are judges and advocates (prosecutors and defence counsel) drawn from nations speaking different languages, the accused themselves often speak ‘indigenous languages not generally known to judges and advocates’.<sup>4</sup> This language challenge can serve as a ‘recipe for confusion and ultimately, injustice’.<sup>5</sup> The ability of accused persons to understand the charge and the case against them, therefore, relies on the accuracy of translation and the provision of accurate interpretation services.

The ability of accused persons to understand the case against them has been protected through the assurance of procedural rights and guarantees which are collectively known as ‘fair trial rights’.<sup>6</sup> The scope and extent of the protection of these rights within the international system of criminal justice and during international criminal trials is an essential point when determining and considering fairness. The most common standard for the communication of the case to accused persons (contained in most human rights treaties) is that the charges and the trial be communicated to an accused person in a language the accused ‘understands and speaks’.<sup>7</sup> However, article 67(i) (a) of the Statute of the International Criminal Court (The ICC Statute) demands the communication of the ‘content’ of the charges to the accused person in a language he ‘fully understands and

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<sup>3</sup> For contrary views on this, Griffin (n 2) 301-315 for a discussion on the weaknesses of the narrative-based system.

<sup>4</sup> Namakula (n 1) vii.

<sup>5</sup> Ibid.

<sup>6</sup> S. Field, ‘Fair Trials and Procedural Tradition in Europe’ (2009) 29 *Oxford Journal of Legal Studies* 365- 387; L. Walker, E. Lind and J. Thibaut, ‘The Relationship between Procedural and Distributive Justice’ (1979) 65 *Virginia Law Review* 1401-1420.

<sup>7</sup> Articles 14 (3) (a) and 14(3) (f) International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR).

speaks'.<sup>8</sup> In a similar vein, the ICC Statute also requires that the trial is communicated to an accused in a language the person 'fully understands and speaks'.<sup>9</sup> The ICC Statute, prima facie, suggests a more expansive interpretation of the standard right concerning the communication of a case to accused persons through its inclusion of the word 'fully'. This chapter examines whether the standard on fair trial rights applied at the International Criminal Court (ICC) is truly unique, or whether it should be reflected in the interpretation of the right in other courts and tribunals that deliberate on similar issues.

These questions have extensive legal implications given that many cases before international courts and tribunals involve accused persons who do not natively speak any of the official languages of the court.<sup>10</sup> Therefore, questions as to how best to understand the right to interpretation and translation impacts on the development of the law in this area, both at the international and domestic level. This chapter argues that the approach (or formula) used by the Appeals Chamber in *The Prosecutor v Germain Katanga (Appeals Chamber) Judgement on the Appeal of Mr Germain Katanga against the decision of Pre Trial Chamber I entitled 'The Defence*

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<sup>8</sup> Article 67(1) (f) Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute).

<sup>9</sup> Article 67(1)(f) ICC Statute which states:

(1) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks.

<sup>10</sup> Fabricio Guariglia, Director of the Prosecutors Division at the International Criminal Court (ICC), Comments made during his presentation 'Length of the Proceedings' for Panel III 19 October 2018 during the Nuremberg Forum 2018 at the Palais de Justice, Nuremberg. This is the situation with regard to 9 States currently under examination at the ICC: Uganda, The Democratic Republic of Congo, Darfur, Libya The Central African Republic, The Republic of Kenya, The Cote D' Ivoire, Georgia and Burundi; the information can be accessed at <<https://www.icc-cpi.int/#>> accessed October 23 2019. There are multiple languages spoken on these territories. In the Democratic Republic of Congo, for example, 213 languages are listed on ethnologue. Uganda is listed as having 43, Kenya as 68. The information can be accessed at <<https://www.ethnologue.com/browse/countries>> accessed October 23 2019.

*Request Concerning Languages*,<sup>11</sup> allows for a full and fair examination of the accused's language competency. Furthermore, this paper posits that utilising this formula will allow for the progressive development of the guarantee in three critical ways. First, it will advance stronger practical guides for the use of the guarantee throughout the trial process. Second, it will advance the ideological objectives underpinning the broad system of international criminal justice. Third, it will enhance understanding of the guarantee, which can inform and augment the wider *jus commune* of rights. With this in mind, the chapter suggests the adoption of the Katanga formula in all the decisions of the ICC, other international courts and tribunals, and domestic courts dealing with similar issues.

The suggestion that there is a special 'Katanga Appeals Formula' that can develop existing norms builds on the literature surrounding the implementation of human rights in international criminal proceedings. It achieves this by specifically drawing on the scholarship that has sought to define and explain the nexus between international human rights law and international criminal justice.<sup>12</sup> Furthermore, it identifies the ideological and doctrinal roots underpinning the broader discussion on fairness in criminal trials.<sup>13</sup> In this way, this chapter's contribution to existing scholarship lies in the way it proposes fundamental changes in the practical implementation of the guarantee for language translation and interpretation as part of one of the components for a fair trial. Its addition should in the long term allow for a stronger realisation of the guarantee for language translation and interpretation during a trial, and a more

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<sup>11</sup> *The Prosecutor v Germain Katanga (Appeals Chamber) Judgement on the Appeal of Mr Germain Katanga against the decision of Pre Trial Chamber I entitled "The Defence Request Concerning Languages"* ICC 01/04-01/07 OA 3 27 May 2008.

<sup>12</sup> S. Zappala *Human Rights in International Criminal Proceedings* (OUP 2003); B Broomhall *International Justice and the International Criminal Court : Between Sovereignty and the Rule of Law* (OUP 2004); R Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005); W Schabas *The International Criminal Court-A Commentary on the Rome Statute* (OUP 2016) 1016-1017; M. Bassiouni *International Criminal Law: Sources, Subjects and Contents* (Brill 2008); R Henham 'Theorising Law and Legitimacy in International Criminal Justice' (2007) *International Journal of Law In Context*, 257-274.

<sup>13</sup> S. Zappala (n 12); Y. Mc Dermott, *Fairness in International Criminal Trials* (OUP 2016) 22; A. Sen, *The Idea of Justice* (Allen Lane 2009), J. Rawls, *Justice as Fairness: A Restatement* (Belknap Press 2001); R. Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); T. Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995); S. Hessler, 'Symmetry, Fairness and Criminal Trials' (2001) *Michigan Law Review* 1560.

comprehensive understanding of the ideological roots that underpin the need for such a realisation.

Through five interlinked sections, this chapter argues that the ‘Katanga Appeals Formula’ can develop the norms surrounding the guarantees for communication of the case to accused persons. After this introductory section, section 2 identifies article 67(1) (a) and 67(1) (f) of the ICC Statute and provides an overview of its drafting history. Section 3 then examines the way in which the scope of protection under article 67(1)(a) and 67(1)(f) of the ICC Statute have been examined in the jurisprudence of the ICC in *The Decision on the Defence Request Concerning Languages at the Pre Trial Chamber I*<sup>14</sup> (The Decision at Pre Trial Chamber I) and in the later *Judgement on the Appeal of Germain Katanga against the Decision in Pre Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’* (The Katanga Appeal) and other relevant cases.<sup>15</sup> Section 4 then examines whether this examination offers a more comprehensive understanding of the scope of the right and its normative applicability for the interpretation of similar provisions in comparative instruments. Importantly, this argument takes into account the uniqueness of the ICC provisions in its further requirement that the accused ‘fully’ understands the charges against him. Section 5 draws the discussion to its conclusion.

### **Article 67(1) (a) and 67(1) (f) and its drafting history**

Article 67 of the ICC Statute defines nine core procedural guarantees (collectively named ‘minimum guarantees’) to afford the accused a fair

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<sup>14</sup> *The Prosecutor v Germain Katanga (Pre Trial Chamber I) Decision on the Defence Request Concerning Languages* ICC -01/04-01/07 21 December 2007.

<sup>15</sup> *The Prosecutor v Germain Katanga (Appeals Chamber) Judgement on the Appeal of Mr Germain Katanga against the decision of Pre Trial Chamber I entitled “The Defence Request Concerning Languages”* ICC 01/04-01/07 OA 3 27 May 2008.

trial.<sup>16</sup> The guarantees specifically relating to communication of the charges to the accused as well as communication of trial proceedings centre around 1(a) and 1(f).<sup>17</sup>

Article 67(1) (a) provides that the accused is ‘to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks’.<sup>18</sup> Article 67(1)(f) provides that the accused is ‘to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements

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<sup>16</sup> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

<sup>17</sup> Article 67(1) (f) Statute of the ICC (n 8).

<sup>18</sup> Ibid.

of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.<sup>19</sup>

Apart from articles 1(a) and 1(f), all the guarantees contained in article 67 mirror those in article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>20</sup> Sections 1(a) and 1(f) depart from the text of the ICCPR and introduce the further element that the accused be informed promptly and in detail of the charges in a language he ‘fully understands and speaks’<sup>21</sup> and that the trial be communicated to him in the same manner.<sup>22</sup> The publicly available archival material relating to the drafting history of the ICC statute does not specifically provide a clear indication for the incorporation of the additional word ‘fully’. Analysis of the archival material finds the introduction and development of the wording ‘fully understands and speaks’ evolved through the two distinct phases in the drafting of the Statute; the Preparatory Commission Phase and the Rome Conference phase. The ICC Statute offers a unique formulation on this right that is distinguishable from other international human rights or international criminal based treaties. This is demonstrated in table 1 below:

Legal Instrument	Year	Specific article	Key text/line
<b>Agreement for the prosecution and punishment of the major war criminals of the European Axis.</b>	1945	Article 16 (a) Article 16 (c)	(a) The Indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment, <b>translated into a language which he understands</b> , shall be furnished to the Defendant at a reasonable time before the trial.  (c) A preliminary examination of a Defendant and his trial shall be conducted in, or translated into, a language which the Defendant fully understands

<sup>19</sup> Ibid.

<sup>20</sup> ICCPR (n 7).

<sup>21</sup> Article 67(1) (a) Statute of the ICC (n 8).

<sup>22</sup> Article 67(1) (f) Statute of the ICC (n 8).

<b>Universal Declaration of Human Rights</b>	1948	Article 10	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.
<b>European Convention on Human Rights</b>	1950	Article 6 (3)(a) Article 6 (3)(e)	(a) to be informed promptly, in a language <b>which he understands</b> and in detail, of the nature and cause of the accusation against him  (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
<b>International Covenant on Civil and Political Rights (ICCPR)</b>	1966	Article 14 (3) (a) Article 14 (3) (f)	(a) to be informed promptly and in detail <b>in a language which he understands</b> of the nature and cause of the charge against him;  (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
<b>American Convention on Human Rights</b>	1969	Article 8 (2) (a)	(a) the right of the accused to be assisted without charge by a translator or interpreter, <b>if he does not understand</b> or does not speak the language of the tribunal or court;
<b>International Criminal Trial for the former Yugoslavia</b>	1993	Article 21 (4) (a) Article 21 (4) (f)	(a) to be informed promptly, <b>in a language which he understands</b> and in detail, of the nature and cause of the accusation against him;

			(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
<b>International Criminal Tribunal for Rwanda</b>	1994	Article 20 (4) (a) Article 20 (4) (f)	(a) To be informed promptly and in detail <b>in a language which he or she understands</b> of the nature and cause of the charge against him or her;  (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
<b>International Criminal Court</b>	1998	Article 67 (a) Article 67 (f)	(a) To be informed promptly and in detail of the nature, cause and content of the charge, <b>in a language which the accused <u>fully</u> understands and speaks</b> ;  (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused <u>fully</u> understands and speaks;

**Table 1: Examples of Language Guarantees in Fair Trial Rights in Human Rights and International Criminal Treaties**

### *June 1989- January 1998- The Preparatory Commission Phase*

At the United Nations General Assembly in June 1989, Trinidad and Tobago requested that the International Law Commission (ILC) resume its work on drafting a statute for an International Criminal Court as part of an effort to seek international assistance with the suppression of narcotics trafficking.<sup>23</sup> This proposal also corresponded with a coincidental academic ‘upturn’ in interest on this idea.<sup>24</sup>

As a matter of priority, the United Nations General Assembly subsequently requested that the ILC draft a statute for an international criminal court. The early working drafts of the ICC Statute on the provisions relating to the ‘rights of the accused’ mirrored the wording contained in Article 14 of the ICCPR.<sup>25</sup> The 1994 ILC Draft Statute included the provision that the accused should ‘be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge’.<sup>26</sup>

In 1994, the ILC presented this draft statute for an International Criminal Court to the United Nations General Assembly<sup>27</sup> and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute.<sup>28</sup> The General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995.<sup>29</sup>

After considering the Ad hoc Committee’s report (which retained the ICCPR language), the UN General Assembly created the Preparatory Committee on the Establishment of the ICC<sup>30</sup> to prepare a consolidated draft

<sup>23</sup> ‘International Criminal Responsibility of Individuals and Entities Engage in Illicit Trafficking of Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities Establishment of an International Criminal Court with Jurisdiction over Such Crimes’, Report of the Sixth Committee to the General Assembly, U.N.Doc A/44/770 (1989).

<sup>24</sup> R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 57; J. Dugard, ‘Obstacles in the Way of an International Court’ (1997) 56 Cambridge Law Journal 329, 330.

<sup>25</sup> Article 14 ICCPR (n 7).

<sup>26</sup> ‘Report of the International Law Commission on the Work of its forty-fifth session’ UN Doc A/CN.4/L.490 Add.1 (1993) 119.

<sup>27</sup> ‘Report of the International Law Commission to the General Assembly to the General Assembly on the work of its forty sixth session’ Vol 11 UN Doc A/CN.4/Ser.A/1994/Add.1 (Part 2) (1994).

<sup>28</sup> Ibid.

<sup>29</sup> ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court to the General Assembly at its fiftieth session’ UN Doc A/50/22 Supplement no 22. (1995).

<sup>30</sup> UNGA Res 50/46 (December 1995).

text. From 1996 to 1998, the UN Preparatory Committee held six sessions at the UN headquarters in New York.<sup>31</sup> It is only during the meetings of the Preparatory Committee that we see the minimum guarantees concerning language comprehension deviating from the standard language contained in the ICCPR.

The draft statutes adopted in the first meetings of the UN Preparatory Committee throughout 1996 mirrored the ICCPR regarding minimum guarantees for the accused.<sup>32</sup> One year later, at a meeting of the Preparatory Committee held from 4-15 August 1997,<sup>33</sup> the draft wording began to shift. In the draft text appearing at the Committee meetings on the rights of the accused on 14 August 1997, a clear distinction appeared between the guarantees afforded to a suspect before trial and to accused persons during a trial. The draft stated that the accused should be ‘informed promptly and in detail, in a language that the accused understands [in his own language], of the nature, cause and content of the charge’.<sup>34</sup> The document suggested that the Committee would categorise which of the rights ‘apply only to suspects at the investigation stage, which apply only to the accused, and which apply to any suspects or accused appearing in proceedings before a chamber of the Court’. A footnote in the document also suggested that a proposal was put forward by a delegation that the wording used in Article 14 of the ICCPR should be utilised, possibly questioning the inclusion of ‘in his own language’ in the draft text.

In the publicly available archival material, there is no clear indication as to why the clause ‘in his own language’ was included at the August 1997 meeting and not during the previous three years of deliberations on the draft

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<sup>31</sup> W. Schabas, *The International Criminal Court-A Commentary on the Rome Statute* (Oxford University Press 2016) 20.

<sup>32</sup> For example, in the ‘Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused to the General Assembly at its fifty first session’, UN Doc A/51/22 Supplement No 22. (27 August 1996), the language states ‘to be informed of the charges against him and questioned in a language which he understands and speaks, or if otherwise, to the [free] assistance of a competent interpreter’. The text contains written proposals from various delegations to be included in the draft statute, for example: ‘to be informed of the charges against him and questioned in a language which he understands and speaks, or if otherwise, to the [free] assistance of a competent interpreter, and to be provided [free of charge] with the translation of any document on which the suspect is to be questioned [or that show why a measure infringing his liberty or property has been proposed]’.

<sup>33</sup> ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Revised Abbreviated Compilation on the Rights of the Accused’ UN DOC A/AC.249/1997/WG.4/CRP.8 (1997).

<sup>34</sup> *Ibid.*

ICC statute. The only new development was that at the launch of the August 1997 Preparatory Committee meetings, there was an inclusion of a new category of States, the ‘Least Developed Countries’ in the development of the ICC Statute. An inference could be drawn that the inclusion of the clause was at their instance. However, there is nothing in the documentation to ascribe their views as the motivation for this inclusion.

In January 1998, six months after the August Preparatory Meeting, the Bureau and Coordinators of the Preparatory Committee convened for an Inter-Sessional meeting in Zutphen, the Netherlands, to technically consolidate and restructure the articles into a draft statute.<sup>35</sup> The report drafted at Zutphen (The Zutphen draft) also showed the continuation of the development of the wording along the lines of the ICCPR.<sup>36</sup> Again, the use of the bracketed ‘in his own language’ showed the continued development of minimum guarantees contained in the ICCPR from the August 1997 meetings. While the threshold of language comprehension began to shift through the inclusion of ‘in his own language’ during the Preparatory Committee, it is not until the United Nations Conference of Plenipotentiaries on the Establishment of an ICC or the Rome Conference in 1998, that the words ‘fully understands’ first appeared.

### *The Rome Conference: June- July 1998*

The Rome Conference (The Conference) took place from 15 June to 17 July 1998. It was during this phase that the ICC Statute was finalised and agreed before it was submitted to the UN General Assembly for approval. In total, 160 countries participated in the drafting of the text alongside 200 accredited non-governmental organisations.<sup>37</sup>

At the Conference, the use of the wording around ‘fully understands and speaks’ appeared early in the proceedings concerning Article 54 on the ‘Rights of persons during an investigation’, but not Article 67 on the ‘Rights

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<sup>35</sup> ‘Report of the Inter-Sessional Meeting from 19-30 January 1998 in Zutphen, The Netherlands. Preparatory Committee on the Establishment of an International Criminal Court’ (The Zutphen Report) UN Doc A/AC-249/1996/L-13(1998).

<sup>36</sup> To be informed promptly and in detail, [In a language that the accused understands] [in his own language], of the nature, cause and content of the charge: Ibid.

<sup>37</sup> A full list of the accredited NGOs that took part is available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/158/99/PDF/N9815899.pdf?OpenElement>> accessed 24 October 2019.

of the Accused'.<sup>38</sup> The wording first appeared in a working paper by the Working Group on Procedural Matters concerning Article 54 on 18 June.<sup>39</sup> The wording also appeared in the context of Article 55 in a Report of the Working Group on Procedural Matters on 24 June 1998.<sup>40</sup> Importantly, there is no precise note or discussion in the working paper to give a clear reason for the inclusion of the new wording. However, in a proposed amendment to Article 51 on 'official and working languages' by 14 delegations<sup>41</sup> on 23 June 1998, the clause 'the right of a person under investigation to be interrogated and to express himself in or herself in his or her own language, without charge whatsoever to that person, shall be preserved' was introduced.<sup>42</sup> Its inclusion in Article 51 would seem to provide an improvement on the wording of 'in his own language' adopted by the Preparatory Committee. Another reason for the unexplained appearance in Article 54 at the Rome Conference (within the first three days of the conference starting) could be that the wording on 'fully understands and speaks' developed before the Conference began. However, a pre-conference text of the draft statute published on 1 April 1998 concerning Article 54 and the rights of a person during investigation mirrored the wording of the ICCPR that the accused was 'to be informed promptly of the

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<sup>38</sup> 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Working Group on Procedural Matters' UN Doc A/Conf.183/c.1/WGPM/C.2 (18 June 1998).

<sup>39</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Report of the Working Group on Procedural Matters' UN Doc A/Conf.183/c.1/WGPM/C.2 (18 June 1998) which states that the accused 'Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness'.

<sup>40</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Report of the Working Group on Procedural Matters' UN Doc A/Conf.183/c.1/WGPM/C.2' (24 June 1998): the accused '*shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary*'.

<sup>41</sup> These states were Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela. See <<https://www.legal-tools.org/doc/2b8299/pdf/>> last accessed 24 October 2019.

<sup>42</sup> 'Report of the Preparatory Committee on the Establishment of an International Criminal Court to the General Assembly –Compilation of Proposals' Vol II UN Doc A/51/22 Supplement no. 22A (1996).

nature and cause of the charge against him or her [and be questioned in a language which he understands]’.<sup>43</sup>

The draft text on Article 54 which included the new bracketed wording [‘and be questioned in a language which he fully understands and speaks’] was adopted by the Drafting Committee at its second reading on 1 July 1998.<sup>44</sup> The reversion to the traditional phrase formulation used by the ICCPR, i.e that the accused be questioned in a language he understands, did not remain.<sup>45</sup> Despite the agreement on the text for article 54, the inclusion of ‘fully understands and speaks’ seems to have been more of a contentious issue surrounding the adoption of Article 67. There is nothing in the papers to show the point at which States sought to include the standard of ‘fully understands and speaks’ during trial. However, in a draft proposal on article 67 submitted to the Working Group on Procedural Matters by Egypt, Oman and the Syrian Arab Republic on 29 June 1998, the delegations put forward revised wording that the accused was to ‘be informed immediately and in detail, in his or her own language or in a language of his or her choice, of the nature of the charge’.<sup>46</sup>

This proposal led to the Chairman of the Working Group of Procedural Matters to put forward a proposal on Article 67 on 3 July 1998<sup>47</sup> as an apparent compromise that did not include the specific wording ‘fully understands and speaks’, even though that clause had been adopted two days before concerning article 54.<sup>48</sup> On 4 July 1998, a letter was issued by the President of the Conference to all representatives of participating states. The

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<sup>43</sup> Arts 54[30] (a) to 54[30](c) ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ A/AC.249/1998/CRP.11 (1 April 1998).

<sup>44</sup> The provision stated that the accused shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter’. See Report of the Preparatory Committee on the Establishment of International Criminal Court Vol II Official Records of the General Assembly 51<sup>st</sup> session UN Doc A/51/22 Supp. 22A.

<sup>45</sup> Art 14 ICCPR (n 7).

<sup>46</sup> Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic at the UN Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court UN Doc A/Conf.183/C.1/WGPM/L.36 (29 June 1998).

<sup>47</sup> Draft Proposal for Article 67 submitted by the Chairman for the Working Group on Procedural Matters, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court UN Doc A/Conf.183/C.1/WGPM/ L.42 (3 July 1998).

<sup>48</sup> Report of the Preparatory Committee on the Establishment of International Criminal Court Vol II.