



## **Position Statement on Procedural Rights and Safeguards in Criminal Proceedings**

### **Introduction**

The International Commission of Jurists (ICJ) is a non-governmental organisation devoted to promoting the understanding and observance of the Rule of Law and the legal protection of human rights throughout the world. The ICJ comprises 60 distinguished jurists from all regions and maintains a network of national sections and affiliated organizations. It is headquartered in Geneva, Switzerland, and enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

This Position Statement is supported by JUSTICE, a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

ICJ Sweden has produced this statement in order to register our commitment and concern for the development of procedural safeguards for defendants in criminal proceedings.

ICJ Sweden promotes human rights and the rule of law in Sweden and internationally.

Our overall vision is an international society of states based on the principles of rule of law, where human rights are respected and where anyone who has been the subject of a violation has access to an effective judicial remedy. Well functioning judicial institutions are a precondition for democracy and good economic development.

## The Basis

The EU Member States have provided within the Treaty on the European Union (TEU) the basis for judicial cooperation in criminal matters, which is today manifested in the European Arrest Warrant. A prerequisite for cooperation within this sensitive area is the existence of mutual trust. The judiciary of a Member State must be able to foresee how a receiving Member State will practically proceed with the case in question for cooperation to be effective: without such foreseeability, Member States may be reluctant to use these tools for cooperation, thus defeating their inherent purpose to create an efficient and integrated system.

To further enhance and effectively cooperate in criminal matters, the development of procedural rights through uniform human rights safeguards is a fundamental necessity.

The European Court of Justice's ruling in *Pupino*<sup>1</sup> makes clear that Article 31(1)(c) TEU provides a legal basis for legislation in this area. This is also the opinion of the Commission as clarified first in its Green Paper "*Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*" and subsequently upheld in its "*Reflection Document*" of 23 January 2009.<sup>2</sup>

In becoming parties to the European Convention on Human Rights (ECHR), all Member States have accepted the rights envisaged, including those arising under Article 6, as clarified by the case law of the European Court of Human Rights (ECtHR). Furthermore, the TEU (Article 6) and the jurisprudence of the European Court of Justice (ECJ) require EU law and its implementation to respect fundamental rights enshrined in the traditions of the Member States and in the ECHR. The EU Charter of Fundamental Rights reaffirms the Member States' commitment to protection of these rights (Articles 47 and 48). On this basis, it should not be difficult for the Member States to reach agreement that these rights are deserving of protection.

It should however be underscored that the rights set out in the ECHR and jurisprudence of the ECtHR do not alone provide a sufficiently detailed basis for the development of mutual recognition in the European Union. It has become apparent that the Member States' implementation of these rights is not consistent. To ensure reliable and consistent protection for procedural rights in criminal proceedings, further clarification of the practical implications of these rights through legislative acts is necessary.

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<sup>1</sup> Case C-105/03 [2005] ECR I-5285, in which the Court confirmed that the legal basis of Council Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings, an instrument requiring similar competence to the protection of defence rights was indeed Article 31 TEU.

<sup>2</sup> *Reflection Document for Experts' Meeting to be held in Brussels on 26 and 27 March 2009: Procedural Rights in Criminal Proceedings*, JLS/E3/CM/ D(2009)

## **The Priority Focus of the Swedish Presidency**

We therefore appreciate and welcome the fact that the Swedish Presidency has recognised and underscored the importance of adopting EU legislation regarding these rights in order to guarantee common standards within the practice of Member States in this area. However, we are concerned that the Swedish Presidency has not proposed a set time frame for the adoption of these measures. We are also concerned that the Swedish Presidency has not included legislation on these rights in its Work Programme. As stated above, the adoption of these measures is imperative to the efficient continuation of the promotion of mutual recognition in the area of criminal matters within the EU.

We therefore call upon the Swedish Presidency to make explicit that the adoption of these rights will be a prioritised issue during the Presidency and as a result will be included in the Stockholm Programme.

Finally, we wish to underscore the importance of adopting a common set of standards governing certain substantive rights of persons deprived of their liberty (pre-trial detention rights concerning the grounds and length of detention), including rights protected under Article 5 ECHR (the right to liberty and security of the person), followed by consensus on the right to silence and the right to be presumed innocent until proven guilty. These highly important but distinct safeguards should be addressed separately to the fundamental rights identified in the original Commission Proposal. In order to meet competency and subsidiarity principles, scrutiny of the approach to be taken by the Member States will be necessary. However, clarifying the reach of these rights is in our view of particular importance and concern in light of the increasing use of the European Arrest Warrant, and we call upon the Swedish Presidency to initiate a dialogue on these issues in parallel to that on Procedural Rights.

## **Goals that must be achieved during the Swedish Presidency**

To this end, we suggest the following priorities in this area:

1. The adoption of a Framework Decision during the Swedish Presidency regarding the Right of Access to Interpretation and Translation for defendants in criminal proceedings and a review mechanism applicable to Member States' compliance with this right, following the Proposal presented by the Commission on 8 July.

This Framework Decision must clarify that services under this right shall be provided by the State and without charge to the suspect or defendant. Furthermore, this Framework Decision must clearly identify which procedural documents are covered by this right and the standards and parameters for interpretive services. The interpretation and translation provided must be

sufficient to allow defendants to prepare their defense effectively and to participate effectively in the proceedings, consistent with the rights to a fair trial, in particular the principle of equality of arms.

2. The inclusion of a Road Map for the adoption of procedural safeguards in the Stockholm Program such as that proposed by the Swedish Presidency at the outset of its Presidency of the EU on 1 July.

This Road Map must encompass all six rights proposed by the Commission in the original Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union:

- The right to free interpretation of proceedings and translation of all relevant procedural documents;
- Access to Legal Representation, promptly following arrest or detention and throughout the criminal proceedings , including the right to legal aid for those who cannot afford a lawyer;
- Specific measures to ensure that vulnerable suspects and defendants are properly protected;
- The right of a non-national to have the relevant consular authorities informed of his or her detention and provision of consular assistance to such detainees;
- The right to have family members informed promptly a suspected person's detention. This should also include provision of other essential information concerning the detention and its authorisation;
- The notification to suspects and defendants in writing of their rights in a "Letter of Rights".

This Road Map must be a politically endorsed document, signed by all Member States, with set time frames for future adoption, and should confirm that binding instruments will be used to adopt these safeguards.

We welcome the opportunity to discuss the issues set out in this statement with the Presidency.

**July 2009**