

‘EQUALITY OF ARMS IS A BLESSED PHRASE’:¹ ITS MEANING UNDER INTERNATIONAL LAW

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ABSTRACT

This paper discusses the meaning of the ‘equality of arms’ principle in relation to fair trial protections under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) and Art 14 of the International Covenant on Civil and Political Rights (“the ICCPR”). We discuss the particular rights to which the equality of arms principle extend - the right to be tried in one’s presence; to defend oneself in person; to choose one’s own counsel; to be informed of the right to counsel; and the right to receive free legal aid.

In essence, the equality of arms principle speaks to the virtues of procedural equality: the idea that both parties should be treated in a manner ensuring that they have an approximately equal opportunity to make their case during the course of a trial. Such protections are guaranteed in most domestic legal systems, are enshrined in relevant international instruments (such as the two we examine in this paper) and are the procedural bedrock of all major international courts and tribunals.

The authors conclude that everyone charged with a criminal offense has a primary, and generally, unrestricted right to defend himself. This right can be forgone and counsel can be chosen by the accused (subject to the usual constraints such as availability of counsel and the defendant’s capacity to pay). Where the defendant is unable to afford counsel, he or she has a right to legal aid but only where the interests of justice so requires.

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¹*RTA v Dederer* [2007] HCA 42, Callinan J at para298