
.....Chapter 6
THE RIGHT TO A FAIR TRIAL: PART I – FROM INVESTIGATION TO TRIAL....

Learning Objectives

- *To familiarize course participants with some of the principal international legal rules concerning the individual rights that must be secured during criminal investigations and the application of these rules by the international monitoring organs;*
- *To sensitize participants to the importance of applying these legal rules in order to protect a broad range of human rights in a society based on the rule of law;*
- *To create an awareness among the participating judges, prosecutors and lawyers of their primordial role in enforcement of the rule of law, including individual rights during criminal investigations;*
- *To create an awareness of the fact that enforcement of the fair trial rules is not only conducive to enhancing the protection of human rights *largo sensu*, but also conducive to encouraging economic investment and promoting national and international peace and security.*

Questions

- *Are you already conversant with the international legal rules and jurisprudence relating to criminal investigations?*
- *Do they perhaps even form part of the national legal system within which you work?*
- *If so, what is their legal status and have you ever been able to apply them?*
- *In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring a person’s human rights at the pre-trial stage?*
- *If so, what were these concerns or problems and how did you address them, given the legal framework within which you are working?*
- *Which issues would you like to have specifically addressed by the facilitators/ trainers during this course?*

Relevant Legal Instruments

Universal Instruments

- The Universal Declaration of Human Rights, 1948
- The International Covenant on Civil and Political Rights, 1966
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- The Statute of the International Criminal Court, 1998

- The Code of Conduct for Law Enforcement Officials, 1979
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- The Standard Minimum Rules for the Treatment of Prisoners, 1955
- The Guidelines on the Role of Prosecutors, 1990
- The Basic Principles on the Role of Lawyers, 1990
- The Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
 - The American Convention on Human Rights, 1969
 - The European Convention on Human Rights, 1950
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1. Introduction

The present chapter will first deal with the overarching principle of *equality before the law*, which conditions both civil and criminal proceedings from the outset, as well as with the principle of *presumption of innocence*, which is of fundamental importance in relation to criminal proceedings. These notions are thus of equal relevance for Chapter 7, but will not be recapitulated in that context. This chapter will then specifically examine some of the human rights that belong to the stage of criminal investigations, up to the beginning of the trial itself, where applicable. It should be noted, however, that the question of administration of juvenile justice will be dealt with specifically in Chapter 10.

It must be emphasized that this chapter does not provide an exhaustive list of rights to be guaranteed at the pre-trial stage, but merely focuses on some human rights that are considered to be of particular importance in connection with criminal investigations.¹ Some of these rights are also essential at the trial stage and will again be examined in Chapter 7. The selection of issues to be dealt with in this rather than the next chapter has been made from a practical point of view, bearing in mind the sequence of events normally occurring in connection with the investigation into criminal activities, and the possible ensuing trial to determine guilt. As the rights enjoyed at the pre-trial and the trial stages are closely interrelated, some overlapping is unavoidable, but has, as far as is possible, been reduced to a minimum.

2. The Effective Protection of the Right to a Fair Trial: A Global Challenge

Every person has the right to a fair trial both in civil and in criminal cases, and the effective protection of all human rights very much depends on the practical availability at all times of access to competent, independent and impartial courts of law which can, and will, administer justice fairly. Add to this the professions of prosecutors and lawyers, each of whom, in his or her own field of competence, is instrumental in making the right to a fair trial a reality, and we have the legal pillar of a democratic society respectful of the rule of law.

¹For an important collection of rules relating to all stages of the investigation and trial, see *Amnesty International Fair Trials Manual*, London, 1998, 187 pp.

However, an independent and impartial Judiciary capable of ensuring fair trial proceedings is not only of importance to the rights and interests of human beings, but is likewise essential to other legal persons, including economic entities, whether smaller enterprises or large corporations, which often depend on courts of law, *inter alia*, to regulate disputes of various kinds. For instance, domestic and foreign enterprises will be reluctant to invest in countries where the courts are not perceived as administering justice impartially. Furthermore, it is beyond doubt that in countries where aggrieved persons or other legal entities can have free access to the courts in order to claim their rights, social tension can more easily be managed and the temptation to take the law into one's own hands is more remote. By contributing in this way to defusing social tensions, the courts of law will contribute to enhancing security not only at the national but also at the international level, since internal tensions often have a dangerous spillover effect across borders.

Yet a glance at the jurisprudence of the international monitoring organs makes it clear that the right to a fair trial is frequently violated in all parts of the world. Indeed, the vast majority of cases dealt with by the Human Rights Committee under the Optional Protocol, for instance, concern alleged violations of pre-trial or trial rights. In what follows, a brief survey of the most relevant aspects of the international jurisprudence will accompany the description of the relevant legal rules.

3. The Legal Texts

The key legal texts on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights, and article 6 of the European Convention on Human Rights. The relevant provisions of these articles will be dealt with below under the appropriate headings, while the complete texts will be distributed as handouts.

Additional rules to which reference will be made below are *inter alia* contained in the following United Nations instruments: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Universal Declaration of Human Rights; the Code of Conduct for Law Enforcement Officials; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Treatment of Prisoners; the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers; the Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda; and the Statute of the International Criminal Court.

4. The Right to Equality before the Law and Equal Treatment by the Law

The right to equality before the law and equal treatment by the law, or, in other words, the principle of non-discrimination, conditions the interpretation and application not only of human rights law *stricto sensu*, but also of international humanitarian law.² According to article 26 of the International Covenant on Civil and Political Rights, for instance, “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Similar provisions are contained in article 3 of the African Charter on Human and Peoples’ Rights and article 24 of the American Convention on Human Rights. Further, article 20(1) of the Statute of the International Criminal Tribunal for Rwanda and article 21(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia provide that “all persons shall be equal before” these Tribunals.

On the other hand, the principle of equality or the prohibition of discrimination does not mean that all distinctions are forbidden, and in this respect the Human Rights Committee has held that differential treatment between people or groups of people “must be based on reasonable and objective criteria”.³ However, further details as to the interpretation of the principle of equality and the prohibition of discrimination will be provided in Chapter 13 below.

The specific right to equality before the courts is a fundamental principle underlying the right to a fair trial, and can be found *expressis verbis* in article 14(1) of the International Covenant on Civil and Political Rights, according to which “all persons shall be equal before the courts and tribunals”.⁴ Although not contained in the corresponding articles on fair trial in the regional conventions, the right to equality before the courts is comprised by the general principle of equality protected thereby.

²See e.g. articles 1, 2 and 7 of the Universal Declaration of Human Rights; articles 2(1), (3), 4(1) and 26 of the International Covenant on Civil and Political Rights; article 2(2) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 18(3) and 28 of the African Charter on Human and Peoples’ Rights; articles 1, 24 and 27(1) of the American Convention on Human Rights; article 14 of the European Convention on Human Rights; articles 2 and 15 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women; article 2 of the 1989 Convention on the Rights of the Child; and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. Of the four 1949 Geneva Conventions, see e.g. articles 3 and 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; articles 9(1) and 75(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and articles 2(1) and 4(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³Communication No. 694/1996, *Waldman v. Canada* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), pp. 97-98, para. 10.6.

⁴See also article 5(a) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which provides for “the right to equal treatment before the tribunals and all other organs administering justice”; article 21(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, according to which “all persons shall be equal before the International Tribunal”; article 21(1) of the Statute of the International Criminal Tribunal for Rwanda; and article 67(1) of the Statute of the International Criminal Court.

The principle of equality before the courts means *in the first place* that, regardless of one's gender, race, origin or financial status, for instance, *every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned*. Further, whether individuals are suspected of a minor offence or a serious crime, the rights have to be equally secured to everyone. *Secondly*, the principle of equality means that *all persons must have equal access to the courts*.

Equal access to courts: The Oló Bahamonde case

The principle of equality was to the fore in the case of *Oló Bahamonde* examined under article 14(1) of the International Covenant on Civil and Political Rights, where the author complained that he had unsuccessfully tried to obtain redress before the domestic courts for the alleged persecution to which he was subjected by governmental authorities. The Committee observed in this respect

“... that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1”.⁵

Equal access to courts by women: Another essential aspect of the right to equality is that *women must have equal access to courts in order to be able effectively to claim their rights*. Two important cases illustrate this basic rule well. In the first, where a woman was not entitled to sue the tenants of two apartment buildings that she owned, the Human Rights Committee found that there was a violation of articles 3, 14(1) and 26 of the Covenant. According to the Peruvian Civil Code only the husband, not the married woman, was entitled to represent matrimonial property before the courts, a state of affairs that is contrary to international human rights law.⁶ In the second, where prohibitive costs of litigation prevented a woman from gaining access to a court in order to request a judicial separation from her husband, and where there was no legal aid available for these complex proceedings, the European Court of Human Rights found a violation of article 6(1) of the European Convention.⁷

While women's right of access to the courts will be dealt with more fully in Chapter 11 below, these examples show the breadth of the protection afforded by the principle of equality.

⁵Communication No. 468/1991, *A. N. Oló Bahamonde v. Equatorial Guinea* (Views adopted on 20 October 1993), UN doc. GAOR, A/49/40 (vol. II), p. 187, para. 9.4.

⁶Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988), UN doc. GAOR, A/44/40, pp. 198-199, paras. 10.1-12.

⁷*Eur. Court HR, Airey Case v. Ireland, judgment of 9 October 1979, Series A, No. 32*, pp. 11-16, paras. 20-28.

The principle of equality must be guaranteed throughout the pre-trial and trial stages, in that every suspected or accused person has the right not to be discriminated against in the way the investigations or trials are conducted or in the way the law is applied to them.

The principle of equality also means that every human being must have equal access to the courts in order to claim their rights. In particular, women must have access to courts on an equal footing with men, in order to be able to claim their rights effectively.

5. The Right to be Presumed Innocent: the Overall Guarantee from Suspicion to Conviction or Acquittal

The right to be presumed innocent until proved guilty is another principle that conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal. Article 14(2) of the International Covenant on Civil and Political Rights provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. Article 7(1)(b) of the African Charter on Human and Peoples’ Rights, article 8(2) of the American Convention on Human Rights and article 6(2) of the European Convention on Human Rights all also guarantee the right to presumption of innocence, and article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone “charged with a penal offence ... until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”. More recently, the principle of presumption of innocence has in particular been included in article 20(3) of the Statute of the International Criminal Tribunal for Rwanda, article 21(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, and in article 66(1) of the Statute of the International Criminal Court.

As noted by the Human Rights Committee in General Comment No. 13, the principle of presumption of innocence means that

“the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial”.⁸

⁸General Comment No. 13 (Article 14), in *UN Compilation of General Comments*, p. 124, para. 7.

Adverse public comments by authorities: In the case of *Gridin*, the authorities failed to exercise the restraint that article 14(2) of the International Covenant requires in order to preserve the accused person’s presumption of innocence. The author had inter alia alleged that high-ranking law enforcement officials had made public statements portraying him as guilty of rapes and murders and that these statements had been given wide media coverage. The Committee noted that the Supreme Court had “referred to this issue, but failed to specifically deal with it when it heard the author’s appeal”.⁹ Consequently, there was a violation of article 14(2) in this case.

Anonymous judges: The right to be presumed innocent guaranteed in article 14(2) of the Covenant was also violated in the case of *Polay Campos*, where the victim was tried by a special tribunal of “faceless judges” who were anonymous and did not constitute an independent and impartial court.¹⁰

Change of venue: The right to be presumed innocent as guaranteed by article 14(2) of the International Covenant was not violated in a case where the author had complained that the trial judge’s refusal to change its venue deprived him of his right to a fair trial and his right to be presumed innocent. The Committee noted that his request had been “examined in detail by the judge at the start of the trial” and that the judge had pointed out “that the author’s fears related to expressions of hostility towards him which well preceded the trial, and that the author was the only one, out of five co-accused, to have requested a change in venue”.¹¹ She then listened to the parties’ submissions, “satisfied herself that the jurors had been selected properly”, and thereafter “exercised her discretion and allowed the trial to proceed” without changing the venue.¹² In these circumstances the Committee did not consider that the decision not to change the venue violated the author’s right to a fair trial or the right to presumption of innocence. It held, in particular, that “an element of discretion is necessary in decisions such as the judge’s on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision”, it was “not in a position to substitute its findings for those of the trial judge”.¹³

“The right to be presumed innocent until proved guilty by a competent court or tribunal” under article 7(1)(b) of the African Charter on Human and Peoples’ Rights was violated in a case where leading representatives of the Nigerian Government had pronounced the accused persons guilty of crimes during various press conferences as well as before the United Nations. The accused were subsequently all convicted and

⁹Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), UN doc. GAOR, A/55/40 (vol. II), p. 176, para. 8.3.

¹⁰Communication No. 577/1994, *R. Espinosa de Polay v. Peru* (Views adopted on 6 November 1997), UN doc. GAOR, A/53/40 (vol. II), p. 43, para. 8.8.

¹¹Communication No. 591/1994, *I. Chung v. Jamaica* (Views adopted on 9 April 1998), UN doc. GAOR, A/53/40 (vol. II), p. 61, para. 8.3.

¹²*Ibid.*, loc. cit.

¹³*Ibid.*

executed following a trial before a court that was not independent as required by article 26 of the Charter.¹⁴

The right to presumption of innocence in article 6(2) of the European Convention on Human Rights has been held to constitute “one of the elements of a fair criminal trial that is required by paragraph 1” of that article, and is a right which, like other rights contained in the Convention, “*must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory*”.¹⁵

The presumption of innocence will thus be violated, for instance, “if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law”, and it is sufficient, “even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty”.¹⁶

Adverse public comments by authorities: The case of Allenet de Ribemont

The “presumption of innocence may be infringed not only by a judge or court but also by other public authorities”.¹⁷ In the case of *Alletnet de Ribemont*, the applicant had just been arrested by the police, when a press conference was held implicating him in the murder of a French Member of Parliament. The press conference, which in principle concerned the French police budget for the coming years, was attended by the Minister of the Interior, the Director of the Paris Criminal Investigation Department, and the Head of the Crime Squad. The applicant himself had at this stage not yet been charged with any crime. The European Court found a violation of article 6(2) in this case, noting that “some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder”. In the view of the Court this “was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority”.¹⁸

¹⁴ ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisations) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, paras. 94-96 of the text of the decision as published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

¹⁵ Eur. Court HR, *Case of Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A, No. 308, p. 16, para. 35; emphasis added.

¹⁶ Ibid., loc. cit.

¹⁷ Ibid., p. 16, para. 36.

¹⁸ Ibid., p. 17, para. 41.

Assessment of costs and the implication of guilt: The European Court has held that article 6(2) “does not confer on a person ‘charged with a criminal offence’ a right to reimbursement of his legal costs where proceedings taken against him are discontinued”, but that a decision to refuse ordering the reimbursement to the former accused of his necessary costs and expenses following the discontinuation of criminal proceedings against him “may raise an issue under article 6 § 2 if supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the guilt of the former accused without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence”.¹⁹

The Court thus found a violation of article 6(2) of the European Convention in the *Minelli* case, where the Chamber of the Assize Court of the Canton of Zürich, in deciding the costs occasioned by a *private* prosecution, had concluded that, in the absence of statutory limitation, the applicant would “very probably” have been convicted of defamation on the basis of a published article which contained accusations of fraud against a particular company.²⁰ In the view of the European Court, “the Chamber of the Assize Court showed that it was satisfied of the guilt of” the applicant, who “had not had the benefit of the guarantees contained in” article 6(1) and (3); the Chamber’s appraisals were thus “incompatible with respect for the presumption of innocence”.²¹ It did not help in this respect that the Federal Court had “added certain nuances” to the aforementioned decision, since it was “confined to clarifying the reasons for that decision, without altering their meaning or scope”. By rejecting the applicant’s appeal, the Federal Court confirmed the decision of the Chamber in law and simultaneously “approved the substance of the decision on the essential points”.²²

The outcome was however different in the case of *Leutscher*, where the applicant had been convicted *in absentia* of several counts of tax offences but where, on appeal, the prosecution was considered time-barred by the Court. In response to the applicant’s request for reimbursement of various costs and fees, the Court of Appeal noted with regard to the counsel’s fees that there was nothing in the file that gave “any cause to doubt that this conviction was correct”.²³ However, the European Court of Human Rights concluded that article 6(2) had not been violated by these facts: the Court of Appeal had a “wide measure of discretion” to decide, on the basis of equity, whether the applicant’s costs should be paid out of public funds, and, in doing so, it was “entitled to take into account the suspicion which still weighed against the applicant as a result of the fact that his conviction had been quashed on appeal only because the prosecution was found to have been time-barred when the case was brought to trial”.²⁴ In the view of the Court, the disputed statement could not be construed as a reassessment of the applicant’s guilt.²⁵

¹⁹ Eur. Court HR, *Case of Leutscher v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, p. 436, para. 29.

²⁰ Eur. Court HR, *Minelli Case v. Switzerland*, judgment of 25 March 1983, Series A, No. 62, p. 18, para. 38.

²¹ *Ibid.*, loc. cit.

²² *Ibid.*, p. 19, para. 40.

²³ *Ibid.*, p. 432, para. 14.

²⁴ *Ibid.*, p. 436, para. 31.

²⁵ *Ibid.*, loc. cit.

The right to be presumed innocent until proved guilty conditions both the stage of criminal investigations and the trial proceedings; it is for the prosecuting authorities to prove beyond reasonable doubt that an accused person is guilty of the offence. Adverse public statements by officials may compromise the presumption of innocence.

6. Human Rights during Criminal Investigations

Even in the course of a criminal investigation, the persons affected thereby continue to enjoy their fundamental rights and freedoms, albeit with some limitations inherent in the deprivation of liberty for those affected by the measure. While some rights, such as the right to freedom from torture, are, as will be seen below, valid for everyone at all times, the right to respect for one's private and family life may, however, increasingly be jeopardized, for instance through sophisticated means of wire tapping. Some examples from the international jurisprudence will illustrate this problem. It should again be recalled that this section will not provide an exhaustive account of the rights guaranteed during criminal investigations, but will focus only on some of the basic rights which must be protected at this important stage.

6.1 The right to respect for one's private life, home and correspondence

The right to respect for one's privacy, family, home and correspondence is guaranteed, albeit in different terms, by article 17 of the International Covenant on Civil and Political Rights, article 11 of the American Convention on Human Rights and article 8 of the European Convention on Human Rights. Limitations on its exercise may however be imposed in certain circumstances. Article 17(1) of the International Covenant thus provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation"; while article 11 of the American Convention is similarly worded, opening, however, with the words: "no one may be the object of arbitrary and abusive interference with ...". According to article 8 of the European Convention, "there shall be no interference by a public authority with the exercise of" the right to respect for one's private and family life, home or correspondence

"... except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The problems associated with the right to privacy will be examined in relation to *wire tapping*, *searches* and *interference with correspondence*, which are measures that are usually resorted to at an early stage of judicial investigations in order to prove suspicions of criminal activity, and which may or may not subsequently lead to the bringing of formal charges.

6.1.1 Wire tapping

While neither the Human Rights Committee nor the Inter-American Court of Human Rights has as yet dealt with the question of interception of telephone conversations for the purpose of judicial investigation into crime, this issue has been to the fore in several cases dealt with by the European Court of Human Rights. The European Court has consistently held that such telephone tapping amounts to “an interference by a public authority” with the applicant’s right to respect for his or her correspondence and private life as guaranteed by article 8 of the European Convention, an interference which, in order to be justified, must, as seen above, be “in accordance with the law”, pursue one or more of the legitimate aims referred to in article 8(2), and lastly, must also be “necessary in a democratic society” for one or more of these legitimate aims.²⁶

Without examining in detail the Court’s jurisprudence regarding the notion of “in accordance with the law”, it is sufficient in this context to point out that recourse to telephone tapping must have a basis in domestic law, a law which must not only be “*accessible*” but also “*foreseeable*” as to “the meaning and nature of the applicable measures”.²⁷ In other words, article 8(2) “does not merely refer back to domestic law but also relates to *the quality of the law*, requiring it to be compatible with the rule of law”.²⁸ This means, in particular, “that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by” article 8(1), because, especially “where a power of the executive is exercised in secret, the risks of arbitrariness are evident”.²⁹ Although “the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly”, the law must nevertheless

“be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence”.³⁰

²⁶See e.g. *Eur. Court HR, Huvig Case v. France, judgment of 24 April 1990, Series A, No. 176-B*, p. 52, para. 25.

²⁷*Ibid.*, pp. 52-55, paras. 26-29; emphasis added.

²⁸*Ibid.*, p. 54, para. 29; emphasis added.

²⁹See e.g. *Eur. Court HR, Malone Case v. the United Kingdom, judgment of 2 August 1984, Series A, No. 82*, p. 32, para. 67.

³⁰*Ibid.*, loc. cit.

The requirement of legal protection implies, in other words, that domestic law must provide adequate legal safeguards against abuse and that, for instance, where the law confers a power of discretion on the authorities concerned, the law must also “indicate the scope of that discretion”.³¹

The Huvig case

In the *Huvig* case the applicants had been subjected to telephone tapping for about two days by the judge investigating charges of tax evasion and false accounting. The European Court accepted that the disputed measures had a legal basis in French law, namely the Code of Criminal Procedure, as interpreted by the French courts, and, furthermore, that the law was accessible. However, in terms of the quality of the law the Court concluded that it did “not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”; consequently, the applicants “did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society”.³² In other words, the legal system did not “afford adequate safeguards against various possible abuses” in that, for instance, “the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order” were “nowhere defined”, and there was nothing obliging a judge “to set a time limit on the duration of telephone tapping”.³³ Further, the law did not specify “the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court”.³⁴ It followed that, since the applicants had not enjoyed the minimum degree of protection required under the rule of law in a democratic society, there had been a breach of article 8 in this case.

The European Court has also found breaches of article 8 in other similar cases such as the *Kruslin* and *Malone* cases, judgments which, as in the *Huvig* case, were founded on the basis that the practices in question did not comply with the requirements flowing from the expression “in accordance with the law” in article 8(2) of the Convention.³⁵

³¹Ibid., para. 68 at p. 33.

³²*Eur. Court HR, Huvig Case v. France, judgment of 24 April 1990, Series A, No. 176-B*, p. 56-57, para. 35.

³³Ibid., p. 56, para. 34.

³⁴Ibid., loc. cit.

³⁵*Eur. Court HR, Malone Case v. the United Kingdom, judgment of 2 August 1984, Series A, No. 82*, and *Eur. Court HR, Kruslin Case v. France, judgment of 24 April 1990, Series A, No. 176-A*. In the case of *Klass and Others*, however, the Court found no breach of article 8: see *Eur. Court HR, Case of Klass and Others, judgment of 6 September 1976, Series A, No. 28*.

The Lampert case

It can be seen from a reading of the judgment in the more recent case of *Lampert* that in 1991 France adopted an amendment to the Code of Criminal Procedure concerning the confidentiality of telecommunications messages, which laid down “clear, detailed rules” and specified “with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”.³⁶ Yet article 8 was also violated in this case on the basis that the applicant “did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped”.³⁷

What had happened in this case was that the applicant was charged with handling the proceeds of aggravated theft after some of his conversations had been intercepted as he called another person whose telephone was being tapped. The applicant’s lawyer appealed against two extensions of the duration of the telephone tapping, but on appeal the Court of Cassation ruled, in particular, “that the applicant had ‘no *locus standi* to challenge the manner in which the duration of the monitoring of a third party’s telephone line was extended’”.³⁸ The European Court accepted that the interference with the applicant’s right to respect for his privacy and correspondence “was designed to establish the truth in connection with criminal proceedings and therefore to prevent disorder”.³⁹ However, the fact that the Court of Cassation had refused the applicant *locus standi* to challenge the extension of the duration of the wire tapping could, in the view of the European Court, “lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own”; that “would in practice render the protective machinery largely devoid of substance”. It followed that the applicant had not had “available to him the ‘effective control’ to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was ‘necessary in a democratic society’”.⁴⁰

While there is always a danger in extrapolating from the European jurisprudence, it would seem reasonable to conclude that under the International Covenant too, as well as the American Convention, the right of the judicial authorities to resort to interception of telephone conversations will be relatively strictly interpreted in favour of the right to respect for one’s privacy, and that, as a minimum, such interference in the exercise of this right must be clearly based in the domestic law, imposed for a specific and legitimate purpose, and be accompanied by adequate safeguards and remedies for the persons whose telephone is tapped.

³⁶*Eur. Court HR, Case of Lampert v. France, judgment of 24 August 1998, Reports 1998-V*, p. 2240, para. 28. This is one interesting example among many reflecting the impact that the jurisprudence of the European Court of Human Rights has on domestic legislation.

³⁷*Ibid.*, p. 2242, para. 39.

³⁸*Ibid.*, p. 2235, paras. 8-10 and p. 2236, para. 14; second emphasis added.

³⁹*Ibid.*, p. 2240, para. 29.

⁴⁰*Ibid.*, p. 2241-2242, paras. 38-40.

6.1.2 Searches

International human rights law provides no detailed rules about the lawfulness of searches, but in this respect too the European case-law may provide some guidance. It is worthy of note, however, that the following case did not concern the issuance of a search warrant to the police but the granting of a warrant to a private party in civil proceedings.

In the *Chappel* case, which did not concern a criminal case but a copyright action, the European Court had to examine the compatibility with article 8 of the European Convention of a search carried out in the applicant's business premises for the purpose of securing evidence to defend the plaintiff's copyright against unauthorized infringement. The Government accepted that there had been an interference with the exercise of the applicant's right to respect for his private life and home, and the applicant, for his part, agreed that the search was legitimate under article 8(2) for the protection of "the rights of others".⁴¹ The question that had to be determined by the Court was thus whether the measure was carried out "in accordance with the law" and whether it was "necessary in a democratic society". The relevant search order was a so-called "Anton Piller order", which is an interlocutory court order intended to preserve evidence pending trial; it is granted on an *ex parte* application without the defendant's being given notice and without his being heard.

The Court was satisfied in this case that the search was based on English law that complied with the conditions both of *accessibility* and of *foreseeability*. As to the former condition, the relevant legal texts and case-law were all published and thus accessible, and as to the latter, "the basic terms and conditions for the grant of this relief were, at the relevant time, laid down with sufficient precision for the 'foreseeability' criterion to be regarded as satisfied"; this was so although there could be "some variations" between the content of the individual orders.⁴²

When examining whether the measure concerned was "necessary in a democratic society", the Court observed, moreover, that the order was accompanied "by safeguards calculated to keep its impact within reasonable bounds", i.e. (1) it was "granted for a short period only"; (2) "restrictions were placed on the times at which and the number of persons by whom the Plaintiffs' search could be effected"; and further, (3) "any materials seized could be used only for a specified purpose".⁴³ In addition, the plaintiffs or their solicitor had given a series of undertakings and "a variety of remedies was available to the applicant in the event that he considered the order to have been improperly executed".⁴⁴

The Court did however accept that there were some "shortcomings in the procedure followed" when the order was carried out, in that, for instance, it must have been distracting for Mr. Chappel to have the searches by the police and the plaintiffs carried out at the same time; yet they were not deemed "so serious that the execution of the order" could, "in the circumstances of the case, be regarded as disproportionate to

⁴¹ Eur. Court HR, *Case of Chappel v. the United Kingdom*, judgment of 30 March 1989, Series A, No. 152-A, p. 21, para. 51.

⁴² Ibid., para. 56 at p. 24.

⁴³ Ibid., p. 25, para. 60.

⁴⁴ Ibid., loc. cit.

the legitimate aim pursued”.⁴⁵ Consequently, there was no violation of article 8 in this case.

6.1.3 Interference with correspondence

Interference with correspondence by national authorities can constitute a problem for persons deprived of their liberty and numerous complaints have been submitted to the European Court of Human Rights in this regard. Where they have been submitted by prisoners **convicted** of criminal offences, they will be dealt with in Chapter 8. In the case of *Pfeifer and Plankl*, however, **the applicants corresponded with each other while in detention on remand**, and in one letter, the investigating judge crossed out and rendered illegible certain passages which he considered to contain “jokes of an insulting nature against prison officers”.⁴⁶ The Court considered that the deletion of the passages constituted an unjustified interference with the applicants’ correspondence. It agreed with the European Commission of Human Rights “that the letter consisted rather of criticisms of prison conditions and in particular the behaviour of certain prison officers” and noted that, although “some of the expressions used were doubtless rather strong ones, ... they were part of a private letter which under the relevant legislation ... should have been read by Mr. Pfeifer and the investigating judge only”.⁴⁷ It next referred to its judgment in the case of *Silver and Others*, where it had held “that it was not ‘necessary in a democratic society’ to stop private letters ‘calculated to hold the authorities up to contempt’ or containing ‘material deliberately calculated to hold the prison authorities up to contempt’ ...”; although the deletion of passages in the case of *Pfeifer and Plankl* was “admittedly a less serious interference”, it was nonetheless “disproportionate” in the circumstances of the case and violated article 8 of the Convention.⁴⁸

The case of *Schönenberg and Durmaz* concerned **correspondence between a lawyer and a person held in detention on remand**. The applicant, a taxi-driver, was arrested in Geneva in connection with suspected drug offences and subsequently transferred to Zürich. A few days later the wife of Mr. Durmaz asked Mr. Schönenberg to take charge of her husband’s defence. On the same day Mr. Schönenberg sent a letter with enclosure to the district prosecutor’s office, as required by the Swiss legislation, requesting that the letter be forwarded to the addressee. In his letter, Mr. Schönenberg told Mr. Durmaz that he had been instructed by the latter’s wife to undertake his defence and sent him forms giving him authority to act. He also, inter alia, wrote that it was his duty to point out that he was entitled to refuse to make statements and that anything he said could be used against him.⁴⁹ The district prosecutor withheld this letter with enclosure and never informed Mr Durmaz about it; by virtue of an order, the prosecutor’s office subsequently decided not to communicate the letter to Mr. Durmaz; instead, a Zürich lawyer was appointed to represent him.⁵⁰

⁴⁵Ibid., p. 27, para. 66.

⁴⁶*Eur. Court HR, Case of Pfeifer and Plankl v. Austria, judgment of 25 February 1992, Series A, No. 227, p. 18, para. 47.*

⁴⁷Ibid., para. 47 at p. 19.

⁴⁸Ibid., loc. cit. and p. 19, para. 48.

⁴⁹*Eur. Court HR, Case of Schönenberg and Durmaz, judgment of 20 June 1988, Series A, No. 137, p. 8-9, paras. 8-9.*

⁵⁰Ibid., p. 9, paras. 10-11.

The Court accepted that the aim of the withholding of this letter was “the prevention of disorder or crime” and relied in this respect on its case-law according to which “the pursuit of this objective may ‘justify wider measures of interference in the case of a ... [convicted] prisoner than in that of a person at liberty’”; in the view of the Court, “the same reasoning may be applied to a person, such as Mr. Durmaz, being held on remand and against whom inquiries with a view to bringing criminal charges are being made since in such a case there is often a risk of collusion”.⁵¹ However, the Court ultimately concluded that the contested interference was not justifiable as being “necessary in a democratic society”, rejecting the Government’s arguments that the letter gave Mr. Durmaz advice relating to pending criminal proceedings which was of such nature as to jeopardize their proper conduct and that the letter was not sent by a lawyer instructed by Mr. Durmaz. It noted in this respect that

“Mr. Schönenberg sought to inform the second applicant of his right ‘to refuse to make any statement’, advising him that to exercise it would be to his ‘advantage’. ... In that way, he was recommending that Mr. Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court’s case-law – whose equivalent may be found in other Contracting States – it is open to an accused person to remain silent. ... Mr. Schönenberg could also properly regard it as his duty, pending a meeting with Mr. Durmaz, to advise him of his right and of the possible consequences of exercising it. In the Court’s view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution.”⁵²

The Court further attached “little importance” to the Government’s argument that the lawyer concerned had not been instructed by Mr. Durmaz, since he “was acting on the instructions of Mrs. Durmaz and had moreover so apprised the ... district prosecutor by telephone”. In the view of the Court,

“these various contacts amounted to preliminary steps intended to enable the second applicant to have the benefit of the assistance of a defence lawyer of his choice and, thereby, to exercise a right enshrined in another fundamental provision of the Convention, namely article 6. ... In the circumstances, the fact that Mr. Schönenberger had not been formally appointed is therefore of little consequence.”⁵³

There had consequently been a breach of article 8 in this case, which thus provides an important reminder that the relationship between a person suspected, accused or charged with a criminal offence and his legal counsel, albeit potential, is a privileged one, which the domestic authorities must carefully safeguard. However, this issue will be further dealt with in section 6.4 below.

Under international human rights law, interferences with a person’s right to privacy in the course of criminal investigations must be lawful and serve a legitimate purpose in relation to which the measure concerned must be proportionate.

⁵¹Ibid., p. 13, para. 25.

⁵²Ibid., pp. 13-14, para. 28.

⁵³Ibid., p. 14, para. 29.

6.2 The right to be treated with humanity and the right to freedom from torture

The treatment of detainees and prisoners will be dealt with in further detail in Chapter 8, but in view of the frequency of recourse to torture and other ill-treatment of persons deprived of their liberty in the context of criminal investigations, it is indispensable to emphasize here that the right to freedom from torture, cruel or inhuman treatment or punishment is guaranteed by all the major treaties and by the Universal Declaration of Human Rights (art. 7 of the International Covenant on Civil and Political Rights; art. 4 of the African Charter on Human and Peoples' Rights; art. 5(2) of the American Convention on Human Rights; art. 3 of the European Convention on Human Rights, which does not contain the term “cruel”; and art. 4 of the Universal Declaration). In some legal instruments this right is reinforced, for persons deprived of their liberty, by the right to be treated with humanity and with respect for the inherent dignity of the human person (art. 10(1) of the Covenant; art. 5(2) of the American Convention). Given the gravity of the practice of torture, from which no part of the world is free, treaties aimed at efficiently promoting the abolition of this illegal practice have been elaborated under the auspices of the United Nations and two regional organizations, namely, the OAS and the Council of Europe.⁵⁴

The rights of persons during investigation are also dealt with in article 55 of the Statute of the International Criminal Court. Article 55(1)(b) thus provides that a person under investigation shall “not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment”.

In the course of criminal investigations and judicial proceedings, the universal and non-derogable prohibition on torture and other inhuman or degrading treatment or punishment is consequently *to be respected at all times, without exception even in the direst of circumstances*.⁵⁵ This means that persons arrested, detained, or otherwise in the hands of police or prosecuting authorities for purposes of interrogation into alleged criminal activities, either as suspects or as witnesses, have the right always to be treated with humanity and without being subjected to any psychological or physical violence, duress or intimidation. As will be shown below, the use of any confession extracted under duress is unlawful under international human rights law. This is in particular stated *expressis verbis* in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁴See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the Inter-American Convention to Prevent and Punish Torture, 1985; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987.

⁵⁵See e.g. article 4(2) of the International Covenant on Civil and Political Rights; article 27(2) of the American Convention on Human Rights; article 15(2) of the European Convention on Human Rights; article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and article 5 of the Inter-American Convention to Prevent and Punish Torture.

Legal instruments have also been drafted aimed at the professional groups involved in criminal investigations. The 1979 Code of Conduct for Law Enforcement Officials provides inter alia in its article 5 that “no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment”. The 1990 Guidelines on the Role of Prosecutors contain in particular the following important provision:

“16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

Also, article 54(1)(c) of the Statute of the International Criminal Court provides that one of the duties of the Prosecutor with respect to investigations is to “fully respect the right of persons arising under this Statute”, which means, inter alia, the right specified in article 55(1)(c) concerning the prohibition of duress and torture.

Furthermore, as stated in preambular paragraph 7 of the 1985 Basic Principles on the Independence of the Judiciary, “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens”, and it is therefore also the duty of judges to be particularly alert to any sign of maltreatment or duress of any kind that might have taken place in the course of criminal investigations and deprivation of liberty, and to take the necessary measures whenever faced with a suspicion of maltreatment.⁵⁶

Judges, prosecutors and lawyers must be particularly alert for any sign of torture, including rape, and other forms of sexual abuse and ill-treatment of *women and children* in custody. Torture and ill-treatment of these vulnerable groups while in the hands of police officers and prison officials are commonplace in many countries, and in order to bring such illegal practices to an end, it is indispensable that the members of the legal professions at all times play an active role in their prevention, investigation and punishment.

Torture and other forms of ill-treatment are prohibited at all times, including during criminal investigations, and can never be justified; these are acts that must be prevented, investigated and punished.

Judges, prosecutors and lawyers must be particularly alert for any sign of torture or ill-treatment of women and children in custody.

⁵⁶Provisions against torture can also be found in article 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

6.3 The right to be notified of the charges in a language one understands

Article 14(3)(a) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. Article 6(3)(a) of the European Convention is similarly worded, while, according to article 8(2)(b) of the American Convention on Human Rights, the accused is entitled to “prior notification in detail ... of the charges against him”. The African Charter on Human and Peoples’ Rights contains no express provision guaranteeing the right to be informed of criminal charges against oneself. However, the African Commission on Human and Peoples’ Rights has held that persons arrested “shall be informed promptly of any charges against them”.⁵⁷ With regard to a person under arrest, Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that he “shall be promptly informed of any charges against him”.

The right to be informed of charges *in a language one understands* implies, of course, that the domestic authorities must provide adequate interpreters and translators in order to fulfil this requirement, which is essential for the purpose of allowing a suspect to defend him or herself adequately. This more general right to provide interpretation during investigation is specifically included in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which

“A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”

The duty to inform a suspect of his or her rights in general during investigation “in a language the suspect speaks and understands” is also included, for instance, in article 42 (A) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Criminal Tribunals, which guarantee, furthermore, the right of a suspect “to have the free legal assistance of an interpreter” if he “cannot understand or speak the language to be used for questioning”.

According to the Human Rights Committee, the right to be informed in article 14(3)(a) “applies to all cases of criminal charges, *including those of persons not in detention*”, and the term “‘promptly’ requires that information is given in the

⁵⁷ ACHPR, *Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria*, Communication No. 224/98, adopted during the 28th session, 23 October – 6 November 2000, para. 43 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

manner described as soon as the charge is first made by a competent authority”.⁵⁸ The Committee has in this respect specified that

“this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates *both the law and the alleged facts on which it is based*”.⁵⁹

In the view of the Committee, this also means that the “detailed information about the charges against the accused must not be provided immediately upon arrest, *but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused*”.⁶⁰ The duty to inform the accused under article 14(3)(a) of the Covenant is thus also “more precise than that for arrested persons under” article 9(2) of the Covenant and, as long as the accused has been promptly brought before a judge as required by article 9(3), “the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest”.⁶¹ In an earlier case the Committee held, however, that “the requirement of prompt information ... only applies once the individual has been *formally* charged with a criminal offence”, and that it does not, consequently, “apply to those remanded in custody pending the result of police investigations”, a situation covered by article 9(2) of the Covenant.⁶²

The question is, however, whether the reasoning in this latter case is consistent with the Committee’s views as expressed in its General Comment or the earlier cases referred to.

In applying the principle of prompt information, the Committee concluded that article 14(3)(a) had not been violated in a case where the author complained that he had been detained for six weeks before being charged with the offence for which he was later convicted. The Committee concluded simply that it transpired from the material before it that the author had been “informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started”.⁶³

Article 14(3)(a) had however been violated in a case where the victim had not been informed of the charges against him prior to his being tried *in camera* by a military court that sentenced him to 30 years’ imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him.⁶⁴

⁵⁸General Comment No. 13 (Article 14), in *United Nations Compilation of General Comments*, p. 124, para. 8; emphasis added.

⁵⁹*Ibid.*, loc. cit.; emphasis added.

⁶⁰Communication No. 561/1993, *D. Williams v. Jamaica* (Views adopted on 8 April 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 151, para. 9.2; emphasis added.

⁶¹Communication No.702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 232, para. 5.9.

⁶²Communication No. 253/1987, *P. Kelly v. Jamaica* (Views adopted on 8 April 1991), UN doc. *GAOR*, A/46/40, p. 247, para. 5.8; emphasis added.

⁶³Communication No. 561/1993, *D. Williams v. Jamaica* (Views adopted on 8 April 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 151, para. 9.2.

⁶⁴Communication No. R.14/63, *R. S. Antonaccio v. Uruguay* (Views adopted on 28 October 1981), UN doc. *GAOR*, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2.

A particular problem is posed by trials *in absentia*. Without outlawing such proceedings altogether under article 14, the Committee has held that they “are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice”; yet special precautions are called for in this respect, and “the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him” under article 14(3)(a), although there must also be “certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused”.⁶⁵

The case of Mbenge

The limits on the responsibility of domestic authorities to trace an accused person had not been reached in the case of *Mbenge*, where the State party had “not challenged the author’s contention that he had known of the trials only through press reports after they had taken place”. Although the two relevant judgements stated “explicitly that summonses to appear had been issued by the clerk of the court”, there was “no indication ... of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium [was] correctly reproduced in” one of the judgements and “was therefore known to the judicial authorities”.⁶⁶ Indeed, the fact that, according to the judgement in the second trial, the summons had been issued only three days before the beginning of the hearings before the court, confirmed the Committee in its conclusion “that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence”. It had consequently violated article 14(3)(a), (b), (d) and (e) of the Covenant.⁶⁷

Article 8(2)(b) of the American Convention on Human Rights was violated in the *Castillo Petruzzi et al.* case, where “the accused did not have sufficient advance notification, in detail, of the charges against them”; indeed, the indictment was presented on 2 January 1994, and the attorneys were only allowed to view the file on 6 January “for a very brief time”, with the judgement being rendered the following day.⁶⁸

⁶⁵Communication No. 16/1977, *D. Monguya Mbenge v. Zaire* (Views adopted on 25 March 1983), UN doc. GAOR, A/38/40, p. 138, paras. 14.1-14.2.

⁶⁶*Ibid.*, para. 14.2.

⁶⁷*Ibid.*, loc. cit.

⁶⁸*I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 202, paras. 141-142 read in conjunction with p. 201, para. 138.

Under article 6(3)(a) of the European Convention on Human Rights, the European Court held that it was sufficient in order to comply with this provision that the applicants were given a “charge-sheet” within respectively ten hours and one hour and a quarter after their arrest; these charge-sheets contained information about the charge (breach of the peace) as well as the date and place of its commission.⁶⁹

However, article 6(3)(a) was violated in a case where the applicant, who was of foreign origin, had informed the Italian authorities of his difficulties in understanding the judicial notification that had been served on him, asking them to send the information to him in his mother tongue or in one of the official languages of the United Nations. He received no answer to his letter and the authorities continued to draw up the documents in Italian. The Court observed that “the Italian judicial authorities should have taken steps to comply with [the applicant’s request] so as to ensure observance of the requirements of [article 6(3)(a)] unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him”.⁷⁰

Every person charged with a criminal offence must be informed promptly in a language which he or she understands of the charges against him, with details being given as to the facts and the law on which the charge is based.

This information must be given in good time before the trial so as to allow the accused person to effectively prepare his or her defence.

6.4 The right to legal assistance

The right to prompt legal assistance upon arrest and detention is essential in many respects, both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the person deprived of his or her liberty. While all relevant human rights treaties guarantee the right of an accused to legal counsel of one’s own choosing (art. 14(3)(d) of the International Covenant, art. 7(1)(c) of the African Charter and art. 6(3)(c) of the European Convention), article 8(2)(d) of the American Convention on Human Rights provides moreover that during criminal proceedings every accused person has the right “**to communicate freely and privately with his counsel**” (emphasis added). Neither the International Covenant, the African Charter nor the European Convention contains a similar express protection of the confidentiality of the client-lawyer relationship.

However, Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners provides that

⁶⁹ Eur. Court. HR, *Case of Steel and Others v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VII, p. 2741, para. 85.

⁷⁰ Eur. Court HR, *Case of Brožicek v. Italy*, judgment of 19 December 1989, Series A, No. 167, p. 18, para. 41.

“For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”

Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides further details in this respect:

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”

According to Principle 15 of the Body of Principles, “communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days”. The Human Rights Committee itself has stated in its General Comment No. 20 on article 7 that provisions “should ... be made against incommunicado detention”.⁷¹

The right to legal assistance, including legal assistance without payment where the suspect has insufficient funds, is also guaranteed by Rule 42(A)(i) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Tribunals. Moreover, Rule 67(A) of the Rules of Detention of the Yugoslavia Tribunal provides that “each detainee shall be entitled to communicate fully and without restraint with his defence counsel, with the assistance of an interpreter where necessary” and, further, that “all such correspondence and communications shall be privileged”. Lastly, Rule 67(D) of these Rules of Detention stipulates that interviews “with legal counsel and interpreters shall be conducted in the sight but not within the hearing, either direct or indirect, of the staff of the detention unit”. Similar provisions are contained in Rule 65 of the Rules of Detention of the Rwanda Court.

⁷¹ *United Nations Compilation of General Comments*, p. 140, para. 11.

The right of access to legal assistance must be *effectively* available, and, where this has not been the case, the Human Rights Committee has concluded that article 14(3) was violated.⁷² This provision was of course also violated where the person concerned did not have access to any legal assistance at all during the first ten months of his detention and, in addition, was not tried in his presence.⁷³ However, this, like many other cases dealt with by the Human Rights Committee, was an extreme case, since it concerned the situation of detainees held in the shadow of a dictatorship.

In its Resolution on the Right to Recourse and Fair Trial, the African Commission on Human and Peoples' Rights reinforced the right to defence contained in article 7(1)(c) of the African Charter by holding that in the determination of charges against them, individuals shall in particular be entitled to “communicate in confidence with counsel of their choice”. This right was violated in the case of *Media Rights Agenda*, acting on behalf of Mr. Niran Malaolu, who was neither allowed access to a lawyer, nor represented by a lawyer of his own choice.⁷⁴

The European Court of Human Rights has observed that “the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance”; but instead it *inter alia* referred to article 93 of the Standard Minimum Rules for the Treatment of Prisoners adopted by the Committee of Ministers of the Council of Europe by resolution (73) 5, which reads as follows:

“An untried prisoner shall be entitled, *as soon as he is imprisoned*, to choose his legal representative, or shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the free assistance of an interpreter for all essential contacts with the administration and for his defence. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”⁷⁵

The Court further stated that it “considers that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from” article 6(3)(c) of

⁷²See, among many other cases, Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), in UN doc. GAOR, A/35/40, p. 118, para. 16; and Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay* (Views adopted on 29 July 1980), p. 131, para. 16.

⁷³Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. GAOR, A/36/40, p. 119, para. 16.

⁷⁴ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, paras. 55-56 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

⁷⁵*Eur. Court HR, Case of S. v. Switzerland, judgment of 28 November 1991, Series A, No. 220*, p. 15, para. 48; emphasis added.

the Convention. “If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.”⁷⁶

The case of S. v. Switzerland

In the case of *S. v. Switzerland*, the applicant complained of a violation of article 6(3)(c) in that the Swiss authorities had exercised surveillance of his meetings with his lawyer and only authorized the lawyer to consult a fraction of the case-file. It also appears from the facts that some letters from the applicant to his lawyer had been intercepted and that on one occasion the policemen supervising the meeting had even taken notes. The Government argued before the Court that the surveillance was justified for reasons of “collusion” since there was a danger that the two lawyers for the co-accused would co-ordinate their defence strategy.

The Court concluded, however, that the applicant’s right under article 6(3)(c) to communicate with his lawyer was violated, because, “notwithstanding the seriousness of the charges against the applicant”, the possibility of collusion could not “justify the restriction in issue and no other reason [had] been adduced cogent enough to do so”. In the view of the Court there was “nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy”, and neither “the professional ethics” of the Court-appointed defence counsel “nor the lawfulness of his conduct were at any time called into question in this case”. Furthermore, “the restriction in issue lasted over seven months”.⁷⁷

As can be seen, the case-law of the international monitoring organs proves that the rules on fair trial contained in the international human rights treaties, although principally appearing to aim at ensuring fair court proceedings as such, may also be applicable to the pre-trial stages of criminal investigation, at least to the extent necessary to ensure a subsequent fair hearing before an independent and impartial court of law.

This follows inter alia from the case-law of the Human Rights Committee with regard to the right of access to a lawyer under article 14, which will be dealt with in further depth in Chapter 7. Further, so far as article 6 of the European Convention on Human Rights is concerned, the European Court has held that in particular article 6(3) “may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions”.⁷⁸ With regard to article 6(3)(c), which concerns the right to defend oneself in person or through legal assistance of one’s own choosing, the manner of its application “during the preliminary investigation depends on the special features of the proceedings

⁷⁶Ibid., para. 48 at p. 16.

⁷⁷Ibid., para. 49.

⁷⁸*Eur. Court HR, Case of John Murray v. the United Kingdom, judgment of 8 February 1996, Reports 1996-I, p. 54, para. 62.*

involved and on the circumstances of the case”.⁷⁹ In the case of *Murray*, the European Court explained its position in the following terms:

“63. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”⁸⁰

Early access to a lawyer: The Murray case

In the case of *Murray*, the applicant was refused access to a lawyer during the first 48 hours of his detention, a measure decided under Section 15 of the Northern Ireland (Emergency Provisions) Act 1987 “on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act”.⁸¹ The applicant was cautioned under the Criminal Evidence (Northern Ireland) Order 1988 that, if he chose to remain silent, inferences might be drawn in support of evidence against him. The European Court considered that the scheme contained in the said Order

“... is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes ... that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.”⁸²

It then concluded that, “under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation”, and that “to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6”.⁸³

⁷⁹Ibid., loc. cit.

⁸⁰Ibid., pp. 54-55, para. 63.

⁸¹Ibid., p. 55, para. 64.

⁸²Ibid., para. 66.

⁸³Ibid., loc. cit.

Upon his or her deprivation of liberty, a person has the right of access to legal counsel without delay and to be able to confer with counsel in private. To have prompt access to a lawyer at an early stage of police investigations may be essential in order to avoid lasting prejudice with regard to the rights of the defence.

6.5 The right not to be forced to testify against oneself/The right to remain silent

Article 14(3)(g) of the International Covenant guarantees the right of everyone “not to be compelled to testify against himself or to confess guilt”, and article 8(2)(g) of the American Convention provides for the right of everyone “not to be compelled to be a witness against himself or to plead guilty”, a provision that is strengthened by article 8(3) according to which “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”. The African Charter and the European Convention contain no similar provision. The effective protection of this right is of particular importance in the course of the preliminary investigations, when the temptation may be greatest to exert pressure on the suspected persons in order to have them confess guilt. It is noteworthy that Guideline 16 of the Guidelines on the Role of Prosecutors also provides that prosecutors shall refuse evidence that has been obtained through recourse to unlawful methods.⁸⁴

The right not to be compelled to incriminate oneself and to confess guilt is also contained in article 55(1)(a) of the Statute of the International Criminal Court and in articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

Article 14(3)(g) of the Covenant has been violated on several occasions, such as where the author had been “forced by means of torture to confess guilt”. He had in fact been held *incommunicado* for three months, a period during which he was “subjected to extreme ill-treatment and forced to sign a confession”.⁸⁵ While grave situations of this kind are clearly incompatible with the prohibition on forced self-incrimination, there are, as will be seen below, other circumstances when it might be more difficult to assess the lawfulness of the compulsion to which an accused person has been subjected.

From the right not to be compelled to testify against oneself flows *the right to remain silent*, although the four human rights treaties examined in this Manual do not expressly provide for this right either during police questioning or during trial

⁸⁴See Principle 16 quoted *in extenso*, section 6.2 above.

⁸⁵Communication No. 139/1983, *H. Conteris* (Views adopted on 17 July 1985), UN doc. GAOR, A/40/40, p. 202, para. 10 read in conjunction with p. 201, para. 9.2. For another case of forced self-incrimination, see Communication No. 159/1983, *R. Cariboni v. Uruguay* (Views adopted on 27 October 1987), UN doc. GAOR, A/43/40, para. 10 at p. 190.

proceedings. However, Rule 42(A)(iii) of the Rules of Procedure and Evidence of both the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia makes express reference to this right, as does article 55(2)(b) of the Statute of the International Criminal Court. Furthermore, the European Court of Human Rights has unequivocally held that

“there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are *generally recognized international standards* which lie at the heart of the notion of a fair procedure under Article 6. ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”⁸⁶

Is the right to remain silent absolute? View of the European Court of Human Rights

In this particular case, the applicant was arrested under the Prevention of Terrorism (Temporary Provisions) Act 1989 and cautioned by the police officer pursuant to article 3 of the Criminal Evidence (Northern Ireland) Order 1988 that, although he did not have to say anything unless he wished to do so, his silence might be treated in court as supporting any relevant evidence against him; he was subsequently cautioned several times. The applicant was arrested coming down the stairs in a house in which alleged IRA terrorists were apprehended together with their victim. During his trial for the offence of conspiracy to murder, the applicant remained silent but was again cautioned that the court, in deciding whether he was guilty, might take into account against him “to the extent that it considers proper” his “refusal to give evidence or to answer any questions”.⁸⁷ He was found guilty of the offence of aiding and abetting the unlawful imprisonment of the man against whom there was a conspiracy to murder, but acquitted on the other charges.

The European Court refrained in this case from giving “an abstract analysis of the scope of” the right to remain silent and the privilege against self-incrimination and, in particular, of what constitutes in this context “improper compulsion”, because what was at stake was

“whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as ‘improper compulsion’”.⁸⁸

⁸⁶ Eur. Court HR, *Case of John Murray v. the United Kingdom*, judgment of 8 February 1996, Reports 1996-I, p. 49, para. 45; emphasis added.

⁸⁷ Ibid., p. 38, para. 20.

⁸⁸ Ibid., p. 49, para. 46.

*Is the right to remain silent absolute?
View of the European Court of Human Rights (cont.d)*

While it was “self-evident” to the Court “that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself”, it was “equally obvious that these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution”. It followed that, “wherever the line between these two extremes is to be drawn”, the question whether the right to be silent “is absolute must be answered in the negative”.⁸⁹ It thus also followed that it “cannot be said ... that an accused’s decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him”. Agreeing with the respondent Government, the Court further observed that “established international standards in this area, while providing for the right to silence and the privilege against self-incrimination are silent on this point”.⁹⁰ This also meant that the question whether

“... the drawing of adverse inferences from an accused’s silence infringes article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation”.⁹¹

The European Court carefully analysed the powers of the national trial judge and concluded that he could only draw “common-sense inferences which [he] considers proper, in the light of the evidence against the accused”. In addition, the trial judge had “a discretion whether, on the facts of the particular case, an inference should be drawn”, and, finally, the exercise of discretion was “subject to review by the appellate courts”.⁹² Against the background of this particular case, the European Court eventually denied that “the drawing of *reasonable* inferences from the applicant’s behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence”.⁹³

It is, however, too early to know whether the above European interpretation of the right to silence will be shared by the Human Rights Committee and/or the other regional monitoring organs.

⁸⁹Ibid., para. 47.

⁹⁰Ibid., loc. cit.

⁹¹Ibid., pp. 49-50, para. 47.

⁹²Ibid., para. 51 at p. 51.

⁹³Ibid., loc. cit.; emphasis added.

The Statute of the International Criminal Court: It is noted in this respect that article 55(2)(b) of the Statute of the International Criminal Court provides that a suspect shall be informed prior to questioning that he has a right to “remain silent, ***without such silence being a consideration in the determination of guilt or conscience***” (emphasis added). Whilst the terms of this Statute cannot be considered to be an authoritative interpretation of the human rights treaties examined in this Manual, it constitutes a legal document with considerable juridical weight. This important subject gives rise to the following questions:

- ❖ Can the European Court’s ruling in the *Murray* case be considered to be consistent with article 55(2)(b) of the Statute of the International Criminal Court?
- ❖ Does the reliance on the role played by “common sense implications” provide a sufficient guarantee against possible miscarriages of justice?
- ❖ Is this notion sufficiently clear to have a place in the evaluation of evidence in criminal proceedings?
- ❖ What if, for instance, the suspect refused to speak out of fear of reprisals by the co-accused and other persons?

A suspect must at no time, and in no circumstances, be compelled to incriminate himself or herself or to confess guilt; a suspect has the right to remain silent at all times.

6.6 The duty to keep records of interrogation

It is essential, both in order to prevent and if need be to prove the occurrence of treatment prohibited by international human rights law, and consequently also for the future judicial proceedings, that records of interrogations be kept and that they remain accessible both to prosecuting authorities and to the defence. On this issue, the Human Rights Committee stated in its General Comment No. 20 regarding article 7 of the International Covenant that “the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings”.⁹⁴

Principle 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment deals with the duty to record in the following terms:

- “1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.”

⁹⁴United Nations Compilation of General Comments, p. 140, para. 11.

Rule 43 of the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and the former Yugoslavia provides that interrogations of suspects “shall be audio-recorded or video-recorded”, in accordance with a special procedure detailed therein. The suspect shall be supplied with a copy of the transcript of this recording (Rule 43(iv)).

Detailed records of interrogations must be kept at all times and must be made available to the suspect and his or her legal counsel.

6.7 The right to adequate time and facilities to prepare one’s defence

Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. Article 8(2)(c) of the American Convention on Human Rights guarantees the accused “adequate time and means for the preparation of his defence”, while article 6(3)(b) of the European Convention on Human Rights speaks of “adequate time and facilities for the preparation of his defence”. Article 7(1) of the African Charter on Human and Peoples’ Rights globally guarantees “the right to defence, including the right to be defended by counsel of his choice”. Articles 20 and 21 respectively of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia were heavily inspired by article 14 of the International Covenant and both provide that the accused shall “have adequate time and facilities for the preparation of his [or her] defence and to communicate with counsel of his or her own choosing” (arts. 20(4)(b) and 21(4)(b)). Since this right will be examined in fuller detail in Chapter 7, only a limited number of examples from the international jurisprudence will be examined here, since they more particularly concern the lack of time and facilities to prepare one’s defence at an early stage of the investigations.

As emphasized by the Human Rights Committee, “the right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms”.⁹⁵ In General Comment No. 13 on article 14, the Committee also explained that the meaning of “*adequate time*” depends on the circumstances of each case, but the *facilities* must include access to *documents and other evidence* which the accused requires to prepare his case, as well as the opportunity to engage and communicate with *counsel*. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer.⁹⁶ This provision moreover “requires counsel to communicate

⁹⁵Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4; and similar wording in Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40, p. 232, para. 5.10.

⁹⁶*United Nations Compilation of General Comments*, p. 124, para. 9; emphasis added.

with the accused in conditions giving *full respect for the confidentiality of their communications*”, and lawyers “should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter”.⁹⁷

Where the author claimed that he did not have adequate time and facilities for the preparation of his defence, the Committee noted that he was actually “represented at trial by the same counsel who had represented him at the preliminary examination”, and further, that “neither the author nor counsel ever requested the Court for more time in the preparation of the defence”; consequently, there was no violation of article 14(3)(b).⁹⁸ *If the defence considers that it has not had sufficient time and facilities to prepare itself, it is thus important that it requests an adjournment of the proceedings.*

The Committee has however emphasized that “in cases in which *a capital sentence* may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial”, and that “this requirement applies to *all* the stages of the judicial proceedings”; again, however, “the determination of what constitutes ‘adequate time’ requires an assessment of the individual circumstances of each case”.⁹⁹

The case of Wright

In the case of *Wright*, the author contended that he had not had adequate time for the preparation of the defence, “that the attorney assigned to the case was instructed on the very day on which the trial began”, and that, therefore, “he had less than one day to prepare the case”.¹⁰⁰ The Committee accepted that “there was considerable pressure to start the trial as scheduled” because of the arrival of a witness from the United States and that it was “uncontested” that, as submitted by the author, the lawyer was appointed “on the very morning the trial was scheduled to start” and, accordingly, “had less than one day to prepare” the author’s defence; yet it was “equally uncontested that no adjournment of the trial was requested by” the author’s counsel.¹⁰¹ Consequently, the Committee did “not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party”, adding that “if counsel had felt that they were not properly prepared, *it was incumbent upon them to request the adjournment of the trial*”.¹⁰² It followed that there was no violation of article 14(3)(b) in this case. The applicant was convicted of murder and sentenced to be executed.

⁹⁷Ibid., loc. cit.; emphasis added.

⁹⁸Communication No. 528/1993, *M. Steadman v. Jamaica* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 26, para. 10.2.

⁹⁹Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4; emphasis added.

¹⁰⁰Ibid., p. 311, para. 3.4.

¹⁰¹Ibid., pp. 315-316, para. 8.4.

¹⁰²Ibid., loc. cit.; emphasis added. For a similar reasoning in a death penalty case see also Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40, p. 232, para. 5.10.

In the light of the outcome in the *Wright* case, it might be asked whether, in death penalty cases or in other cases where a heavy prison sentence may be imposed on the accused at the end of his or her trial, it is fair to lay the *entire* burden for compliance with article 14(3)(b) on the defence. In the interests of justice, might the judge concerned perhaps have a duty to see to it that the accused is indeed ensured adequate time and facilities for the preparation of his defence?

The case of Smith

In the case of *Smith*, another death penalty case, the Committee concluded that article 14(3)(b) had in fact been violated. In this case the author also complained that his trial was unfair, and that he had inadequate time to prepare his defence since he could only consult with his lawyer on the opening day of his trial and that, as a result, a number of key witnesses could not be called. According to the Committee it was “uncontested that the trial defence was prepared on the first day of the trial”; one of the author’s court-appointed lawyers asked another lawyer to replace him, and another had withdrawn the day prior to the beginning of the trial. The attorney who actually defended the author was present in court at 10 a.m. when the trial opened and asked for an adjournment until 2 p.m. “so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before”.¹⁰³ The request was granted and the lawyer consequently “had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner”.¹⁰⁴ This, the Committee concluded, was “insufficient to prepare adequately the defence in a capital case” and there was moreover “the indication that this affected counsel’s possibility of determining which witnesses to call”.¹⁰⁵ Consequently, these facts constituted a violation of article 14(3)(b) of the Covenant.¹⁰⁶

In the *Smith* case the defence actually asked for a brief adjournment. What do you think the Committee would have decided if such an adjournment had not been requested by the defence lawyer?

Incommunicado detention: Article 14(3)(b) was also violated in the case of *Marais*, who was unable to communicate with his lawyer and to prepare his defence, except for two days during the trial itself. Although the lawyer had “obtained a permit from the Examining Magistrate to see his client, he was repeatedly prevented from doing so”, his client being held *incommunicado*.¹⁰⁷ Both article 14(3)(b) and article 14(3)(d) were violated in the case of *Yasseen and Thomas*, where Yasseen had no legal

¹⁰³Communication No. 282/1988, *L. Smith v. Jamaica* (Views adopted on 31 March 1993), UN doc. A/48/40 (vol. II), p. 35, para. 10.4.

¹⁰⁴*Ibid.*, loc. cit.

¹⁰⁵*Ibid.*

¹⁰⁶*Ibid.*

¹⁰⁷Communication No. 49/1979, *D. Marais, Jr. v. Madagascar* (Views adopted on 24 March 1983), UN doc. G.AOR, A/38/40, p. 148, para. 17.3 and p. 149, para. 19.

representation for the first four days of his trial, at the end of which a death sentence was imposed.¹⁰⁸

In numerous cases brought against Uruguay in the 1970s and the beginning of the 1980s this particular provision was violated, among others, and common features of these cases were that the authors had been arrested and detained on suspicion of being involved in subversive or terrorist activities, held *incommunicado* for long periods, subjected to torture or other ill-treatment and subsequently tried and convicted by military courts.¹⁰⁹ Article 14(3)(b) was also violated in the case of *Wight* against Madagascar, who was “kept incommunicado without access to legal counsel” during a ten-month period “while criminal charges against him were being investigated and determined”.¹¹⁰ Further, in the case of *Peñarrieta et al.*, the Committee concluded that article 14(3)(b) had been violated because the authors had had no access to legal counsel “during the initial 44 days of detention”, i.e. when they were kept *incommunicado* following their arrest.¹¹¹

Incommunicado detention that lasts for weeks or even months is a particularly serious violation of the right to respect for several human rights, among them the right to prepare one’s defence. However, even brief periods of *incommunicado* detention may have serious adverse effects on the detained person’s rights, including his right to defend himself, and, as stated by the Human Rights Committee, provisions should therefore “also be made against incommunicado detention”.¹¹²

Access to documents: With regard to *access to documents* by the accused and/or his or her legal counsel, the Committee has specified that article 14(3)(b) “does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall ‘have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing’”. In one case the author had been able, for almost two months prior to the court hearing of his case, either “personally or through his lawyer”, to examine “documents relevant to his case at the police station”, although he had chosen “not to do so, but requested that copies of all documents be sent to him”. Article 14(3)(b) of the Covenant had not, consequently, been violated in this case.¹¹³

Furthermore, according to the Committee’s case-law, “the right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, *provided that the relevant documents are made available to his*

¹⁰⁸Communication No. 676/1996, *A. S. Yasseen and N. Thomas v. Guyana* (Views adopted on 30 March 1998), UN doc. GAOR, A/53/40 (vol. II), p. 161, para. 7.8.

¹⁰⁹See, for example, Communication No. R.13/56, *L. Celiberti de Casariego v. Uruguay* (Views adopted on 29 July 1981), UN doc. GAOR, A/36/40, p. 188, para. 11; Communication No. 43/1979, *A. D. Caldas v. Uruguay* (Views adopted on 21 July 1983), UN doc. GAOR, A/38/40, p. 196, para. 14; and Communication No. R.17/70, *M. Cubas Simones v. Uruguay* (Views adopted on 1 April 1982), UN doc. GAOR, A/37/40, pp. 177-178, para. 12.

¹¹⁰Communication No. 115/1982, *J. Wight v. Madagascar* (Views adopted on 1 April 1985), UN doc. GAOR, A/40/40, p. 178, para. 17.

¹¹¹Communication No. 176/1984, *L. Peñarrieta et al. v. Bolivia* (Views adopted on 2 November 1987), UN doc. GAOR, A/43/40, p. 207, para. 16.

¹¹²General Comment No. 20 on article 7, *United Nations Compilation of General Comments*, p. 140, para. 11.

¹¹³Communication No. 158/1983, *O. F. v. Norway* (decision adopted on 26 October 1984), UN doc. GAOR, A/40/40, p. 211, para. 5.5.

counsel".¹¹⁴ Where a British citizen tried in Norway had a Norwegian lawyer of his own choice, who had access to the entire file and who had moreover the assistance of an interpreter in his meetings with the author, neither the right to a fair trial in article 14(2) nor the right to have adequate facilities to prepare his defence as provided by article 14(3)(b) was violated. An additional factor in this case was that if the lawyer had considered that he had not enough time to familiarize himself with the file, he could have requested an adjournment, which he did not do.¹¹⁵

Article 8(2)(c) of the American Convention on Human Rights was violated in the case of *Castillo Petruzzi et al.* where "the conditions under which the defence attorneys had to operate were wholly inadequate for a proper defence, as they did not have access to the case file until the day before the ruling of first instance was delivered". In the view of the Inter-American Court of Human Rights, "the effect was that the presence and participation of the defence attorneys were mere formalities", and consequently, it could "hardly be argued that the victims had adequate means of defence".¹¹⁶

An accused person must always have adequate time and facilities to prepare his or her defence, including effective access to documents and other evidence which are essential for his or her defence.

Incommunicado detention interferes with the right to ensure an efficient defence and should be outlawed.

7. Concluding Remarks

Without being exhaustive, this chapter has described some of the essential human rights that must be guaranteed during pre-trial investigation into criminal activities. These comprise a number of rights essential to preserving not only a suspect's physical and mental integrity, but also his or her right to secure an effective defence throughout these early proceedings and subsequently during the trial itself. In order for these rights to be effectively realized, all legal professions, that is to say, judges, prosecutors and lawyers alike, have an essential role to play. The police and prosecutorial authorities have a professional duty under international law to protect these rights, as do the domestic judges, who must at all times be alert to any sign that such important rights as the right to freedom from torture, the right to effective access to legal counsel, the right not to be compelled to testify against oneself and the right to

¹¹⁴Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 18, para. 14.1; emphasis added.

¹¹⁵Communication No. 451/1991, *B. S. Harvard v. Norway* (Views adopted on 15 July 1994), UN doc. GAOR, A/49/40 (vol. II), p. 154, para. 9.5.

¹¹⁶I-A Court HR, *Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 202, para. 141.

prepare an effective defence have not been respected. Add to these rights the basic rights to equality before the law and to presumption of innocence, and it can be concluded that international human rights law provides an important foundation for the creation of a judicial system that will function on the basis of respect for the rule of law and individual rights, for the ultimate purpose of administering justice fairly and efficiently.

