The investigation phase in international criminal procedure: in search of common rules

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Citation for published version (APA):
SECTION II: THE COLLECTION OF EVIDENCE

Chapter 4: Interrogation of suspects and accused persons*

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I. INTRODUCTION

Interrogating or questioning individuals is an important investigative measure in the evidence-gathering process. Statements that have been obtained from the suspect or the accused person can be particularly valuable for the Prosecutor. Statements resulting from suspect interviews, especially when they are confessional in nature, facilitate the Prosecution’s burden to establish a prima facie case against the suspect. Since the interrogation of suspects or accused persons has been regulated in detail in international criminal procedure, statements that abide by the procedural rules carry strong indicia of reliability and authenticity. In turn, the existence of sufficient procedural guarantees to prevent any form of undue pressure or oppressive questioning is necessary since the questioning of the suspect or accused person is “a key pressure point in criminal procedure.”

It is the aim of the present chapter to outline the legal requirements in the form of ‘minimum rules’ and procedural safeguards that the Prosecutor should respect when interrogating an accused person or a suspect. The use of the resulting statements as evidence at trial is not part of this discussion, but the issue will be touched upon when necessary. It goes without saying that these statements contain valuable information that the Prosecutor would often like to tender as evidence.

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1201 ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009, par. 18 (“it would be difficult to conceive of evidence that has stronger indicia of reliability and authenticity than a Suspect interview, conducted with the benefit of experienced counsel, which proceeded in accordance with the safeguards under Rules 42 and 43, and was then preserved for trial under Rule 41”).
This chapter will start by comparing the different procedural statuses of persons being questioned (witness – suspect – accused person). It will highlight the importance of a clear delineation between them. Similar to national criminal justice systems, defining the status of the person being questioned is necessary for determining the precise procedural norms that apply to them and what rights they can avail themselves. It is important to recognize that this status is not static but may change over the course of the criminal investigation. The remainder of this chapter will only deal with the interrogation of suspects and accused persons, while the subject of questioning witnesses will be dealt with in the subsequent chapter (Chapter 5).

Secondly, it will be necessary to determine what the exact scope of these procedural rules on the conduct of an interrogation is. It was previously discussed how investigative actions will often be executed by national law enforcement officials. How far, then, should the procedural rules for questioning suspects and accused persons under international criminal procedural law be respected when the questioning is conducted by national law enforcement personnel or another international actor? The interplay between the international and national level needs to be scrutinised to determine the applicable procedural rules (international versus national rules of criminal procedure).

The core of this chapter consists of discussing the procedural powers (sword dimension) and safeguards (shield dimension) relevant to questioning suspects and accused persons. It will include a comparison of the procedural frameworks of the different international(ised) criminal courts and tribunals under review with special attention to the practices of these institutions. Notwithstanding the detailed regulation of this aspect of the investigation, the practice of the different tribunals reveals several problems that may arise when conducting an interrogation. Most litigation concerns such questions as the waiver of the right to counsel and the voluntariness or lack thereof in questioning. This chapter will ultimately result in the identification of some general procedural rules regarding the conduct of the interrogation of suspects and accused persons under international criminal procedural law.

1204 See supra, Chapter 2, VII.1.
II. APPLICABLE PROCEDURAL REGIME

II.1. Status of the interviewee

II.1.1. Introduction

Different procedural rules regulate the interrogation or questioning of individuals, depending on the status of the person being questioned. More safeguards are in place when the person being questioned is a suspect or an accused person. Other circumstances may also have an influence on the procedural regime for conducting interrogations; firstly, whether or not the person being interrogated is detained or not. In this and the following chapter, a distinction will be drawn between the questioning of witnesses, suspects and accused persons. Further distinctions are possible, for example, based on the relationship of the person interrogated with the victim(s) of the crimes allegedly committed or with the suspect(s) or accused person(s). While such relationships may have an influence on the weight afforded to a given testimony, the same procedural rules apply to questioning these persons. Therefore, such a distinction is not useful for this study. In short, the following parameters will be taken into consideration in the present and following chapters as they potentially impact the rules governing the questioning of persons in international criminal procedure:

- The person who is conducting the interrogation or interview: is the questioning conducted by the Prosecutor, the Prosecutor’s staff, by national authorities or by the defence counsel or his or her staff?
- The status of the interrogated person: suspect, accused person or witness (victim)?
- Is the person detained or not (custodial v. non-custodial interrogations)?

II.1.2. Suspects v. witnesses

The first important distinction for determining the applicable procedural regime is the distinction between suspects and witnesses. Whereas detailed provisions regulate the rights of suspects during an interrogation as well as the conduct of the interrogation, not many

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1205 See infra, Chapter 4, I.3.
1206 Certain rights attach where the person is deprived of liberty, e.g. the right to be promptly informed of the reasons of the arrest. See in detail, infra, Chapter 7, V.
1207 For this distinction, see C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 131.
procedural norms detail the questioning of witnesses, irrespective of whether they are questioned by the Prosecution or by the Defence.\footnote{1208}

The situation becomes more complicated when a witness later becomes a suspect or an accused. The ICTY Trial Chamber considered this situation in \textit{Halilović}.\footnote{1209} The Prosecution sought to tender a statement by Halilović from the bar table, given some five years before the indictment against him was confirmed.\footnote{1210} At the relevant time, the Prosecution did not consider him a suspect.\footnote{1211} Nevertheless, the Prosecution anticipated that Halilović could become a suspect and, on several occasions, informed him of his right to counsel and the right to remain silent. The question raises what safeguards should be applied for the admissibility of witness statements in the event that these witnesses later become suspects or accused persons.\footnote{1212} The underlying question is whether the statements taken when a person was still considered a witness, should respect the procedural safeguards for suspects and accused persons, as laid down in the procedural framework of the ICTY? In other words, should these procedural safeguards be applied \textit{retroactively}? The Trial Chamber in \textit{Halilović} stated that:

\begin{quote}
"The fundamental difference between an accused and a witness may result in an inadmissibility of a statement of an accused taken at the time when he was still considered a witness, insofar as the statement was not taken in accordance with Rules 42, 43 and 63 of the Rules. [...] In order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of any former statement of an accused irrespective of the status of the accused at the time of taking the statement."\footnote{1213}
\end{quote}

The Trial Chamber stated that the statement was only a summary of seven days of interviews, taken over a period of four months.\footnote{1214} Because there was no recording pursuant to Rule 43

\footnotesize
\begin{itemize}
\item \footnote{1208}{See \textit{infra} Chapter 5.}
\item \footnote{1209}{ICTY, Decision on Motion for Exclusion of Statement of Accused, \textit{Prosecutor} v. \textit{Halilović}, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005; ICTY, Judgement, \textit{Prosecutor} v. \textit{Halilović}, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 19 \textit{et seq}.}
\item \footnote{1210}{This statement was the result of different interviews with \textit{Halilović} in February and May 1996.}
\item \footnote{1211}{ICTY, Judgement, \textit{Prosecutor} v. \textit{Halilović}, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 22.}
\item \footnote{1212}{\textit{Ibid.}, par. 37.}
\item \footnote{1213}{ICTY, Decision on Motion for Exclusion of Statement of Accused, \textit{Prosecutor} v. \textit{Halilović}, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 21.}
\item \footnote{1214}{\textit{Ibid.}, par. 25.}
\end{itemize}
(which deals with the recording of the interrogation of suspects), the Chamber could not verify the accuracy of the statement. The Trial Chamber further held that Halilović had not chosen to waive his right to remain silent at trial (the only way he could challenge the contents of the statement if admitted into evidence). Consequently, the Trial Chamber did not admit the statement pursuant to Rule 89 (D) of the ICTY RPE. Nevertheless, the Chamber did not seem to find that the violation of Rule 43 meant having to automatically exclude the statement of the accused.

The issue was considered again by the Appeals Chamber in its final judgement. The Appeals Chamber found that the statement was correctly excluded by the Trial Chamber, but clarified that the statement’s being inadmissible due to a retroactive reading of Rule 43 of the Rules was not decisive in the Trial Chamber’s reasoning. The Appeals Chamber excluded the statement pursuant to Rule 89 (D) of the Rules, because it did not consider the statement reliable enough and thus could have threatened the fairness of the proceedings. Consequently, the Appeals Chamber did not address the question of whether the procedural safeguards for the interrogation of suspects or accused persons should be upheld when questioning a witness who later becomes a suspect or accused.

In the opinion of this author, the ICTY missed an important opportunity to clarify this issue. Interestingly though, two of the three separate opinions to the Appeals Chamber’s decision, those of Judge Schomburg and Judge Meron, dealt with this particular question. Leaving the issue of the admissibility of prior statements aside, it is important to establish whether the procedural safeguards for questioning should be retroactively applied when a witness later becomes a suspect or an accused. A positive answer to this question would mean that the Prosecutor should always apply the procedural safeguards in Rule 42 and 43 if there is a chance that this witness may become a suspect or accused person. Judge Meron supported this

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1215 For a discussion on the right to remain silent during interrogation, see infra, Chapter 5, III.3.
1216 ICTY, Decision on Motion for Exclusion of Statement of Accused, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 27.
1217 As will be discussed, infra, Chapter 4, II.2.3.
1218 ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, par. 38.
1219 Ibid., par. 38-39.
retroactive application of the procedural safeguards. Because of the underlying purposes of these procedural safeguards, namely voluntariness and reliability, they imply a value judgement that only those interviews that respect these safeguards can be admitted as evidence. Such a view offers a better protection of the rights of the accused person but places a heavy burden on the Prosecution by requiring that any interrogation be recorded from the moment there is even a possibility that the witness may become a suspect.

Judge Schomburg, on the other hand, argued that the procedural safeguards apply as soon as the witness becomes a suspect. The Chamber should assess ex post whether or not the person qualified as a suspect or accused at the moment that their statement was taken. In other words, the Chamber should consider whether or not the objective requirements for a person to become a suspect or an accused person were fulfilled. Contrary to Meron, Schomburg’s opinion does not require the Prosecutor to make audio recordings of all statements made by witnesses that may become a suspect. Judge Schomburg’s reasoning on this point seems to be in line with the case law of the ICTR. In the Zigiranyirazo case, the Trial Chamber ex post examined whether the accused—who was treated as a witness during an interview with the Prosecution—objectively qualified as a suspect at the relevant time. In that case, the Chamber found that, “while the evidence is not conclusive, there is evidence that the Prosecution possessed information that the accused had committed crimes over which the ICTR had jurisdiction and should, given this uncertainty, have been considered a suspect at the relevant time.” It follows that the Prosecution has no obligation to retroactively apply prosecutorial safeguards from the interrogation of suspects and accused persons to the questioning of witnesses who later become suspects or accused persons.

The question remains, then, as to the what consequences and remedies there are for violating these procedural safeguards. This is the separate question of the admission of the prior statement into evidence. While the Trial Chamber in Halilović was ambiguous on this point,

1221 ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Meron, par. 5-6.
1222 ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 4-5.
1223 Ibid., par. 5 (“The difference between Judge Meron’s opinion and mine is that under his approach the Prosecution would de facto feel obliged in its own interest to make audio or video recordings of all statements by all witnesses who could potentially become suspects. This would go beyond the ambit of Rule 43 and its clear wording”).
the Appeals Chamber still assessed the reliability of the statements and did not uphold an automatic exclusion of the evidence. Later, it will be shown that the consequence of the violation of the procedural safeguards for the questioning of suspects or accused persons is the exclusion of the resulting statements.\textsuperscript{1225} Hence, that the statement in the *Halilović* case was not automatically excluded can be interpreted as a further indication, besides the aforementioned case law of the ICTR, that no obligation exists for the Prosecutor to retroactively apply the procedural safeguards.\textsuperscript{1226}

Equally important is the question of whether the definition of ‘suspect’ is objective or subjective in nature. According to the ICTY, ICTR, SCSL and STL RPE, a suspect is ‘a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Court has jurisdiction’.\textsuperscript{1227} This definition seems to be objective in nature, insofar that it is based on objective criteria.\textsuperscript{1228} Nevertheless, it has been argued that the Appeals Chamber in *Halilović* held the definition of ‘suspect’ to be subjective in nature.\textsuperscript{1229} Under a subjective approach, determining the status of a suspect falls under the discretion of the Prosecutor. If such a view were to be upheld, however, it would be necessary to ensure that the person being questioned is given sufficient protection from arbitrarily being deprived of his or her procedural rights. This could be ensured through the possibility of allowing the Trial Chamber to retroactively apply the procedural rights of Rules 42 and 43. The view that the definition of ‘suspect’ is subjective in

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\textsuperscript{1225} See infra, Chapter 4, IV.
\textsuperscript{1226} This being said, a wider application of the procedural safeguards for the questioning of suspects or accused may prove useful for the Prosecution, as respect for these safeguards will help the Prosecutor later to prove the reliability and voluntariness of the statements made.
\textsuperscript{1227} Rule 2 ICTY, ICTR, SCSL and STL RPE.
\textsuperscript{1228} Confirming, consider ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 4. Judge Schomburg makes an interesting comparison with national states and concludes that some states do rely on objective criteria to determine the point in time that a person becomes a suspect, whereas other states rely on a mixture between objective and subjective criteria, before concluding that such comparative exercise is not necessary given the statutory definition in the RPE; see also ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par. 6 (“the test is whether the witness “was objectively a suspect, even though he may be called a witness””).
\textsuperscript{1229} S. SWOBODA, Admitting Relevant and Reliable Evidence: The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 380 (the author argues that the majority of judges of the Appeals Chamber in *Halilović* refused to accept that the status of a suspect depends on objective criteria and held that the decision to grant the interviewee the status of a suspect falls under the discretion of the Prosecutor. However, it is the opinion of this author that no acceptance of a subjective approach can be read in the Appeals Chamber judgement as this was not a decisive consideration. The difference between the objective and subjective approach was only addressed by Judge Schomburg and Judge Shahabuddeen, respectively in their Separate Opinion and Declaration, see fn. 1228).
nature, however, is incorrect. Firstly, the ICTY Appeals Chamber in *Halilović* did not address whether the definition of ‘suspect’ was objective or subjective in nature and it did not reject the former.\(^{1230}\) Secondly, a literal interpretation of the definition of ‘suspects’ in the ICTY RPE shows it to be objective in nature, particularly insofar that it treats the subjective belief of the Prosecutor as irrelevant.\(^{1231}\) It will be argued later on in this chapter how the procedural rights that apply to the interrogation of suspects embody basic and minimum rights of persons during the investigation that should always be respected when a suspect is being interrogated. Hence, the applicability of these procedural safeguards should not depend upon a possible later determination by a Chamber on the admissibility of the results of such interrogation. A further note of caution is warranted here. While it is argued that an objective approach should be upheld, such an approach does not entirely remove prosecutorial discretion. On the contrary, the Prosecutor exercises considerable discretion given the broad nature of the definition of suspects.\(^{1232}\) There are only a few cases (e.g. where the Prosecutor seeks to admit the prior statement of an accused at trial, as was the case in *Halilović*), when a Prosecutor’s decision to designate an individual as a suspect is subjected to judicial review.\(^{1233}\) The example of *Sesay*, cited below, exemplifies the inherent risks of abusing discretion in the deliberate withholding of rights from persons being questioned.\(^{1234}\) Therefore, it is important for the Prosecutor to treat a witness as a suspect from the moment any fact arises from which it follows that there are grounds to believe that the witness has committed a crime within the jurisdiction of the Court.\(^{1235}\) Because of the risk of the abuse of discretion, the holding by the

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\(^{1230}\) It is the opinion of this author that no acceptance of a subjective approach can be read in the Appeals Chamber decision as this was not a decisive consideration. It is recalled that the difference between the objective and subjective approach was only addressed by Judge Schomburg and Judge Shahabuddin, respectively in their Separate Opinion and Declaration, see fn. 1228).


\(^{1232}\) S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, pp. 50-51; S. ZAPPALÀ, Rights of Persons During an Investigation, in A. CASSESE, P. GAETA and J. R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court, Oxford, Oxford University Press, 2002, p. 1191 (the author rightly argues that the determination of what is ‘reliable information’ which tends to show that the suspect may have committed a crime within the jurisdiction of the Tribunal does not offer any guidance as to what should exactly be considered ‘reliable information’. Consequently, such determination is subject to the discretion of the Prosecutor).


\(^{1234}\) See *infra*, Chapter 4, IV.2.

\(^{1235}\) See in that regard Regulation 28 of the ICC Draft Regulations of the Office of the Prosecution: “Witness as potential suspect - If during the interview facts are made known on the basis of which there are grounds to believe that the witness has committed a crime within the jurisdiction of the Court, he or she shall be immediately treated as a suspect for the purpose of these Regulations, in particular be informed of his or her rights under article 55 (2) of the Statute.” In a similar vein, see: ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 26.
STL Pre-Trial Judge that only the Prosecutor is in a position to determine whether a person can be considered a suspect is to be criticised. Such reasoning blocks any judicial review of the determination by the Prosecutor.

The ICC Statute avoids the term ‘suspect’, instead referring to a ‘person against whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court’. Disagreements on the definition of suspects as well as the wish “to avoid any kind of premature evaluation as to the guilt of the person under investigation” led to the deletion of this term. This definition is equally objective in nature. The Prosecutor has no discretion in deciding whether or not the person should be considered a suspect. It follows from Regulation 41 (2) of the Regulations of the OTP that if any information conveyed during a witness interview raises grounds to believe that the witness has committed a crime within the jurisdiction of the Court, the interviewee will immediately be informed of his or her rights under Article 55 (2) ICC Statute. The stated practice of the Prosecution is that interviews are preceded by a ‘screening interview’, one of the purposes of which is to determine whether the person interviewed qualifies as a suspect. Similar to the ad hoc tribunals, the designation of a person as a suspect is an internal process.

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1236 STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 36. Confusingly, the Pre-Trial Judge consequently determined that “the persons detained cannot, at this stage in the investigation, be considered as either suspects or accused persons in the proceedings pending before the Tribunal”).

1237 G. METTRAUX, The Internationalization of Domestic Jurisdictions by International Tribunals: The Special Tribunal for Lebanon Renders its First Decisions, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 922 (“If the Prosecutor were the sole arbiter of who can or should be regarded as a suspect for the purpose of these rules, the risk exists that individuals might be denied such status simply to avoid or circumvent the specific safeguards provided for in the Rules”).


1239 Article 55 (2) ICC Statute; in line with other authors, the term ‘suspect’ and a ‘person against whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court’ are used interchangeably, see e.g. C.K. HALL, Article 55, in O. TRIFTERER, Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1097; H. FRIMAN, The Rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and S.R. LÜDER (eds.), International and National Prosecution of Crimes under International Law: Current Developments, Berlin, Berlin Verlag Arno Spitz GmbH, 2001, p. 197.

1240 ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11 (the Prosecution investigator in charge of the investigations in the events that occurred in Bogoro testified with regard to screening interviews (or screening meetings) that “[w]e also try
In a similar vein, the TRCP objectively defined a suspect as “any person against whom there exists a reasonable suspicion of having committed a crime.”\(^{1241}\) The only exceptions are the ECCC Internal Rules, which define a suspect as “a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged.”\(^{1242}\) In this definition, objective criteria have been mixed with subjective criteria, by including the personal convictions of the Co-Prosecutors or Co-Investigating Judges. In a similar vein, the term ‘charged person’, which will be explained further on, is subjective in nature.\(^{1243}\) It is clear that the risk of postponing or deliberately withholding certain rights is inherent in such subjective definitions.

II.1.3. Suspects v. accused persons

Another important distinction to account for in determining the procedural regime for questioning is the difference between accused persons and mere suspects. A different procedural regime applies to all international(ised) criminal tribunals and courts under review. The ICTY, ICTR, SCSL and STL RPE define an accused as ‘a person against whom one or more counts in an indictment have been confirmed.’\(^{1244}\) This distinction is relevant as only the accused person will enjoy the whole gamut of rights under Articles 21 ICTY Statute, 20 ICTR Statute, 17 SCSL Statute and 16 STL Statute. While the Statute and the RPE of the ICC do not define the term ‘accused’, these documents refer to a person as the ‘accused’ once charges have been confirmed.\(^{1245}\) The accused is entitled to the rights enumerated in Article 67 ICC Statute. However, since, as previously discussed, the Prosecution’s investigation “should largely be completed at the stage of the confirmation of charges hearing,”\(^{1246}\) the interrogation of accused persons by the ICC Prosecutor will be exceptional. In a similar vein, considering the ECCC, the interrogation of the accused will be less relevant to this study on the and gauge whether the individual might have committed a crime under the Statute.” “This is because it also affects the preparation and the logistics required for a full interview”; ibid., p. 12 (“If the assessment is that the person should be treated under Article 55 (2), these rights are given to the person in the very beginning. In this case the interview is also audio or video recorded, unless the person objects to the audio or video in which case we do a written statement”). See additionally: ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 149.

\(^{1241}\) Section 1 (w) TRCP.

\(^{1242}\) See Glossary annexed to the ECCC Internal Rules.

\(^{1243}\) See infra, Chapter 4, IV.6.3.

\(^{1244}\) Rule 2 and Rule 47 (H) (ii) ICTY, ICTR and SCSL RPE; Rule 2 and Rule 68 (f) (ii) STL RPE.

\(^{1245}\) See e.g. Article 61 (6) and 63 ICC Statute.

\(^{1246}\) ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, *Prosecutor v. Mharashimana, Situation in the DRC*, Case No. 01/04-01/10-514 (OA 4), A. Ch., 30 May 2012, par. 44. See supra, Chapter 3, I.3.
investigation phase, provided that a person only formally qualifies as an accused person after
the Co-Investigating Judges or the Pre-Trial Chamber (in case of disagreement) indict(s) the
person by sending him or her to trial. However, in relation to the ECCC, it will be
important to distinguish between the interrogation of suspects and of charged persons, where,
as will be discussed, different procedural norms apply.

Confusion may be created on purpose as to the exact status of a person. In Chapter 1,
reference was made to the Sesay case, where the interrogators referred to the accused as a
suspect. In this case, the SCSL Trial Chamber suggested that the investigators did so on
purpose, in order to confuse the accused and to ensure cooperation. According to the case
law that is publicly available, such behaviour by prosecution investigators is exceptional.
Nevertheless, such incidents underline the significance of a clear understanding and respect
for the different statuses of suspects and accused persons and the applicable procedural
regimes.

II.1.4. The autonomous interpretation of ‘charged’ under international human rights law

At the outset, it also needs to be reiterated how, under international human rights law, the
enjoyment of the right to a fair trial in criminal proceedings depends upon the existence of a
criminal ‘charge’. It was previously discussed that this term is to be given an autonomous
interpretation. In the words of the Court: “The prominent place held in a democratic
society by the right to a fair trial favours a "substantive", rather than a "formal", conception of

1247 Rule 67 ECCC IR, glossary annexed to the Internal Rules. The Internal Rules define an accused as “any
person who has been indicted by the Co-Investigating Judges or the Pre-Trial Chamber”. The procedure for the
questioning of the accused person by the Trial Chamber is outlined in Rule 90 ECCC IR.
1248 According to the glossary annexed to the Internal Rules, a ‘charged person’ refers to “any person who
is subject to prosecution in a particular case, during the period between the Introductory Submission and
Indictment or dismissal of the case.”
1249 SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to
the Prosecution, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 47: “[w]e take
cognisance of the fact that the investigators also repeatedly referred to the Accused throughout the interview as a
suspect, rather than as an accused, although he had been charged and they were very much aware of it. This
lends support to the inference that the Accused may have been further confused about his role during the first
interview because up to that point, he had not yet been served with the Indictment.” See also accompanying
footnote 63 citing the transcript of the interview with Sesay on 10 March 2003: “Q. "You are hereby advised that
you are a suspected of [sic] being a participant being involved in International War Crimes and/or Crimes
Against Humanity..." “So being a suspect, which is the reason why there was an arrest warrant issued for you,
and that is why you are considered as a suspect, okay”. From the transcript of the interview on 14 March 2003:
A. “Yeah, but according to you, I’m a suspect of – you know.” Q. “Yes, you’re a suspect and that’s why you’re
being advised of your rights...”
1250 See in more detail, supra, Chapter 2, III.4.
the "charge" referred to by Article 6 (art. 6); it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6."

Hence, notwithstanding the requirement of a ‘charge’ for the enjoyment of the right to a fair trial in criminal matters under Article 14 ICCPR or Article 6 ECHR, the right to a fair trial may already apply before the official indictment. The ECtHR explained that ‘whilst ‘charge’, for the purposes of Article 6 (1), may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.’

Arguably, this is the case from the moment a person is considered to be a ‘suspect’ by the Prosecutor. In any case, according to the case law of the Court, a person will be ‘charged’ if he or she makes self-incriminating statements during questioning, leading the investigators to suspect the person’s involvement in a crime.

From this, it follows that the Co-Investigating Judges of the ECCC’s interpretation of Article 14 ICCPR and Article 6 ECHR is faulty. The Co-Investigating Judges interpret the term

1251 ECHR, Adolf v. Austria, Application No. 8269/78, Series A, No. 49, Judgment of 26 March 1982, par. 30; see also ECHR, Deweer v. Belgium, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 42, 44; the receiving of a ‘notice of intended prosecution’ in the UK was considered sufficient by the Court, see ECHR, O’Halloran and Francis v. The United Kingdom, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 35.


1253 TRECHSEL argues that from the moment a person is confronted with questions or with a request for documents which could result in self-incrimination, that person is de facto ‘charged’, within the meaning of Article 6. In support, he refers to the Serves case, in which the ECtHR applied the right to a witness, after it found that he could be considered to be subject to a ‘charge’, in the meaning of Article 6 (1) (ECHR, Serves v. France, Application No. 20223/92, Reports 1997-VI, Judgment of 20 October 1997, par. 42). See S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 349.

1254 ECHR, Shubelnik v Ukraine, Application No. 16404/03, Judgment of 19 February 2009, par. 57 (finding that Article 6 ECHR already applied prior to the moment the person was formally charged and from the moment he confessed the murder. “[F]rom the first interview of the applicant it became clear that he was not simply testifying about witnessing a crime but was actually confessing to committing one. From the moment the applicant first made his confession, it could not be said that the investigator did not suspect the applicant’s involvement in the murder.”).
‘charge’ under these provisions in a formal sense so as to only apply from the moment the suspect is officially charged, thereby ignoring the autonomous interpretation given to the term.\(^{1255}\) On one other occasion, however, they refer to the ‘substantially affected’ criterion under the ECtHR’s case law, but seem to wrongly interpret this criterion as presupposing the official notification of the charges.\(^{1256}\)

II.2. Status of the interviewer

II.2.1. Introduction

While the status of the interviewee may vary, the status of the interviewer may differ as well. Firstly, the interrogation can solely be conducted by national law enforcement officials. These national enforcement officials may act upon a request by the tribunal or not. Secondly, questioning can be conducted by the Prosecution staff, with national enforcement officials (or other non-tribunal investigators) being present. Thirdly, questioning can be conducted by the Prosecutor or Prosecution investigators, without other enforcement officials being present. What route will be followed depends upon different factors, including the location of the interviewee and the implementing legislation of the state where the questioning is taking place.

II.2.2. Uniformity of procedure?

As far as the international criminal courts and tribunals are concerned, neither the Statute nor the RPEs of the ad hoc tribunals and the SCSL provide any guidance as to whether or not the procedural safeguards for the interrogation of suspects and accused persons only apply to the interrogation of persons by the Prosecution or whether these procedural safeguards should

\(^{1255}\) ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCJJ, 17 May 2013, par. 52-54.

\(^{1256}\) See ECCC, Decision on Request for Access to Case Files 003 and 004, Case File no. 004/29-07-2011-ECCC-OCIJ, 5 April 2011, par. 3, as referred to in ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCJJ, 17 May 2013, par. 50, fn. 43 (“the Unnamed Suspects at this stage where they have not been officially informed of the criminal proceedings, have not been substantially affected by the investigations”).
also be upheld in cases where questioning is conducted by national law enforcement officials. No specific provisions regulate questioning conducted by state authorities.1257

Conversely, the ICC Statute clearly stipulates (in Article 55 (2) ICC Statute) that the rights of suspects equally apply when such an interrogation is conducted by the national authorities at the request of the Prosecutor.1258 This provision guarantees procedural uniformity. Arguably, the provision should be interpreted in a broad manner so as to also include interviewers that belong to, for instance, international governmental organisations or peacekeeping operations.1259 Consequently, questioning by any authority should be in accordance with the procedural safeguards that are laid down in the Statute. While the questioning by national law enforcement officials will be conducted according to the provisions of national laws, these minimum procedural safeguards should always be respected.1260

Nevertheless, it follows from the wording of Article 55 (1) ICC Statute that Article 55 concerns safeguards “[i]n respect of an investigation under this Statute.” Hence, Pre-Trial Chamber I held in the Gbagbo case that the procedural safeguards only apply to investigative acts that are “taken either by the Prosecutor or by national authorities at his or her behest.”1261 Thus, procedural safeguards on the questioning of suspects that are laid down in the ICC Statute (e.g. the right to the assistance of counsel) do not apply when the suspect is

1258 Article 55 (2) ICC Statute (‘Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned’ (emphasis added)); Rule 111 (2) ICC RPE (‘When the Prosecutor or national authorities question a person, due regard shall be given to article 55’ (emphasis added)).
1260 According to W.A SCHABAS, “the Statute almost seems to be saying that it cannot trust domestic justice systems to provide adequate respect for the rights of the individual.” See W.A. SCHABAS, An Introduction to the International Criminal Court, Cambridge, Cambridge University Press, 2007, p. 252.
1261 ICC, Decision on the ‘Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129), Prosecutor v. Gbagbo, Situation in Côte d’Ivoire, Case No. ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 96 (“Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under Article 55 of the Statute”). Emphasis added.
interrogated in the context of national proceedings unrelated to the proceedings before the Court.\textsuperscript{1262}

However, as pointed out by Trial Chamber II in the Katanga and Ngudjolo Chui case, even when evidence has been gathered in national proceedings unrelated to the proceedings before the Court in non-compliance with the procedural safeguards under the ICC Statute (Article 55 ICC Statute), the resulting evidence may not be admissible in case it has been gathered in a manner that is in violation of internationally recognised human rights.\textsuperscript{1263} In this manner, the Court further ensures the uniformity of procedural safeguards.

In the Delalić case, the ICTY Trial Chamber removed any doubt as to the applicability of international criminal procedure during questioning by national law enforcement officials.

The Trial Chamber rejected the Prosecution’s assertion that a distinction should be drawn between acts performed by tribunal investigators and acts by non-tribunal investigators.\textsuperscript{1264} The Chamber confirmed that the rules on questioning suspects that are laid down in the Statute and RPE equally apply in both scenarios. This is important “as it protects the

\textsuperscript{1262} Where the accused is questioned during by the initial phases of the investigation by the national authorities, but not at the request of the ICC, the safeguards for the interrogations of suspects and accused persons do not apply. Consider e.g. ICC, Decision on the Confirmation of Charges, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-PTC I, 30 September 2008, par. 79 – 99 (where Katanga was interrogated by the Congolese authorities in the absence of counsel, and the Defence consequently objected to the admissibility of the resulting \textit{procès-verbal} for the purposes of the confirmation hearing, the Pre-Trial Chamber considered this absence of counsel during the interrogation in light of the requirements of international human rights law, rather than to find a violation of Article 55 (2) (c) ICC Statute (right for suspects to the assistance of counsel during interrogation)); when the issue of the admissibility of the \textit{procès-verbal} was raised again at trial, the Trial Chamber held that “evidence collected in non-compliance with the requirements of article 55(2) of the Statute, by a state not acting at the request of the Court, cannot be said to have been obtained "by means of a violation" of the Statute, as is required by article 69(7). As the Defence has rightly remarked, ‘the drafters of the Rome Statute agreed to adopt a provision explicitly requiring that suspects be questioned in the presence of counsel even though, domestically, this right is not always guaranteed.’ It cannot be concluded from this that the States Parties have agreed to comply with the procedural standards of the Statute in their domestic criminal proceedings. Article 55(2) does not impose procedural obligations on states acting independently of the Court” (first emphasis in original, second emphasis added). See ICC, Decision on the Prosecutor’s Bar Table Motions, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2635, T. Ch., II, 17 December 2010, par. 59.

\textsuperscript{1263} Ibid., par. 60-65.

\textsuperscript{1264} ICTY, Decision on Zrdavko Mucić Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 2 September 1997, par. 43-44 and 48, see also ICTY, Judgement, Prosecutor v. Delalić, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 530. A different view is apparently held by the ICTR Registrar, consider ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, Prosecutor v. Zigiranyirazo, T. Ch. III, 18 June 2012, par. 24 ("the Registrar notes that Rules 42 and 55[sic] apply when a suspect or accused is questioned by the Prosecutor of the ICTR, and that Mr. Zigiranyirazo does not allege that he was questioned by the Prosecutor of the ICTR while he was detained in Belgium” (emphasis added)).
uniformity of the criminal procedure, already at an early stage of proceedings.1265 This holding clarifies that the procedural guarantees during interrogations, as laid down in Rule 42 and 63 of the ICTY, ICTR and SCSL RPE are essential or minimum guarantees which should be respected in all cases.1266 Legal assistance by states or other international organisations should thus be provided in accordance with the procedural safeguards for the interrogation of suspects and accused, otherwise risking the exclusion of the evidence.

However, later case law has limited the applicability of the rules of international criminal procedure to interrogations by non-tribunal investigators. In Mrkić, the Trial Chamber differentiated between interrogations conducted by (1) the Prosecutor, prosecution staff and persons acting on the Prosecutor’s directions1267 and (2) interrogations conducted by persons or authorities who have no relevant connection with the ICTY Prosecutor.1268 Understanding the scope of this decision requires a brief explanation of its background. The Court had to consider whether statements made during questioning by all different accused persons to investigators of the military security organ in Belgrade and to a military investigating judge should uphold the procedural safeguards as laid down in the Statute and the RPE of the ICTY.

The accused were questioned as suspects and during the proceedings before the Investigative Judge, two officers of the OTP were present, without participating.1269 The Trial Chamber found that the investigators and the Investigative Judge were not acting under the ICTY Prosecutor’s direction.1270 The Chamber stated that “it is not shown that the Serbian military questioning was other than for Serbian military purposes.” “In particular, it is not shown to

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1266 For a discussion of these procedural rights, see infra, Chapter 4, III. It is to be noted that the ICTR Prosecutor has occasionally argued that Rule 42 of the ICTR RPE, which elaborates the procedural rights of suspects during interrogation, does not apply when a suspect is provisionally arrested pursuant to Rule 40, before that person is transferred to Arusha. The Prosecutor found support for this reasoning in Rule 40 (C) of the ICTR RPE. This reasoning has not been endorsed by the Tribunal, see e.g. ICTR, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, Prosecutor v. Kajelijeli, Case No. ICTR-98-44-I, T. Ch. II, 8 May 2000, par. 24.
1267 Cf. Rule 37 (B) ICTR, ICTY and SCSL RPE.
1268 ICTY, Decision Concerning the Use of Statements given by the Accused, Prosecutor v. Mrkić et al., Case No. IT-05-13/1-T, T. Ch. II, 9 October 2006, par. 21; see also the reference in ICTY, Judgement, Prosecutor v. Halliövi, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, fn. 1.
1269 ICTY, Decision Concerning the Use of Statements given by the Accused, Prosecutor v. Mrkić et al., Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006, par. 15-16.
1270 Ibid., par. 15.
have been, in any way, at the direction of, or request of, or even to assist, the ICTY Prosecutor.” The Chamber further argued that:

“there is no express provision of the Statute or the Rules which regulates the questioning or taking of statements from persons who are then accused in an indictment filed in the Tribunal, or are suspects, by persons or authorities who have no relevant connection to the ICTY Prosecutor.” Nor is there, subject to provisions […] any provision regulating the use, or the admission into evidence, in a trial in this Tribunal, of statements obtained in such circumstances.”

The Trial Chamber observed that the rights of the accused persons during interrogation (as laid down in Rules 63, 42 and 43 ICTY RPE) were not upheld at the time that the statements were made, but also that there were no indications as to any infringement of Serbian laws.

It follows from the Prosecutor’s reasoning that the context in which the statements were taken was different from the context in which the statements were taken from Mucić in the Delalić (Čelebići) case. There, the accused was interrogated by the Austrian authorities “in respect of proceedings which had been instituted at the instigation of the ICTY Prosecutor to secure the transfer of an accused to the Tribunal.” Therefore, there was a relevant connection with the ICTY Prosecutor. Moreover, the situation was also different from other case law where questioning was conducted by OTP investigators. Importantly, the Trial Chamber subsequently allowed the use of the resulting statements at trial. The Prosecution requested the use of these statements for the specific and limited purpose of cross-examining the defence witnesses and accused persons who gave evidence in their own defence. The Chamber clearly stated that it would not have allowed the admission of these statements as substantial evidence.

1271 Ibid., par. 15.
1272 Ibid., par. 21; consider also par. 17.
1273 Ibid., par. 22, 27. Among others, the accused persons, while questioned, were obliged to answer the questions of the investigators of the military security organ (while before the military judge they had and were informed of the possibility to refuse to answer incriminating questions). Besides, the accused persons did at no time during the questioning have the assistance of counsel and there is no proof of a voluntary and express waiver.
1274 Ibid., par. 27.
1275 Ibid., par. 27. Consider e.g. ICTR, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, Prosecutor v. Ndayambaje et al., T. Ch. II, 15 May 2006, par. 67.
1276 ICTY, Decision Concerning the Use of Statements given by the Accused, Prosecutor v. Mrklić et al., Case No. IT-95-13/1-T, T. Ch. II, 9 October 2006, par. 29.
One can conclude that this decision draws a distinction between questioning by the Prosecutor, prosecution staff or persons/authorities mandated by the Prosecution and authorities without any relevant connection to the Prosecutor. In the latter case, there are no rules as to the conduct of questioning suspects or accused persons under international criminal procedural law that should be respected. Only national law should be respected. Nevertheless, the consequence of not upholding the procedural safeguards for questioning suspects or accused persons under international criminal procedure may be the non-admission of the evidence at trial. Exceptionally, however, statements from the questioning can be used during cross-examination.

In the end, both decisions favour respecting the procedural safeguards under international criminal procedural law during interrogations by states or other international organisations regardless of whether such interrogation followed a request by the tribunal. Otherwise, the result may be the non-admission of the statements at trial.

II.2.3. Minimum guarantees v. modalities for the conduct of questioning

If the procedural safeguards for the interrogation of suspects and accused persons should be respected, irrespective of whether the interrogation is conducted by tribunal investigators or by the national authorities, the follow-up question is whether the modalities for the conduct of such interrogation should be exactly the same as the modalities provided for in international criminal procedure as laid down in Rule 43 of the ICTY, ICTR and SCSL RPE or as outlined in Rule 112 of the ICC RPE.1277

As far as the ad hoc tribunals are concerned, Judge Schomburg held that the rationale of Rule 43—which contains the recording procedure—is to translate the procedural guarantees for suspects and accused persons during questioning “into reality using contemporary technical standards and at the same time to assure the precision and reliability of a suspect’s statement in the language he used when answering questions put to him by an interrogator.”1278 Two Judges of the ICTY Appeals Chamber argued in Halilović that Rule 43 reflects a substantive judgment that unrecorded statements are, by definition, insufficiently reliable and that such

1277 For a discussion of the recording requirements, infra, Chapter 4, IV.6.
unrecorded statements should always be excluded. However, such was not the majority view. The majority held that, in the absence of a recording of the interview in accordance with Rule 43, the Prosecutor is still able to prove its reliability. This will be assessed by the Chamber in accordance with Rule 89 (C) and (D) of the RPE. This argumentation is persuasive. Rule 43 provides a mechanism to ensure the reliability of an accused or a suspect’s statement, but such reliability can also be proven by other means. In this regard, Judge Shahabuddeen referred to Rule 92 of the RPE on confessions. According to this Rule, a confession will “be presumed to have been free and voluntary”, if the requirements of Rule 63 (which provides for audio or video recording in accordance with Rule 43) are strictly complied with, unless the contrary is proven. Consequently, even if the recording procedure of Rule 43 is not respected, the confession can be admitted as evidence.

Rule 43 provides no indication that non-tribunal investigators should conduct interrogations according to it. However, it seems advisable to ensure that this recording procedure is respected, insofar that it helps to prove the reliability and voluntariness of the statement. Hence, it is advisable to include a reference to this recording procedure within any request for legal assistance. Regarding the ad hoc tribunals, given the broad cooperation obligations, national states would be required to honour such a request.

The procedural framework of the ICC seems clearer in this regard. Although it follows from Article 55 (2) ICC Statute that the rights of suspects also apply in interrogations conducted by national authorities, Rule 112 of the ICC RPE, which pertains to the recording procedure for interrogations of suspects and accused persons, only refers to the Prosecutor. Consequently, one can infer that the modalities of Rule 112 of the ICC RPE should not be upheld in case the

1281 S. SWOBOĐA, Admitting Relevant and Reliable Evidence: The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89 (C) ICTY RPE, in T. KRUESMANN (ed.), ICTY: Towards a Fair Trial?, Antwerp, Intersentia, 2009, p. 380; ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par. 7-10 (Judge Shahabuddeen argues that if the sanction of the violation of Rule 43 were the automatic exclusion of the statement, it would have been explicitly stated in the provision).
1282 Rule 92 ICTY, ICTR and SCSL RPE; ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Declaration of Judge Shahabuddeen, par 8.

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questioning is conducted by non-tribunal investigators. However, where the modalities provided for under Rule 112 may be beneficial in establishing the reliability and voluntariness of the interrogation, the ICC Prosecutor may be well advised to request the national authorities to conduct a suspect interview in accordance with these modalities. It follows from Article 99 (1) of the ICC Statute that states should execute a request for assistance in accordance with the relevant procedure under their national law in the manner specified in the request, unless prohibited by such law.\footnote{This article should be read together with Article 88 of the ICC which obliges states to ensure that procedures are available under their national law for all forms of cooperation specified. On this issue, see G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, p. 207 and following. See also infra, fn. 1591.}

III. PROSECUTORIAL POWER TO INTERROGATE SUSpects AND ACCused PERSONS

III.1. The ad hoc tribunals and the SCSL

The Statutes of the different ad hoc tribunals and the SCSL allow the Prosecutor to question suspects, victims and witnesses during the investigation.\footnote{Article 18 (2) ICTY Statute; Article 17 (2) ICTR Statute and Article 15 (2) SCSL Statute.} The Prosecutor is equally authorised to question accused persons.\footnote{Rule 63 ICTY, ICTR and SCSL RPE.}

The RPE of the ad hoc tribunals and the SCSL provide a detailed regulation of the conduct of the interrogation of suspects and accused persons.\footnote{See in particular Rules 42, 43 and 63 of the ICTY, ICTR and SCSL RPE.} Several rights of the suspect during interrogation are outlined in their respective RPEs and Statutes: (i) the right to be assisted by counsel, (ii) the right to the free assistance of an interpreter and (iii) the right to remain silent and to be cautioned. The suspect should be informed about these rights prior to questioning, in a language spoken and understood by the suspect.\footnote{Rule 42 ICTY RPE, ICTR RPE and SCSL RPE; Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute.} It will be illustrated in the next subsection how these procedural safeguards reflect international human rights norms. Hence, these rights reflect minimum rights that should be respected in all instances. The violation of one of these fundamental rights should lead to the exclusion of such evidence at trial. In
addition to these rights, accused persons enjoy all rights laid down in article 21 of the ICTY Statute, Article 20 ICTR Statute and Article 17 of the SCSL Statute.

Most litigation before the ad hoc tribunals concerns the waiver of the right to counsel as well as the voluntariness of the statement given (absence of coercive circumstances). While the procedural safeguards seem to be respected in most interrogations, case law provides us with examples of transgressions, where the questioning results in inducements or threats. Prosecution staff should strictly respect the rights of suspects and accused persons and also be well trained in order to distinguish acceptable and unacceptable interrogation methods.

III.2. The International Criminal Court

The ICC Prosecutor’s power to question persons being investigated, victims and witnesses, derives from Article 54 (3) (b) of the ICC Statute. A detailed regulation on the recording of suspect interviews is laid down in Rule 112 of the ICC RPE. Pursuant to Article 93 (1) (c) of the ICC Statute, States Parties are under an obligation to comply with requests from the ICC to provide assistance to the questioning of persons investigated or prosecuted. In such a case, Article 99 (1) ICC Statute leaves broad discretion for the Prosecution to participate in the questioning of the suspect or accused person by the requested state. Moreover, in case this is necessary for the successful execution of the request and where the suspect participates in the interview on a voluntary basis, the Prosecutor may him or herself interview a suspect on the territory of a state party without further state assistance.1288

III.3. Internationalised criminal courts and tribunals

Article 23 new, paragraph 8 of the ECCC Law authorises the Co-Investigating Judges to question suspects. According to the Internal Rules, the Co-Investigating Judges may summon and question suspects and charged persons.1289 The judicial police and investigators cannot question charged persons.1290 In turn, the Co-Prosecutors have the power to question any person that may provide relevant information for the case under investigation during their

1288 Consider Article 99 (4) ICC Statute.
1289 Rule 55 (5) (a) ECCC IR.
1290 Rule 62 (3) (b) ECCC IR.
preliminary investigation. 1291 At the SPSC, the power of the Public Prosecutor to question suspects and accused persons was outlined in general terms in Section 7.4 (b) of the TRCP. Finally, the power of the STL Prosecutor to question suspects is outlined in Article 11 (5) of the STL Statute as well as Rule 61(i) of the STL RPE. The powers to question suspects and accused persons are regulated in detail in the RPE. 1292

IV. PROCEDURAL SAFEGUARDS AND MODALITIES

IV.1. Right to the assistance by counsel during interrogation

IV.1.1. The ad hoc tribunals and the SCSL

According to Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute as well as Rules 42 (A) (i) and 42 (B) of the ICTY, ICTR and SCSL RPE, every suspect has a right to the assistance of counsel in the course of an interrogation. This right can be waived by the suspect, on the condition that such a waiver is given voluntarily. In addition, it can be revoked by the suspect at any time. A similar right to assistance by counsel during questioning is guaranteed for accused persons. 1293 ICTR Trial Chamber I underlined the importance of the right to counsel by stressing that it “is rooted in the concern that an individual, when detained by officials for interrogation is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.” 1294 Such a guarantee ensures the proper conduct of the questioning and ensures that the person is aware of his rights. 1295 Arguably, it even surpasses the requirements under international human rights law.

1291 Rule 50 (4) ECCC IR.
1292 Rules 65, 66 and 85 STL RPE.
1293 Rule 63 (A) ICTY, ICTR and SCSL RPE.
1294 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 16 (The Trial Chamber added that the right to legal assistance is also importance as it ensures the respect of other rights of the suspect or accused person (ibid., par. 23)).
International human rights law recognizes the defendant’s right to have the assistance of a counsel during interrogation. The case law of the European Court of Human Rights (‘ECtHR’) has long been vague, emphasising the need to look at the criminal proceedings as a whole in order to determine whether Article 6 (3) (c) has been violated. The Court stated that while the right to benefit from the assistance of a lawyer in the early stages of an investigation can be derived from Article 6, such a right can be restricted for good cause. This implied that it was ‘virtually impossible’ to derive a full-fledged right to the assistance of a defence counsel in the course of the investigation, from the case law of the ECtHR. Moreover, the Court relied on a retrospective determination to establish whether the restriction of counsel, in light of the entirety of the proceedings, had deprived the accused of a fair hearing. The Court underscored that it depended on the special features and the circumstances of the case whether the presence of a counsel during interrogations was necessary.

The ECtHR altered its case law in its judgement in the Salduz case. The court reiterated that “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.” Next, and after referring to the particularly vulnerable position of the suspect during interrogations (especially in light of the growing complexity of the legislation on criminal procedure), the Court found that “in order for the right to fair trial to remain sufficiently ‘practical and effective’, article 6 (1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of

1296 ECtHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996, par. 63.
1297 S.J. SUMMERS, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, p. 181. However, in Delalić, the ICTY seems to read such right to counsel during interrogations in the case law of the ECtHR: see ICTY, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch, 2 September 1997, par. 50 et seq.
1298 ECtHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996. Summers identifies two reasons why such test is inadequate: (1) every determination requires a hypothetical assessment of the effect on future fairness or through retrospective examination of the influence of the pre-trial factors on the fairness of the trial, consequently such test is of little use for criminal justice authorities seeking guidance; and (2) it disregards the importance of the fairness of the investigation for the fairness of the trial: S.J. SUMMERS, Fair trials: the European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, p. 182.
1300 ECtHR, Salduz v. Turkey, Application No. 36391/02, Judgment (Grand Chamber) of 27 November 2008; see also ECtHR, Panovits v. Cyprus, Application No. 4268/04, Judgment of 11 December 2008.
1301 ECtHR, Salduz v. Turkey, Application No. 36391/02, Judgment (Grand Chamber) of 27 November 2008, par. 52 (emphasis added).
each case that there are compelling reasons to restrict this right.”\textsuperscript{1302} Such restriction must not unduly prejudice the rights of the accused under Article 6. The Court concluded that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction.”\textsuperscript{1303} Exceptions to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time.\textsuperscript{1304} The fact that denial of access to a lawyer is provided for on a systematic basis by the relevant legal provisions does not satisfy this test.\textsuperscript{1305}

While the \textit{Salduz} judgement left some doubt as to whether access to a lawyer also encompasses assistance by a lawyer during the interrogation, the subsequent case law removed that doubt.\textsuperscript{1306} It follows that the ICC Trial Chamber II’s holding that the ECtHR only requires \textit{access} to a lawyer and does not necessarily require that a lawyer be physically present during every interrogation should be held at fault.\textsuperscript{1307} Besides, the ECtHR clarified that persons ‘charged’ not only have the right to be assisted by a lawyer from the moment that they are in police custody or pre-trial detention, but also in case they are questioned by the police or the investigating judge outside of detention.\textsuperscript{1308} In \textit{Zaichenko v. Russia}, the Court held that the right of access to counsel first arises when there is a “significant curtailment of the applicant’s freedom of action.”\textsuperscript{1309} The right to the assistance of counsel involves the whole range of services specifically associated with it. This implies that counsel should be able “to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and a check of the conditions of detention.”\textsuperscript{1310}

\textsuperscript{1302} Ibid., par. 55.  
\textsuperscript{1303} Ibid., par. 55. (emphasis added).  
\textsuperscript{1304} Ibid., par. 54.  
\textsuperscript{1305} Ibid., par. 55.  
\textsuperscript{1306} ECtHR, \textit{Panovits v. Cyprus}, Application No. 4268/04, Judgment of 11 December 2008, par. 66; ECtHR, \textit{Brusco v. France}, Application No. 1466/07, Judgment of 14 October 2010, par. 54 (“L’avocat n’a donc été en mesure ni de l’informer sur son droit à garder le silence et de ne pas s’auto-incriminer avant son premier interrogatoire ni de l’assister lors de cette déposition et lors de celles qui suivirent, comme l’exige l’article 6 de la Convention”).  
\textsuperscript{1307} ICC, Decision on the Prosecutor’s Bar Table Motions, \textit{Prosecutor v. Katanga and Ngudjolo Chui}, \textit{Situation in the DRC}, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 60-61.  
\textsuperscript{1309} ECtHR, \textit{Zaichenko v. Russia}, Application No. 39660/02, Judgment of 18 February 2010, par. 48.  
\textsuperscript{1310} ECtHR, \textit{Dayanan v. Turkey}, Application No. 7377/03, Judgment of 31 October 2009, par. 32.
Also the HRC underlined the importance of the presence of counsel during interrogations and held that the right to counsel under Article 14 (3) (d) applies to the investigation phase.1311

The case law of the ad hoc tribunals emphasised that Rule 42, which outlines the right to counsel for suspects, reflects (and is an adaptation mutatis mutandis of) Article 6 (3) (c) ECHR and Article 14 (3) ICCPR.1312 Consequently, the case law of the ECHR and the HRC are of primary importance for understanding the content and scope of the right to the assistance of counsel during interrogations. However, the case law further clarified that even in a case where the non-provision of the right to legal assistance in a certain national criminal justice system would not be found to be in violation of Article 6 (3) (c) of the ECHR by the ECtHR, a national provision restricting the right to counsel during interrogations would still not be acceptable under Article 18 (3) of the ICTY Statute and Rule 42 (A) (ii).1313 The ad hoc tribunals thus seem to offer a stronger protection of the right to legal assistance during interrogations than international human rights law currently does. This is only logical given the specificity of the right under Rule 42 compared to the human rights provisions, which leaves no room for interpretation and restriction of the guarantee.1314

Remarkably, it follows from the ICTY RPE, that counsel can be assigned to a suspect “whenever the interests of justice so demand.”1315 Does this Rule qualify the right to assistance by counsel during interrogations such that no assistance by counsel can be provided

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1311 HRC, Aliiev v. Ukraine, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997, 7 August 2003, par. 6.6; HRC, Saidova v. Tajikistan, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001, 20 August 2004, par. 6.8; Concluding Observations of the Human Rights Committee: South Korea, U.N. Doc. CCPR/C/KOR/CO/3, 28 November 2006, par. 14 (“The Committee is concerned by the State party’s interference with the right to counsel during pre-trial criminal detention, in particular, that consultation with counsel is permitted only during interrogation, and that even during interrogation, police officials can deny access to counsel on grounds that it will purportedly interfere with the investigation, aid a fugitive defendant, or endanger the acquisition of evidence”). Also the UN Basic Principles on the Role of Lawyers make clear that the right of access to counsel extends to all stages of criminal proceedings, including interrogations, presumably even before formal arrest. See the UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

1312 Consider ICTY, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 2 September 1997, par. 60.

1313 Ibid., par 61.

1314 In a similar vein, these provisions surpass the requirement of counsel during interrogation as recognised by the U.S Supreme Court in Miranda v. Arizona (Miranda v. Arizona, 384 U.S. 436 (1966), pp. 478-79). It limits this right to custodial interrogation. In addition, the right has been limited considerably in consequent jurisprudence. See further, e.g. S. SLOBOGIN, An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation, in «Michigan Journal of International Law», Vol. 22, 2001, pp. 439 – 442.

1315 Rule 45 (A) ICTY RPE. However, Rule 45 ICTR and SCSL RPE does not include such ‘interests of justice’ requirement.
if the interests of justice do not so require? Such reading seems at odds with Article 18 (3) of the ICTY Statute which does not include such qualification of the right to assistance by counsel.\textsuperscript{1316} Therefore, this interpretation would violate the hierarchy of norms.

§ The right to be informed about such right

In order to be in a position to exercise or waive the right to be assisted by counsel, the suspect or accused should first be cautioned about the existence of the right to counsel during interrogation.\textsuperscript{1317} The ICTY RPE require that the suspect be informed prior to the questioning, in a language that the suspect ‘understands’.\textsuperscript{1318} Conversely, the RPE of the ICTR and SCSL require that the person be informed about this right in a language that the person ‘speaks and understands’.\textsuperscript{1319} All that is required is that this right be read out to the person. No obligation exists for the Prosecutor to explain the consequences of exercising or waiving the right in greater depth.\textsuperscript{1320} There is no requirement incumbent on the Prosecutor to clarify the status of the person and to clarify to the person his or her status as a suspect (or accused).\textsuperscript{1321} However, as will be explained in the next section, the suspect or accused should be informed about the exact nature of the right to legal assistance during questioning, as otherwise he or she is not in an informed position to waive the right.

In the Delalić case, the Defence relied on the suspect’s cultural background to contend that the person was unable to understand and appreciate the scope and meaning of his right to counsel when the right was read to him. The Trial Chamber rejected this argument on the basis that the suspect was entitled to have his rights read to him in a language that he

\textsuperscript{1316} M. BOHLANDER, The Defence, in G. BOAS and W.A. SCHABAS (eds.), International Criminal Law Developments in the Case Law of the ICTY, Leiden-Boston, Martinus Nijhoff Publishers, 2003, p. 39. While Bohlander leaves aside whether this apparent inconsistency reveals a breach of the hierarchy of norms, is an acceptable interpretation under Article 15 of the Statute, or is the result of a mere oversight, he clarifies that the phrase ‘interests of justice’ was taken of Article 14 of the ICCPR and, while it could have a meaning in domestic prosecutions, it is meaningless in international criminal law.

\textsuperscript{1317} Rule 42 (A) ICTY, ICTR and SCSL RPE; Rule 63 (B) ICTY, ICTR and SCSL RPE.

\textsuperscript{1318} Rule 42 (A) ICTY RPE.

\textsuperscript{1319} Rule 42 (A) ICTR and SCSL RPE. The text of Rule 42 of the ICTY also required the suspect to be informed in a language he or she “speaks and understands” but this provision was amended in 2005 (U.N. Doc. IT/32/Rev. 36, 21 July 2005).

\textsuperscript{1320} ICTY, Judgement, Prosecutor v. Delalić et al., Case no. IT-96-21-A, A. Ch., 20 February 2001, par. 552.

\textsuperscript{1321} ICTY, Decision on Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 9 October 1996, par. 9-10; ICTR, Decision on Prosper Mugiraneza’s Renewed Motion to Exclude his Custodial Statements from Evidence, Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, T. Ch. II, 4 December 2003, par. 17-19.
understood. “If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.”

§ Requirements for waiver of the right

The right to counsel can be waived by the suspect or the accused person if such a waiver is made ‘voluntarily’. However, one wonders whether it would ever be in the person’s best interests to refuse the assistance of counsel, considering the seriousness of the crimes alleged. According to the case law of the tribunals, the burden of proof of voluntariness and the absence of oppressive conduct in waiving the right to counsel falls on the Prosecution. The standard of proof was defined as “convincingly and beyond reasonable doubt.” If the person already has the status of being ‘accused’, the rules seem more stringent in that they not only require the waiver to be ‘voluntary’ but also to be ‘express’. However, the requirement of an ‘express’ waiver was also read into Rule 42. The ICTR Trial Chamber held in Bagosora et al. that the waiver must be “express and unequivocal” and clearly relate to the interview in which the statement is taken.

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1322 ICTY, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, Prosecutor v. Delalić, T. Ch., 2 September 1997, par. 59; ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, Prosecutor v. Popović et al., Case No. IT-05-88-T, T. Ch. II, 25 October 2007, par. 32, as later confirmed by the Appeals Chamber. See ICTY, Decision on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, Prosecutor v. Popović et al., Case No. IT-05-88-AR73.10, A. Ch., 14 December 2007, par. 34 (“the Appeals Chamber is not convinced that the Trial Chamber abused its discretion or otherwise erred in concluding that the Prosecution unambiguously advised Borovčanin about his right to counsel”).

1323 ICTY, Judgement, Prosecutor v. Delalić et al., Case no. IT-96-21-A, A. Ch., 20 February 2001, par. 553.


1325 Rule 63 (A) ICTY, ICTR and SCSL RPE.

1326 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 18; ICTY, Astrit Haraqija’s Defence Motion to Join Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence and to Seek the Exclusion of Same Against Astrit Haraqija, Prosecutor v. Haraqija et al., Case No. IT-04-84-R77.4, T. Ch. I, 4 August 2008, par. 3. The SCSL in this regard referred to it as an ‘established principle of law’, see SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 36.

1327 ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 2 September 1997, par. 42.

1328 The ad hoc tribunals derived
this requirement from human rights law and common law case law. The term ‘equivocal’ has been interpreted by a Trial Chamber of the ICTY as meaning “unclear in meaning or intention; ambiguous.”

The term voluntary has been interpreted as including the requirements of being informed as well as knowing and intelligent. The information required for a suspect or accused to make an informed decision depends on the stage of the proceedings. The requirement for a waiver to be knowing and intelligent implies that the accused is able “to make a rational appreciation of the effects of proceeding without a lawyer.” A suspect may be taken to comprehend what a reasonable person would understand. However, when there are indications that a person is confused, steps must be taken in order to ensure that the suspect actually does understand the nature of his or her rights.

According to Judge Itoe in the Sesay case, it is not sufficient to “rattle through the textual reading of the waiver”; rather, a “comprehensive explanation of its contents and implications” is required. In the Bagosora et al. case, the ICTR found that the Prosecution did not discharge its burden of showing that the accused, Kabiligi, had voluntarily waived his right to counsel. The waiver by the accused was based on the misconception that his right to counsel depended on being informed of the

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1329 ECtHR, Pishalnikov v. Russia, Case No. 7025/04, Judgment of 24 September 2009, par. 77 (holding that a waiver “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right”). See also ECtHR, Håkansson and Sturesson v. Sweden, Series A, No. 171, Application No. 11855/85, Judgment of 21 February 1990, par. 66 and ECtHR, Pfeifer and Plankl v. Austria, Series A, No. 227, Judgment No. 10802/84, Judgment of 25 February 1992.


1331 ICTY, Reasons for Oral Decision Denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, Prosecutor v. Krajišnik, T. Ch., Case No. IT-00-39-T, 18 August 2005, par. 6. This decision relates to the waiver of the right to counsel at trial. However, the interpretation of the requirements for a valid waiver of counsel may also be relevant for our analysis.

1332 Ibid., par. 5; see also ECCC, Decision on Appeal against Provisional Detention Order of Nuon Chea, The case of Nuon Chea et al., Case No. 002/19-09-2007, PTC, 20 March 2008, par. 26.

1333 In this sense, one may compare both the Bagosora et al. and Krajišnik decisions. Whereas, in the Bagosora et al. Decision, the Trial Chamber considered it sufficient that a suspect is informed about the right to a lawyer, in Krajišnik, which concerned the right to self-representation and waiver at trial, the Chamber required information on the financial and practical consequences of proceeding without a lawyer.


1335 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.

1336 SCSL, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Decision on the Admissibility of Certain prior Statements of the Accused given to the Prosecution, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 43. Judge Itoe dissents from the majority in that he does not agree that the waiver of counsel by Sesay was voluntary made and subscribed to.
case against him. The investigators did not correct this misconception. Consequently, the Trial Chamber concluded that there was a violation of the right to counsel and the interview was to be excluded from the evidence, according to Rule 95 ICTR RPE.

Waiving the right to counsel can only be voluntary when the suspect knows the right he or she is entitled to in the first place. To be so informed, “the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning.” “Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective.” In the Nchamihigo case, the suspect was interviewed in the absence of counsel and the Prosecution claimed that he had waived his right voluntarily. Although the suspect requested the assistance of two attorneys that had previously assisted him, the Prosecution investigator told him the attorneys could only come to assist him if he had sufficient means to pay them. They failed to inform him, however, that a duty counsel had been appointed to represent him and would be available during questioning. Hence, the Trial Chamber concluded that Nchamihigo had not voluntarily waived his right to assistance by counsel.

1337 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 19 (“The accused told the investigators that as soon as he is informed about the case against him, he would then ‘exercise’ his right to counsel or ‘be entitled’ to have the assistance of counsel”).
1338 Ibid., par. 20 (the Trial Chamber stated that “[i]t was improper for the investigators to have explained that “standard procedure” was that disclosure occurred at a later time. The Accused was under the impression that the interview was “preliminary, but the investigators proceeded to ask important questions of substance”).
1339 Ibid., par. 21; ICTR, Decision on Kahligi Motion for the Exclusion of Portions of Testimony of Prosecution Witness Alison des Forges, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 4 September 2006, par. 2 (the Trial Chamber held that expert witness testimony on the conduct of the interview of the accused should likewise be excluded).
1340 ICTR, Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense Request to Hold a Voir Dire, Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, T. Ch. III, 5 February 2007, par. 24; ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.
1341 ICTR, Decision on the Prosecutor’s Motion for the Admission of Certain Materials, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, T. Ch. I, 14 October 2004, par. 17.
1342 ICTR, Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense Request to Hold a Voir Dire, Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, T. Ch. III, 5 February 2007.
1343 Ibid., par. 17-18.
1344 Ibid., par. 24.
§ Revocation of waiver

In case the waiver is revoked by the suspect or accused person, the interrogation should immediately cease and only be resumed when the suspect or accused person has obtained or has been assigned counsel.1345

§ Right to adequate assistance by counsel

In Popović, Borovčanin’s Defence argued that he had not been adequately represented during the interview as his counsel stood mute during the majority of the interviews. However, the Trial Chamber did not feel that this suggested that the representation was defective in any way.1346 However, it did hold that if substantive evidence was adduced, questioning the counsel’s competence to adequately represent the accused’s or suspect’s interests, the Trial Chamber should examine such evidence.1347 In the Halilović case, the Appeals Chamber found that the Trial Chamber had not given sufficient weight to evidence that the representation was inadequate. In casu, there was an Order by the Registry which explicitly stated that the withdrawal of Baliljagić’s counsel was based on “available information which seems to put into doubt the quality of the representation of the accused” and added that “it does not appear that the accused is adequately represented.”1348 There seems to be a high threshold for deeming a suspect’s or accused’s representation incompetent. In Orić, ICTY Trial Chamber II held that the counsel’s conduct must have been “so deficient that he didn’t act as ‘counsel’, or that he provided ‘flagrant incompetent advocacy’” 1349

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1345 Rule 42 (B) ICTY, ICTR and SCSL RPE. Rule 63 (A) ICTY, ICTR and SCSL RPE.
1347 Ibid., par. 31. Consider additionally ICTY, Decision on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, Prosecutor v. Popović et al., Case No. IT-05-88-AR73.10, A. Ch., 14 December 2007, par. 32-36 (the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in finding that there was no violation of the right of the accused to effective representation).
1348 ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No, IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 61-62 (“On the evidence placed before the Trial Chamber, the Appeals Chamber is not satisfied that the Trial Chamber gave sufficient weight to the evidence showing Mr. B to be incompetent to represent the interests of the Appellant. Both the statements of the Prosecution and the decision of the Registrar to withdraw Mr. B as assigned counsel to the Appellant clearly indicate that Mr. B was incompetent to provide effective representation to the Appellant”).
1349 ICTY, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rule 89 (D) and 95, Prosecutor v. Orić, Case No. IT-03-68-T, T. Ch. II, 7 February 2006, par. 26 (footnotes omitted).
In the Blagojević and Jokić case, Jokić and Obrenović (a former co-accused who pleaded guilty) requested the same counsel (Simić) as their counsel of choice. The Defence argued that this created a conflict of interests and that the interview transcripts should not be admitted as evidence. The Defence argued that this created a conflict of interests and that the interview transcripts should not be admitted as evidence. It held that the Prosecution should have informed Mr. Jokić of “an apparent conflict of interest” and should have informed him about “the issue of waiver of conflict-free counsel.” However, the Trial Chamber found that the Prosecution had respected all procedural requirements. “As a matter of principle […], once a suspect or an accused waives his or her right to remain silent, the result of any questioning by members of the Prosecution […] can be used in proceedings involving that suspect or accused.” It further held that it was not up to the Prosecutor to question—or interfere with—Jokić’s choice of counsel. Rather it is the counsel’s as well as the person retaining the counsel’s responsibility to ensure that there is no conflict of interest. Finally, in Prlic et al., the Appeals Chamber held that the accused failed to substantiate how the counsel’s allegedly opposing interests could be expected to adversely affect the counsel’s assistance during the suspect interviews. A divergence of personal or political views would not suffice.

IV.1.2. The International Criminal Court

Article 55 (2) (c) of the ICC Statute outlines a suspect’s right to have the assistance of a counsel of his or her choice or to have legal assistance assigned during interrogation. The suspect has to be informed about this right prior to being questioned. Such information should be conveyed by the Prosecution in “the most unequivocal language”. Article 67 (1) (d) ICC Statute provides a similar right for accused persons. This includes the right to have

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1350 ICTY, Decision on Prosecution’s Motion for Clarification of Oral Decision Regarding Admissibility of Accused’s Statement, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, T. Ch. I, Section A, 18 September 2003, par. 10.
1351 Ibid., par. 10.
1352 Ibid., par. 20.
1353 Ibid., par. 19.
1354 Ibid., par. 20.
1355 Ibid., par. 20.
1356 ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 18 – 26.
1357 Ibid., par. 24-25.
1358 Article 55 (2) ICC Statute.
1360 A provision which closely resembles Article 14 (3) (d) ICCPR.
legal assistance assigned in any case where the interests of justice require so and without payment if the person does not have sufficient means to pay for it. As such, suspects and accused persons are given a considerable degree of choice to agree to or refuse counsel that was assigned to them. In *Kantanga and Ngudjolo Chui*, Trial Chamber II held that “the main importance of the right to counsel in the context of pre-trial interrogations is to protect the essence of the accused’s right, which is to be presumed innocent, to remain silent and not to be forced to self-incriminate”. It held that if a suspect is interrogated without counsel by national authorities in proceedings unrelated to the Court, the resulting statement may still be admissible as evidence. This is allowed in cases where the absence of a counsel’s assistance during the interrogation is not in itself a breach of ‘internationally recognized human rights’ (and the ECHR more precisely), as referred to in Article 69 (7) ICC Statute. However, it was explained above how the jurisprudence of the ECHR in principle requires the assistance of counsel during the interrogation. Still, the Trial Chamber held that the resulting statement was to be excluded since there were “serious concerns that those statements were obtained in violation of his right to remain silent and the privilege against self-incrimination.”

1361 Controversy has risen on the interpretation of the ‘interests of justice’ reference. Whereas ZAPPALÀ argues that such qualifier is unwelcome as it puts a limitation on this right, HALL has argued that this does not limit but instead enhances the possibilities to have assistance by legal counsel. According to HALL, the choice to include this language was made because delegates at the Rome Conference wanted certainty that persons suspected of the heinous crimes falling within the jurisdiction of the court would be able to obtain assistance by counsel. HALL argues that it will always be in the interests of justice for a suspect to be represented by counsel, unless a person is willing and able to represent himself or herself. See: C.K. HALL, Article 55 in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, p. 1100; S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, p. 60. On the ‘interests of justice’ requirement in Article 67 (1) (d), SCHABAS clarifies that this wording had been removed by the ILC and reinstated by the Prepatory Committee. He acknowledges that it is difficult to imagine a case before the ICC where the interests of justice would not require an indigent defendant to have legal assistance assigned, see W.A. SCHABAS, Article 67, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, pp. 1263-1264.

1362 Rule 21 (2) of the ICC RPE juncto Regulation 75 of the Regulations of the Court.

1363 However, no unfettered right for suspects and accused persons to counsel of their own choosing currently exists.


1365 Ibid., par. 60-61.

1366 Ibid., par. 63.
§ Waiver

After the suspect has been informed about his or her right to assistance by counsel, he or she can voluntarily choose to waive this right. Unfortunately, unlike the statutory documents of the ad hoc tribunals and the SCSL, there is no explicit requirement to immediately cease questioning when a suspect, who previously waived his or her right to counsel, changes his or her mind.

IV.1.3. Internationalised criminal courts and tribunals

Article 24 new ECCC Law includes an unconditional right for suspects to legal assistance of their own choosing and to have counsel assigned if they cannot afford it. Contrary to other tribunals, the right to legal assistance for suspects herein is not limited to interrogation. Moreover, the free choice of counsel is explicitly guaranteed, which is not always true of other tribunals that sometimes present unfortunate restrictions. A charged person’s right to have the assistance of counsel during questioning is provided for in Rule 58 (2) of the Internal Rules. The charged person can waive the right to a lawyer during questioning, on the condition that a separate written and signed record is completed by the charged person and included in the case file. Apart from these formal elements, the ECCC Pre-Trial Chamber confirmed the jurisprudence of the ad hoc tribunals and held that such a waiver should be unequivocal and voluntary, the latter term meaning that the waiver should be informed, knowing and intelligent. As far as the interrogation of suspects is concerned, the possibility

1367 Article 55 (2) (d) ICC Statute.
1368 Compare Article 55 (2) (d) ICC Statute with Rule 42 (B) ICTR, ICTY and SCSL RPE and Rule 63 (A) ICTR, ICTY and SCSL RPE.
1369 A similar right is provided for accused persons in Article 35 new (d) ECCC Law; see also Rule 21 (1) (d) ECCC IR.
1371 Consider also Rule 21 (1) (d) ECCC IR.
1372 ECCC, Decision on Appeal against Provisional Detention Order of NUON Chea, The case of Noun Chea et al., Case No. 002/19-09-2007-ECCC/OCHJ (PTC01), PTC, 20 March 2008, par. 17-39. While this decision deals
of waiving the right to counsel is not explicitly provided for, but can be indirectly construed. Notwithstanding the plain wording of Article 24 new ECCC Law and Rule 21 (1) (d) ECCC IR, International Co-Investigating Judge Harman confusingly held that a right to assistance by counsel should only be provided to ‘charged persons’. In light of the clear wording of these provisions, this interpretation should be rejected. Conversely, if such a limitation were to imply that a suspect—unlike a ‘charged person’—did not have the right to assistance by counsel during an interrogation, it would be in violation of international human rights norms, as was set out above.

At the SPSC, suspects and accused persons also had the right to legal assistance. Unfortunately, the right to have the assistance of counsel during an interrogation as well as the possibility to waive such a right was only mentioned specifically in the TRCP in relation to custodial interrogations. The case law of the SPSC reveals that the minimum rights of suspects and accused were not always respected. Several defendants made statements to investigators without counsel being present. For example, in the case of Joni Marques et al., the accused was questioned without the presence of his lawyer. The lawyer sent a standardised letter stating that due to time constraints, the questioning could take place with the adversarial hearing prior to the ordering of pre-trial detention (Rule 63 ECCC IR), and while the Pre-Trial Chamber held that the rules on the interview of the charged person do not apply to this adversarial hearing (ibid., par. 17), there is no reason why the same material conditions should not apply to the interview of the charged person by the Co-Investigating Judges. See the discussion of this decision, infra, Chapter 8, II.4.1.

Rule 25 (1) (b) ECCC IR (detailing that in case the Co-Prosecutors or Co-Investigating Judges interrogate a suspect, the waiver of the right to assistance by counsel should be recorded).

ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 50 (“in recognising the Suspect’s right to be defended by a lawyer of his/her choice the Notification of Suspect Rights decision overruled a series of previous decisions by the CIJ’s refusing to grant defence rights to the persons named in the Introductory Submission, without providing any reasons beyond citing Internal Rule 21, and giving this provision a particularly broad interpretation”). It is difficult to understand how granting a right to the assistance of counsel to suspects gives a ‘particularly broad interpretation’ to Rule 21 ECCC IR. It is recalled that Rule 21 (1) (d) affords “[e]very person suspected or prosecuted” the right “to be defended by a lawyer of his/her choice” (emphasis added). However, in paragraphs 57 – 59 of the same decision the International Co-Investigating Judge rather (and correctly) argued that the rights of ‘suspects’ are more limited in nature than those of ‘charged persons’ and only encompass the rights expressly set forth in Rule 21 (1) (d), including the right to be assisted by counsel. Hence, suspects do not enjoy the full gamut of defence rights (e.g. access to the case file).

More specifically, the right to assistance of counsel during suspect interviews derives from Rule 25 (1) (b) ECCC IR. Besides, it follows from Rule 28 (9) ECCC IR that from the moment an issue of self-incrimination arises during a witness interview, the questioning should stop and counsel should be provided.

See supra, Chapter 4, IV.1.1.

Section 6.3 (a) TRCP.

Section 6.2 (f) TRCP.


without his presence. The letter also included a list of rights to be read to the accused before questioning. Consequently, the statement was allowed at the trial during the cross-examination of the accused. The court found that the accused had waived his right to counsel by being interviewed.

Finally, the STL Statute and RPE provide suspects and accused persons with the right to be questioned only in the presence of counsel. However, while Rule 65 STL RPE provides that the suspect has the right to be assigned legal assistance without payment if he or she does not have sufficient means to pay for it, the Statute adds that legal assistance will only be provided ‘where the interests of justice require so’. Such a requirement does not add anything regarding crimes within the jurisdiction of these international criminal tribunals, as it will always be in the interest of justice to have counsel assigned if the suspect does not have the means to pay for it. Prior to the actual questioning, the suspect should be informed, in a language that he or she speaks and understands, that he or she has the right to legal assistance during the questioning itself. This right to assistance by counsel can be waived. The provision takes into consideration the case law of the ad hoc tribunals by not only requiring that the waiver be ‘voluntary’ but also ‘express’. However, the Statute seems to offer lesser protection to the suspect than the RPE in that it only requires that the waiver be voluntary. In the case of a waiver, if the suspect subsequently expresses a desire to have counsel, questioning should immediately cease and resume only when the suspect’s counsel is present.

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1382 Article 15 (e) STL Statute; Rule 65 (A) (ii) STL RPE and Rule 85 (A) STL RPE.
1383 Compare Rule 65 (A) (ii) STL RPE and Article 15 (c) STL Statute.
1384 Article 15 STL Statute. However, Rule 65 (A) STL RPE only requires that the suspect is informed ‘in a manner and language the suspect understands’.
1385 Article 15 (c) STL Statute.
1386 Rule 65 (B) STL RPE, compare with Rule 42 (B) of the ICTR, ICTY and SCSL RPE, supra, Chapter 4, IV.1.1.
1387 Article 15 (e) STL Statute.
1388 Rule 65 (B) STL RPE.
IV.2. Right to remain silent

IV.2.1. The ad hoc tribunals and the SCSL

Suspects’ right to remain silent during questioning, as well as accused persons’ right not to be compelled to testify against themselves or confess guilt, are laid down in the Statute and the Rules. Originally, the ICTY RPE only provided that the accused should not be compelled to testify against him or herself or to confess guilt. The RPE were later amended to explicitly include a suspect’s and accused person’s right to remain silent during questioning. An accused person’s right to not be compelled to testify against him or herself or to confess guilt does not only apply to the proceedings of the court, but also to any further interrogation of the accused outside the courtroom.

This right to remain silent and the privilege against self-incrimination (or the nemo tenetur principle) reflect international human rights law. Although this right and privilege are not provided for under the ECHR, they have been recognised in the case law of the ECtHR. The right to remain silent and the privilege against self-incrimination were first recognised in Funke and in Murray. They are closely connected to the presumption of innocence.

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1388 Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. The right is not mentioned in the Statute.
1389 Rule 63 (B) ICTY, ICTR and SCSL RPE.
1390 Article 20 (4) (g) ICTR Statute, Article 21 (4) (g) ICTY Statute and Article 17 (4) (g) SCSL Statute.
1391 Rule 42 of the ICTY RPE was amended at the fifth Plenary Session (16 January – 3 February 1995): Rule 42 (A) (iii), ICTY RPE, U.N. Doc. IT/32/Rev. 3, 30 January 1995; Rule 63 was amended at the twelfth Plenary Session (2 – 3 December 1996) to make it consistent with Rule 42 (A) (iii): Rule 63, ICTY RPE, U.N. Doc. IT/32/Rev. 10, 3 December 1996. The right to remain silent for suspects was mentioned from the beginning in the ICTR and SCSL RPE (Rule 42 (A) (iii), the right to remain silent for accused was made explicit in the ICTR RPE after the amendment of Rule 63 at the fifth Plenary Session (1 – 8 June 1998): Rule 63 (B), 8 June 1998.
1392 Contra, consider M. BERGER, The Right To Silence in The Hague International Criminal Courts, in «University of San Francisco School of Law Review», Vol. 47, 2012, pp. 38-39. The author argues that “[b]oth the language of the self-incrimination contained in Article 21, as well as the context of the entire article, suggests that its focus is the adjudicatory process before the Court. […] It does not necessarily mean that the Prosecutor may subject the accused to further questioning outside of the courtroom. Nor does any other provision of the ICTY Statute suggest that there is any such right.” However, it seems that the author is mixing up a procedural safeguard (privilege against self-incrimination) and a power-conferring rule (power to question accused persons). Additionally, it emerges from this argumentation that the Prosecutor’s investigative powers are governed by a prohibiting rule. On this issue, see supra, Chapter 2, VI.
1393 Article 14 (3) (g) ICCPR and Article 8 (2) (g) and 8 (3) ACHR.
1394 The non-exhaustive character of the rights enumerated in Article 6 (2) and 6 (3), them being specific aspects of the general right to a fair trial, allows for the reading of such right and privilege into Article 6. See ECHR, Deweer v. Belgium, Application No. 6903/75, Series A, No. 35, Judgment of 27 February 1980, par. 56.
1395 ECHR, Funke v. France, Application No. 10828/84, Judgement of 25 February 1993, par. 44; ECHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996, par. 45. In Saunders, the ECHR stated that “although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6).” See
Additionally, there is a link with the right not to be subjected to torture or to inhuman or degrading treatment, since torture and inhuman or degrading treatment constitute methods that are often used in order to compel individuals to confess or to testify against themselves. 1396 The right to remain silent can be considered more limited in scope than the privilege against self-incrimination, which is not limited to verbal expressions. On the other hand, the right to silence goes beyond this as it not only protects the individual from making incriminating statements, but any declaration at all. 1397 These terms are equated by the ECHR. Some form of compulsion must take place in order for these right and privilege to apply. 1398 The right to remain silent and the privilege against self-incrimination protect the individual against, what the Court labels, ‘improper compulsion’ by the authorities. 1399 Besides, the privilege against self-incrimination protects the accused’s will to remain silent against the ‘defiance of the will of the accused through coercion or oppression’. 1400 Neither the right to remain silent nor the privilege against self-incrimination are considered absolute by the Court. 1401 The Court must take different factors into consideration, including (i) the nature and degree of compulsion used to obtain the evidence, (ii) the weight of the public


See ECHR, Saunders v. The United Kingdom, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 69 (“The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing”). See the discussion, infra, Chapter 4, IV.2; Chapter 6, II.5.1.

See e.g. ECHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 48-50; ECHR, Bykov v. Russia, Application No. 4378/02, Judgment (grand chamber) of 10 March 2009, par. 92. Consider. J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, p. 283 (the authors propose a different rationale for these rights and argue that where the defendant is asked to account and thus to participate already at the pre-trial stage of proceedings, these two rights should rather function as a procedural right to ensure that there can be no participation at the pre-trial stage until the accused is given access to all defence rights which apply to that stage of proceedings).


ECtHR, O’Halloran and Francis v. The United Kingdom, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 53; ECHR, Bykov v. Russia, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, Partly Dissenting Opinion of Judge Costa, par. 7.

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interest in the investigation and punishment of the offence in issue, (iii) the existence of any relevant safeguards in the procedure, and (iv) the use that any obtained material is put to.\textsuperscript{1402}

There is a link between the above-mentioned right and privilege and the procedural safeguards outlined in Rule 43. Rule 43 of the RPE encompasses technical rules that are not only aimed at ensuring the reliability and precision of an individual’s statement, but which aim at safeguarding the guarantees of Rule 42 and protect the individual against involuntary self-incrimination in particular.\textsuperscript{1403} These technical rules will be discussed in a later section.\textsuperscript{1404}

§ Right to be informed about this right

As with the other rights afforded to a suspect or an accused person, the individual should be informed about the existence of the right prior to the start of the interrogation and in a language that he or she (speaks and) understands.\textsuperscript{1405} The suspect or the accused person should also be cautioned that any statement he or she makes will be recorded and can be used as evidence.\textsuperscript{1406} However, there is no requirement that the suspect be explicitly informed that his or her statement may be used as evidence against him or herself.\textsuperscript{1407} The ICTY Appeals Chamber accepted a presumption and held that the accused is presumed to know of the right to remain silent if he or she is assisted by counsel.\textsuperscript{1408} This underlines the important

\textsuperscript{1402} ECtHR, \textit{Jalloh v. Germany}, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 117.

\textsuperscript{1403} ICTY, \textit{Judgement, Prosecutor v. Halilović}, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 2.

\textsuperscript{1404} See infra, Chapter 4, IV.6.

\textsuperscript{1405} See \textit{infra}, Chapter 4, IV.6.

\textsuperscript{1406} ICTY, Decision on Motion for Exclusion of Statement of Accused, \textit{Prosecutor v. Halilović}, Case No. IT-01-48-AR73.2, T. Ch. I, Section A, 8 July 2005, par. 23. Although, occasionally, the Prosecution has gone further than this obligation requires. For example, in the \textit{Popović} case, the suspect Borovčanin was cautioned that any statement he made could be used against him and the words “against you” were added. However, these words were subsequently not translated in BCS. The Trial Chamber noted that the investigator was under no obligation to do so and that this omission in the translation is immaterial for the application of the objective test which is set out in Rule 42. See: ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, \textit{Prosecutor v. Popović et al.}, Case No. IT-05-88-T, T. Ch. II, 25 October 2007, par. 35.

\textsuperscript{1407} ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, \textit{Prosecutor v. Halilović}, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 15. In \textit{Bagosora et al.}, the Trial Chamber underscored the importance of legal representation to have an explanation on other rights at the preliminary stage, see ICTR, Decision on the Prosecutor’s Motion for the Admission of
connection between these two rights. Also, the ECtHR held that the right to assistance by
counsel during interrogation is all the more important when the person has not been informed
of his or her right to remain silent, prior to the commencement of the interview. 1409

Could an accused person be ‘encouraged’ to speak rather than remain silent? This situation
arose in the Delalić case. The Trial Chamber ruled that “telling a suspect that a confession
would on conviction assist in mitigation of punishment is not so strong as to induce
confession.”1410 According to the Trial Chamber, offering an alternative to remaining silent is
‘undesirable’ and at odds with the right to remain silent. However, it does not render the
interrogation involuntary. 1411

§ Waiver of right to remain silent

Similar to waiving the right for the assistance of counsel, any waiver of the right to remain
silent, and thus the choice to respond to any question, should be voluntary, express and
unequivocal. 1412 Likewise, the suspect or accused should be aware that the right exists as well
as of the consequences that arise should they choose to waive this right. 1413 In the Delalić
case, Mucić claimed that a subjective test should be applied to assess the voluntariness of the
waiver. He claimed that his cultural background and the fact that he was under arrest in a
foreign country should be taken into consideration. 1414 The Trial Chamber did not accept this
cultural argument and stated that the suspect had the facility of interpretation at his
disposal. 1415
§ No retroactive invocation of the right

If the accused has freely and voluntarily made statements prior to trial, he cannot retroactively choose to invoke his right against self-incrimination to try and prevent those statements from being introduced. That is, of course, provided that he was informed about his right to remain silent before having given the statement. Once a suspect or accused has waived his or her right to remain silent, the results from any questioning can be used in proceedings that involve that suspect or accused.1416

§ Drawing adverse inferences from the silence of the accused

The question also arises as to whether and to what extent it is possible to hold a suspect’s or an accused’s silence against him or her. Arguably, warning a suspect that his or her silence during the interrogation can be used against him or her can be considered a form of indirect compulsion. In the Delalić et al. case, the Trial Chamber had to consider the possibility of drawing inferences from the accused’s silence. The Prosecution requested an order from the Chamber that Mucić provide a handwriting sample to prove his authorship of a letter. The Defence opposed this request as being in violation of the protection against self-incrimination. The Prosecutor relied on the Murray case of the ECtHR.1417 However, the Trial Chamber argued that, unlike in the Murray case, the ICTY Statute does not provide for the power to draw adverse inferences.1418 Article 21 (4) (g), Rule 42 (A) (iii) and Rule 63 are unambiguous.1419 The Trial Chamber ruled that compelling the accused to provide a sample would infringe upon Article 21 (4) (g) ICTY Statute.1420 It argued that “[i]f the handwriting

1416 ICTY, Decision on Prosecution’s Motion for Clarification of Oral Decision Regarding Admissibility of Accused’s Statement, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, T. Ch. 1 (Section A), 18 September 2003, par. 19; ICTY, Decision on the Admission of the Record of the Interview of the Accused Kvočka, Prosecutor v. Kvočka et al., Case No. IT-99-30/1-T, T. Ch., 16 March 2001; ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 15; ICTY, Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C), Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, T. Ch., 17 February 2009, par. 13.
1417 ECtHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgement (Grand Chamber) of 8 February 1996.
1418 ICTY, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, Prosecutor v. Delalić et al., Case No. IT-96-21-T, T. Ch., 19 January 1998, par. 46.
1419 The Chamber also rejected the argumentation by the Prosecution, based on American jurisprudence, that the privilege from self-incrimination should be qualified or restricted to testimonial evidence. There was no such condition contemplated by the law maker. See ibid., par. 51-58.
1420 ibid., par. 47.
sample taken together with other evidence will constitute material evidence to prove the charge against the accused, then the order of the Trial Chamber would have compelled the production of self-incriminating evidence.”

According to the Chamber, the precise meaning of the right to silence is that the accused person can stay mute without reacting to the allegation. Later case law of the ad hoc tribunals confirmed that in the absence of an express statutory provision, drawing adverse inferences is absolutely prohibited.

Consequently, the procedural safeguards offered by the ad hoc tribunals go beyond the requirements of the ECtHR. As explained above, according to the ECtHR, the right to remain silent is not absolute. A conviction cannot solely or mainly be based on an accused’s silence. Nevertheless, in case the silence ‘calls’ for an explanation which the accused ought to be in a position to provide, the failure to provide such an explanation “may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.” Close attention should be paid to all circumstances: the situations in which an inference can be drawn, the weight that can be attached to an inference in assessing the evidence, the degree of compulsion inherent in the situation, etc. However, a state cannot impose sanctions compelling an accused person to provide information. This would destroy the very essence of one’s privilege against self-incrimination and the right to remain silent. In this manner, the ECtHR tries to resolve the tension between affording the right to

1421 Ibid., par. 48.
1422 Ibid., par. 49.
1423 Ibid., par. 50.
1425 Disregarding the fact that, as rightly stressed by the Trial Chamber in the Delalić case, there is no legal basis for the drawing of adverse inferences provided for in neither the Statute nor the RPE.
1426 ECHR, Murray v. The United Kingdom, Application No. 18731/91, Judgment (Grand Chamber) of 8 February 1996, par. 51; ECHR, Adetoro v. The United Kingdom, Application No. 46834/06, Judgment of 20 April 2010, par. 48; ECHR, Al-Khawaja and Tahery v. The United Kingdom, Application Nos. 26766/05 and 22228/06, Reports 2011, par. 138.
1427 Ibid., par. 49; ECHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 47; ECHR, Averill v. The United Kingdom, Application No. 36408/97, Reports 2000-VI, Judgment of 6 June 2000, par. 44.
remain silent to the defendant and the requirement of defence participation, which is a prerequisite for the trier of fact to have all relevant information at his or her disposal.\footnote{J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, p. 103.} Unlike the ECtHR, the HRC seems to hold that drawing adverse inferences violates the right to a fair trial.\footnote{HRC, Concluding Observations: United Kingdom of Great-Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UKOT, 6 December 2001, par. 17 (“the Committee remains troubled by the principle that juries may draw negative inferences from the silence of accused persons. The State party should reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under article 14 of the Covenant”).}

SLUITER and ZAHAR provide a possible explanation as to why the law of international criminal procedure surpasses the requirements outlined in the case law of the ECtHR. They argue that “[a]ssistance from the accused, generally in the form of a confession, is at the present stage of international criminal law not as important as in domestic jurisdictions. There is not the situation of immediate arrest followed by interrogation, offering a conducive environment for a confession. The general practice is for an accused person to determine their defence strategy and adequately prepare for a trial beforehand.”\footnote{A. ZAHAR and G. SLUITER, International Criminal Law: a Critical Introduction, Oxford, Oxford University Press, 2008, p. 307.} From the perspective of efficiency, one could argue that preventing the tribunals from drawing adverse inferences makes the suspect’s or the accused’s decision to remain silent or not testify “more costly than would otherwise be the case.”\footnote{M. BERGER, The Right To Silence in The Hague International Criminal Courts, in «University of San Francisco School of Law Reviews», Vol. 47, 2012, p. 21.} However— notwithstanding the prohibition of drawing adverse inferences in the procedures of ad hoc tribunals---, this does not prevent the triers of fact from taking the accused’s silence into consideration, even if they do not openly admit it. Additionally, the decision to remain silent is sometimes considered by the ad hoc tribunals in relation to applications for provisional release, which seems to be odds with the right to remain silent and the privilege against self-incrimination.\footnote{See infra, Chapter 8, II.2.6.1.}

\section*{§ The right not to be compelled to incriminate oneself and oppressiveness of the interrogation}

A substantial amount of litigation before the ad hoc tribunals focuses on the alleged involuntariness of interrogations. Oppressive conduct renders an interrogation involuntary. Arguably, the right to remain silent and the privilege against self-incrimination serve to...
ensuring that the participation of the suspect or the accused is ‘voluntary’ and respects his or her will.1434 Below, two kinds of oppressive conduct will be distinguished: (i) statements that ‘excite hope’ and thereby coerce the suspect or defendant into cooperating involuntarily and (ii) conduct that ‘raises fears’ and, thus, also coerces the suspect or defendant into cooperating.

§ Inducements and incentives

In the case law of ad hoc tribunals, a distinction can be drawn between ‘inducements that render cooperation involuntary’ and ‘inducements that are mere incentives to cooperate’. In Halilović, the Appeals Chamber stated that the fact that the interviewer offered an incentive during an interrogation which the accused subsequently took into account, does not mean that the accused acted involuntarily.1435 It follows from the Appeals Chamber’s reasoning that only more powerful inducements that “coerce the Appellant into cooperating with the Prosecutor” render the cooperation involuntary.1436 Such a test, however, is not always easy to apply in practice, given its subjective nature. It is not always clear to what extent an inducement coerces an accused person into cooperating. For example, it is difficult to measure the effect of a Prosecutor’s statement that it would not oppose an application for provisional release if the person cooperates during the interrogation. A confession given by an accused person must be the product of his or her free will. In Halilović, the Appeals Chamber agreed with the Trial Chamber that a statement by the Prosecution that “could have a positive influence on the Prosecution’s position in respect of an application for provisional release”, is distinct from a promise of provisional release and did not render the interview involuntary. However, the Appeals Chamber did find that the Trial Chamber erred by not classifying such a statement as an inducement. While the statement did not coerce the accused into cooperating, it should still be treated as an ‘inducement understood as an incentive to cooperate’. 1437

1435 ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38.
1436 Compare ICTY, Decision on Hazim Delić’s Motion Pursuant to Rule 73, Prosecutor v. Delalić et al., Case No. ICTY-96-21-T, T. Ch. I, 1 September 1997, par. 15.
1437 ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 38-39; ICTY,
In Sesay, the SCSL Trial Chamber relied heavily on common law case-law to derive certain ‘principles of law’ regarding the voluntariness of interrogations. It follows from these principles that a promise made by the Prosecution will only render a statement involuntary if the *quid pro quo* offered provides a strong enough inducement “to raise a reasonable doubt about whether the will of the suspect was overborne.”1438 In *casu*, the Prosecution investigators told the accused that they had the authority to ask the Judges for leniency if the accused would cooperate. They also said that the Judges would accept whatever they, as investigators, would tell the Judges.1439 Moreover, they told the accused that cooperation would enable the investigators to ask the Court for a reduced sentence. The accused was also told that the Prosecution would take care of his family for the duration of the interrogation and that they would be placed into protective custody, given financial benefits as well as the possibility of relocating to another country.1440 Finally, they indicated to the accused that he would be called as a witness for the Prosecution if he would cooperate. According to the Chamber, the accused could have understood this to mean that he could avoid prosecution.1441

In addition to other irregularities, this led the Court to conclude that the Prosecution had not discharged its burden to prove beyond reasonable doubt that the statements were given voluntarily. The Court explained that the statements were the result of a “fear of prejudice and hope of advantage”. The Court referred to the role of the Prosecution investigators in this case as one which “borders on a semblance of arm twisting and holding out promises and inducements to the Accused in the course of the interrogation and particularly during the unrecorded conversations in the course of the break in order to sustain the accused’s cooperation with the Prosecution.”1442

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1439 Ibid., par. 46.

1440 Ibid., par. 45.

1441 Ibid., par. 46.

1442 Ibid., par. 51.
§ Circumstances surrounding the interrogation: coercion, duress, threats

The ICC Statute explicitly prohibits any form of coercion, duress or threat during questioning.¹⁴⁴³ No similar provision can be found in the Statute or RPE of the ad hoc tribunals or the SCSL. Nevertheless, the jurisprudence provides some guidance as to what conduct is prohibited.

Cases where statements are induced by oppressive conduct (coercion, force or fraud) that sapped the accused’s concentration and free will through various acts, weakened resistance and rendered it impossible for the suspect to think clearly, constitute oppressive conduct.¹⁴⁴⁴ Oppressiveness hinges upon many factors that cannot all be catalogued. First, the characteristics of the suspect or accused person should be taken into consideration. What may be oppressive to a child, old man or an invalid person or someone inexperienced in the administration of justice may not be oppressive to a mature person who is familiar with the judicial process.¹⁴⁴⁵ The duration and manner of questions as well as material considerations are equally important.¹⁴⁴⁶

The Trial Chamber in the Sesay case refused to take the cultural background of the accused into consideration when looking into the oppressiveness of the questioning.¹⁴⁴⁷ The Chamber held that the test is to be construed objectively. It rejected the Defence’s argument that “the Accused had spent the previous ten years fighting in a war in the bush and did not have direct experience of a judicial system or of a system or a state authority based on the rule of law and the protection of human rights relevant to its analysis of the circumstances in which the questioning occurred.”¹⁴⁴⁸

The ICTY Trial Chamber in Delalić et al. drew from the English law of evidence, which defines oppressive questioning as:

¹⁴⁴³ Article 55 (1) (b) ICC Statute.
¹⁴⁴⁴ ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 2 September 1997, par. 66.
¹⁴⁴⁵ Ibid., par. 67.
¹⁴⁴⁶ Examples are the facilities provided such as refreshments as well as the rest between different periods of questioning.
¹⁴⁴⁸ Ibid., par. 56.
“Questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hope (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have remained silent.”

This test led the Trial Chamber to conclude that an interview that lasted four and three quarter hours and in which five different officers participated did not constitute oppressive questioning. In Orić, the Defence complained that the defendant had been questioned aggressively. The Trial Chamber concluded that the questioning was not aggressive and held that where the style of interrogation was “somewhat ‘aggressive’”, “this was within the limits of normality and in no way affects the integrity of the interview rendering it unreliable.”

§ Other forms of improper compulsion; prohibition of deceptive methods

The case law of the ad hoc tribunals also clarified that the interviewer should not mislead the suspect or accused in regard to his or her affiliation with the OTP. It may be asked what other forms of compulsion or deception should be considered unacceptable given that they can render the questioning involuntary. However, further relevant case law on this issue is lacking.

There is not a great deal of guidance as to what forms of compulsion and deception are acceptable under human rights law either. While the case law of the ECtHR clarified that the right to remain silent offers protection against improper compulsion, it is less clear what types

1449 ICTY, Decision on Zdravko Mucić Motion for the Exclusion of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21, T. Ch., 2 September 1997, par. 68 (referring to R v. Prager (1972) 56 Cr. App. R. 151 (English Court of Appeal)).

1450 Ibid., par. 69.


1452 Note that all national criminal justice systems allow for some forms of pressure in the course of the interrogation. See P. ROBERTS, Comparative Criminal Justice Goes Global, in «Oxford Journal of Legal Studies», Vol. 28, 2008, p. 380 (“Today, every police force in every jurisdiction in the world uses lawful psychological pressure to extract confessions from suspects during interrogation, and this undoubtedly frequently produces ‘testimony’ (or evidence presented to the court in the form of a confession) which would not have been forthcoming in the absence of such pressures”).
of compulsion should be labelled ‘improper’. The Court seeks to distinguish between (i) direct compulsion (e.g. bringing criminal proceedings against a person to compel him or her to provide evidence (Funke)), which may result in the violation of the right to remain silent and the privilege against self-incrimination and (ii) certain amounts of indirect compulsion (e.g. warning a suspect that adverse inferences may be drawn (Murray)), which do not violate the privilege against self-incrimination or the right to remain silent. Admittedly, such criteria are rather vague. The question is whether “the very essence” of the privilege against self-incrimination is destroyed.

As previously indicated, the privilege against self-incrimination and the right to remain silent also imply that, in a criminal case, the prosecution does not seek to prove its case against the accused by resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. This may be the case when an accused is questioned in custody using an informant placed in his cell, even if no direct compulsion is exercised in such a situation. In Allan v. UK, the ECtHR held that:

“While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to

1454 ECtHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 46 (“The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context “improper compulsion””).
1455 ECtHR, Murray v. the United Kingdom, Application No. 18731/91, Reports 1996-I, Judgment (Grand Chamber) of 8 February 1996, par. 48-50; ECtHR, O’Halloran and Francis v. The United Kingdom, Application Nos. 15809/02 and 25624/02, Judgment (Grand Chamber) of 29 June 2007, par. 53 (noting that not every form of direct compulsion automatically results in a violation of these rights, considering that they are not absolute).
1456 Ibid., par. 49.
 eliciting, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.” 1458

It is important to consider the particularities of the case, in that the accused was in pre-trial detention and “consistently availed himself of the right to silence.” 1459 Furthermore, in casu, the police took advantage of the accused’s vulnerable and susceptible state, the result of lengthy periods of interrogation. However, this judgment should not lead us to conclude that the use of trickery, subterfuge or other forms of deception, automatically violates the accused’s right to remain silent and privilege against self-incrimination. This is evidenced by the Court’s judgment in Bykov that a statement was not considered to be obtained by coercion, oppression or in defiance of the will of the accused (and thus in breach of the privilege against self-incrimination), where an informant was used outside of custody and where the accused was “willing to continue the conversation” started by the informant. 1460

IV.2.2. The International Criminal Court

According to Article 55 (2) (b) ICC Statute, a suspect who is questioned, either by the Prosecutor or by national authorities, has the right to remain silent during the questioning. 1461 This provision does not apply in cases where a suspect was interrogated by national authorities in proceedings unrelated to the Court. However, Trial Chamber II in the Katanga and Ngudjolo Chui case still decided to exclude self-incriminating statements made by the accused in Congolese proceedings unrelated to the Court, since they could have been obtained in violation of ‘internationally recognized human rights’. More precisely, there were “serious concerns that those statements were obtained from him in violation of his right to remain silent and of the privilege against self-incrimination.” 1462 It based this conclusion on the fact

1459 Ibid., par. 52.
1460 ECHR, Bykov v. Russia, Application No. 4378/02, Judgment (Grand chamber) of 10 March 2009, par. 99-105. Consider also the dissent by Judge Costa, who argued that “[t]he right to remain silent would be truly “theoretical and illusory” if it were accepted that the police had the right to “make a suspect talk” by using a covert recording of a conversation with an informer assigned the task of entrapping the suspect”). See ibid., Partly Dissenting Opinion of Judge Costa, par. 8.
1461 Article 55 (2) (b) ICC Statute.
1462 ICC, Decision on the Prosecutor’s Bar Table Motions, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, par. 63-65. However, the Trial Chamber omitted to explain whether the two-prong test for the exclusion of evidence under Article 69 (7) ICC
that it was the accused’s first interview in detention and that, at the time, he was unaware of the reasons for his detention.\textsuperscript{1463} The Chamber underlined the link between the right to remain silent and to not be compelled to incriminate oneself and the right to counsel. Even if the accused would have had access to his counsel shortly before the interrogation, the counsel’s advice would not have been adequate given that it necessarily would have been based on incomplete information.\textsuperscript{1464}

Accused persons enjoy the right to not be compelled to testify or confess guilt in addition to the right to remain silent during interrogation.\textsuperscript{1465} The practice of the \textit{ad hoc} tribunals and the SCSL may offer guidance as to how this right should be interpreted. It follows from Regulation 43 (1) of the ICC OTP Regulations that: ‘[n]o inducement whatsoever shall be offered to a person in exchange for questioning or statement’.

\textbf{§ Right to be informed about such right}

Similar to the \textit{ad hoc} tribunals and the SCSL, the right to remain silent can be waived and the accused or suspect should be cautioned. Regrettably, unlike the procedural framework of the \textit{ad hoc} tribunals and the SCSL, no express requirement is to be found in the Statute or the Rules stating that the suspect or accused should be cautioned about the possibility that his or her statement could be used as evidence at trial.\textsuperscript{1466} However, the Prosecution has stated that it has “adopted, and consistently applied, a policy of informing all persons questioned – including under Article 55 (2) – that their evidence may be used in subsequent proceedings.”\textsuperscript{1467}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1463} Ibid., par. 63.
\item \textsuperscript{1464} Ibid., par. 63.
\item \textsuperscript{1465} Article 67 (1) (g) ICC Statute.
\item \textsuperscript{1466} Compare with Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. While Regulation 40 (f) of the Regulations of the Office of the Prosecutor states that the person questioned should be informed of the ‘procedures which may follow’, including those of ‘being requested to appear before the Court’, this falls short of a clear-cut obligation to inform the person questioned that \textit{any statement made} may be used in evidence.
\item \textsuperscript{1467} ICC, Prosecution’s Observations Regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, \textit{Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC}, Case No. ICC-01/04-01/07-336, PTC I, 20 March 2008, par. 21.
\end{itemize}
\end{footnotesize}
§ Drawing inferences from silence

Unlike the *ad hoc* tribunals and the SCSL, the ICC Statute explicitly states that silence cannot be taken into consideration when determining the guilt or innocence of an accused.\(^{1468}\) In this sense, the ICC Statute offers greater protection. Such protection may go further than what is required under international human rights law.\(^{1469}\)

IV.2.3. Internationalised criminal courts and tribunals

The ECCC Law includes the right for *accused persons* to not be compelled to testify against themselves or confess guilt.\(^{1470}\) Despite the fact that the ECCC Law does not include the right to remain silent for suspects or charged persons, the Internal Rules provide that every suspect or charged person should be presumed innocent and therefore informed at every stage of the proceedings about their *right to remain silent*.\(^{1471}\) It follows from the case law of the Pre-Trial Chamber that a charged person’s or a lawyer’s request to postpone an interview cannot be understood as invoking the right to remain silent.\(^{1472}\) The case law further clarified that the right to remain silent does not apply to an adversarial hearing on provisional detention (Rule 63 of the IR) because the charged person is *not questioned* at this occasion and is only given the opportunity to respond to the request of the Co-Prosecutors.\(^{1473}\) In this way, the Pre-Trial Chamber seems to place an unfortunate restriction on a charged person’s right to remain silent. This seems to be at odds with labelling this right as a ‘fundamental principle’, which implies that it should apply at every stage of the proceedings.\(^{1474}\)

Also at the STL, the suspect and the accused person enjoy the right to not be compelled to incriminate him or herself, or confess guilt as well as the right to remain silent. He or she should be informed of these rights prior to the start of any interrogation.\(^{1475}\) The suspect or accused should be cautioned that any statement will be recorded and can be used as evidence

\(^{1468}\) Article 55 (2) (b) ICC Statute.

\(^{1469}\) See *supra*, Chapter 4, IV.2.1.

\(^{1470}\) Article 35 new (g) ECCC Law.

\(^{1471}\) Rule 21 (1) (d) ECCC IR.


\(^{1474}\) The right to remain silent is included in the list of ‘fundamental principles’ in Rule 21 of the ECCC IR.

\(^{1475}\) Article 15 (b) STL Statute, Rule 65 (A) (iv) STL RPE, Rule 85 (B) STL RPE.
at trial. In line with the ICC RPE, such silence cannot be considered in the determination of guilt or innocence.\textsuperscript{1476}

Finally, the TRCP also recognized that a suspect or an accused is entitled to the right to remain silent as well as the protection from his or her silence being used in the determination of guilt or innocence.\textsuperscript{1477} The jurisprudence confirmed that the right to remain silent can be waived provided that such a waiver is made voluntarily and knowingly.\textsuperscript{1478} The issue of retroactively applying the right to remain silent to statements made by the defendant in the course of the investigation (to an SCU investigator, Investigating Judge or a police officer) has arisen on several occasions. For example, in the judgment in the \textit{Prosecutor v. Anigio de Oliveira} case, the panel held that a statement made by the defendant during the investigation to the Investigating Judge could not be admitted as evidence at trial, in case the defendant decided to remain silent at trial.\textsuperscript{1479} Such statements could only be used on the condition that the defendant waived his or her right to remain silent \textit{at trial}. While Section 33.4 TRCP allowed for the admission of a statement made by an accused to the Investigating Judge as evidence, the panel held that such a provision is limited to situations where the defendant chose to waive the right to remain silent at trial.\textsuperscript{1480} In the \textit{Francisco Pereira} case, the panel had to decide whether a statement made by the defendant to an investigator, rather than to the Investigating Judge, could be admitted as evidence.\textsuperscript{1481} The majority held that a defendant’s prior statement made to an investigator could not be admitted into evidence at trial insofar that this would violate his right to remain silent \textit{at trial}.\textsuperscript{1482} However, unlike the panel in \textit{Prosecutor v. Anigio de Oliveira}, the majority concluded that statements made before an Investigating Judge could be admitted as evidence. They did not limit this possibility to instances where the defendant waived the right to remain silent at trial.\textsuperscript{1483} Judge Rapoza dissented and held that, notwithstanding the defendant’s choice to remain silent at trial, the

\textsuperscript{1476} Article 15 (b) STL Statute.

\textsuperscript{1477} Section 6.3 (h) TRCP; see also 6.2 (a) TRCP (custodial interrogation).

\textsuperscript{1478} Ibid., pp. 8 - 9.

\textsuperscript{1479} Ibid., pp. 8 - 9.


\textsuperscript{1481} Ibid., p. 9 (only available in Portuguese).

\textsuperscript{1482} Ibid., pp. 8 - 9.

\textsuperscript{1483} Ibid., pp. 8 - 9.


\textsuperscript{1484} The right to remain silent at trial is provided for in Section 30.4 TRCP.

defendant’s statement made to an investigator could be admitted, provided that he voluntarily
and knowingly waived his right to remain silent during the interrogation. Judge Rapoza
argued that where the right to remain silent serves to protect a person from being compelled to
make a statement when interrogated by an investigator, Investigating Judge or police officer,
the element of compulsion disappears when the suspect knowingly and voluntarily waives this
right. The retroactive application of the right to remain silent to statements that were made
voluntarily during the investigation, does not advance the rationale of the right to remain
silent, to know the protection against compulsion. Other case law confirmed Judge
Rapoza’s dissent. For example, in Prosecutor v. Alarico Mesquita et al., the panel
unanimously allowed an accused’s prior statement made before an investigator as
evidence.

IV.3. Right to be informed of the charges or allegations
IV.3.1. The ad hoc tribunals and the SCSL

§ Accused persons

Accused persons enjoy the right to be informed promptly and in detail in a language which
they understand about the nature and cause of the charges against them prior to being
questioned. This information duty helps to ensure that the privilege against self-
incrimination is exercised effectively. There have been occasions, however, when the
Prosecutor has violated this right. In the Simić et al. case, a telephone interview was
conducted with the accused, Miroslav Tadić, without properly having served him the
indictment. As of the first interview, the indictment still had not been served on the
accused. In spite of this, the Prosecution proceeded with the interrogation after reading out

1484 SPSC, Dissenting Opinion on the Defendant’s Oral Motion to Exclude Statement of the Accused, Prosecutor
v. Francisco Pereira, Case No.34/2003, SPSC, 17 September 2004, p. 4 (in other words, “[t]he defendant’s right
to maintain his silence at trial is not so broad as to require the exclusion from evidence of a previous statement
knowingly and voluntarily given to an investigator”).
1485 Ibid., p. 5.
1486 Ibid., p. 6.
1487 See JSMP, Admissibility Of Prior Statements As Evidence Before The Special Panels, 29 October 2004
(available at: http://jsmp.tl/wp-content/uploads/2012/06/Justice-Update-Admissibility-of-prior-statements-as-
1488 Article 21 (4) (a) ICTY Statute, Article 20 (4) (a) ICTR Statute and Article 17 (4) (a) SCSL Statute.
1489 ICTY, Decision on Prosecutor’s Request to Add Further Exhibits to the Confidential Prosecution Exhibit
List Filed on the 9th of April 2001, Prosecutor v. Simić et al., Case No. IT-95-9-T, T. Ch. II, Section B, 11
sections of the indictment to Tadić over the phone.\textsuperscript{1490} At the time of a second telephone interview, the first six pages of the indictment had been served on the accused.\textsuperscript{1491} While the Prosecution was aware that the accused had an incomplete copy, they nevertheless proceeded with the interview on the facts of the indictment.\textsuperscript{1492} The Chamber held that effective service of the indictment was not satisfactorily made prior to any of the telephone interviews. For this reason, it found that the accused did not fully appreciate the seriousness of the indictment at the time nor did he fully understand the nature of the indictment and the proceedings.\textsuperscript{1493} The obligation of the valid service of the indictment cannot be derogated from.\textsuperscript{1494}

§ Mere suspects

A more complicated question arises as to whether this right also applies when a suspect is being questioned. Neither the Statute nor the Rules of the \textit{ad hoc} tribunals include an explicit obligation to inform the suspect about the allegations against him or her. Of course, the suspect cannot yet be informed about the precise charges against him or her at such a time, insofar that the suspect interview forms part of the fact-finding process used to determine whether charges should be brought against the suspect.\textsuperscript{1495}

Is there an obligation to inform a suspect about the allegations against him or her before questioning? Some decisions of the \textit{ad hoc} tribunals seem to place such an obligation on the Prosecution. In the \textit{Karemera et al.} case, the ICTR Trial Chamber did not admit the interviews of Nzirorera and Ngirumpatse, who had been interviewed after being provisionally arrested pursuant to Article 40 of the Rules, into evidence.\textsuperscript{1496} The Chamber decided to exclude the evidence pursuant to Rule 95 as the suspects were not informed promptly and in

\textsuperscript{1490} \textit{Ibid.}, p. 2.
\textsuperscript{1491} The indictment was faxed to the accused but only the first six pages were received by the accused.
\textsuperscript{1492} \textit{Ibid.}, p. 2.
\textsuperscript{1493} \textit{Ibid.}, p. 2; ICTY, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, \textit{Prosecutor v. Simić et al.}, Case No. IT-95-9-T, T. Ch. II, 11 March 2003, par. 3.
\textsuperscript{1494} \textit{Ibid.}, par. 5; par. 6 (the right to be informed promptly and in detail not only includes the legal qualification of the charges against the accused but also the facts that are underlying the charge).
detail of the charge against him or her in accordance with Article 20 (4) (a) ICTR Statute. 1497

This decision is confusing, as the Chamber failed to explain why Article 20, which outlines the rights of the accused, should be applied to the (custodial) questioning of a suspect. 1498

While the Chamber accepted that Ngirumpatse was informed about his rights to be assisted by counsel, to have the free assistance of an interpreter and to remain silent, likewise, “[t]he Chamber finds no indication that he was informed about the charges against him or the nature and cause thereof.” 1499 In the Court’s reasoning, it is unclear whether such a requirement constitutes a separate right for the suspect during questioning or whether the requirement follows from a retrospective application of the rights of accused persons.

Undoubtedly, in cases where a suspect is subjected to custodial interrogation, the suspect has the right to be informed about the reasons for his or her arrest. This right follows from the arrest of the suspect. 1500 Consequently, provisionally detained suspects should be informed about the reasons for their arrest and any charge against them, as in the Karemera case. As such, however, there seems to be no explicit right in the Statute or the Rules for all suspects (detained or not) to be informed about the allegations against them when questioned.

Several authors subscribe to a suspect’s right to being promptly informed about the nature and cause of the allegations in case of questioning. 1501 SAFFERLING presumes the applicability of Article 21 (4) (a) ICTY Statute and Article 20 (4) (a) ICTR Statute to suspects, insofar that

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1497 Ibid., par. 9; par. 40-41. Rule 95 states that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

1498 At several times, the Trial Chamber seems to imply that there is an obligation to inform the suspect about “the charges or provisional charges.” Such wording is confusing, as information on the allegations seems to be referred to. Moreover, the Trial Chamber could be clearer that such right to be informed about the allegations attaches to the arrest of the suspect and is not a requirement for the questioning of suspects. Additionally, the Trial Chamber holds that there is such right to be informed about the allegations because otherwise, a suspect is not in a position to waive his or her right to counsel in an informed way.

1499 Ibid., par. 41.

1500 International human rights norms require that upon arrest, a person should be informed about the reasons for this arrest and should be promptly informed of any charge against him. Consequently, the suspect that has provisionally been arrested will have to be informed about the allegations, see Article 5 (2) ECHR, Article 9 (2) ICCPR, Article 7 (4) ACHR. Such requirement cannot be found in the African Charter. See, in detail, infra, Chapter 7, V.2.

1501 C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 291; C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, pp. 115, 120-121; ZAPPALÀ argues, on Article 21 of the ICTY Statute in general, that “whether the same protection must be afforded to a person before he or she assumes the status of accused cannot really be discussed. It is logical to assume, as explained above, that in general, protection for those who are not yet accused may be wider but certainly not narrower.” He argues that persons under investigation must benefit from all those rights established for the accused which may be applicable to their situation, see S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003, pp. 48-50.
such an extension “seems logical and indeed necessary.”\footnote{1502} Such argumentation seems to be more of a \textit{de lege ferenda}.

As the Trial Chamber acknowledged in \cite{Karemera et al.}, there is a close link between the right to be assisted by counsel and the right to be informed about the allegations.\footnote{1503} Indeed, it is difficult for a suspect to decide whether to waive or exercise the right to counsel if the suspect is not generally made aware of the allegations against him or her.\footnote{1504} In \textit{casu}, the Chamber expressed its doubt about whether a suspect, who had no knowledge about the charges or provisional charges against him, was in an \textit{informed} position to waive his right to counsel or to answer questions put to him during his interview.\footnote{1505} In \cite{Haraqija and Morina}, the Chamber took into consideration that the suspect “was informed of the factual basis for the allegations against him,” when assessing the decision of the suspect Morina to proceed with the questioning while unrepresented.\footnote{1506} In a similar vein, the Appeals Chamber held that a suspect should be informed of the ‘nature of the investigation’ prior to an interview in order to make an informed decision about the waiver of his rights.\footnote{1507}

Other case law does not seem to put such a duty on the Prosecutor. In these instances, the reasoning suggests that an individual is in an informed position to waive the right to counsel so long as he or she is informed that he or she is a suspect, responsible for committing acts...
which are chargeable under the tribunal Statute.\textsuperscript{1508} In Delalić, the Trial Chamber stated that it was not necessary for the Prosecution to inform a suspect of the "[f]acts on which [their] suspicions were based."\textsuperscript{1509} While the aforementioned case law may be welcomed as broadening suspects’ rights, the basis and source of such a right remains unclear. In Haraquija and Morina, the Trial Chamber first took the fact that Morina was informed about the factual allegations against him into consideration and subsequently rejected the Defence’s argument that the obligation to inform the suspect of the nature and cause of the charge against him under Article 14 (3) (a) could be applied to the questioning of suspects.\textsuperscript{1510} The question remains as to where the Chamber derived such a right to be informed from.

Perhaps, this right for suspects to be informed of the charges or allegations derives from international human rights norms. Human rights law embodies the right that everyone ‘charged with’ or ‘accused of’ a criminal offence must be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation or charge.\textsuperscript{1511} As explained above, however, it remains unresolved what the precise boundaries of this right are.\textsuperscript{1512} Whether it follows from human rights law that a suspect should be informed about the allegations against him or her depends on the moment when a person is ‘charged’. The right to be informed could be interpreted as applying only when a person is formally charged. Such an interpretation would mean that the Prosecution would be able to question a suspect as long as they wanted without informing him or her about the allegations, so long as no confirmation of the charges is sought.\textsuperscript{1513} However, it was discussed how the ECtHR has preferred a substantial interpretation of the term ‘charge’. Hence “whilst "charge",\

\textsuperscript{1508} See supra, Chapter 4, IV.1.1; see for example, ICTY, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, Prosecutor v. Delalić et al., Case No. IT-96-21-T, T. Ch., 9 October 1996, par. 12; ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, Prosecutor v. Popović et al., Case No. IT-03-88-T, T. Ch. II, 25 October 2007, par. 32.
\textsuperscript{1509} ICTY, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized from the Accused Zejnil Delalić, Prosecutor v. Delalić et al., Case No. IT-96-21-T, T. Ch., 9 October 1996, par. 11 (the Chamber adds that "[t]here is nothing in Rule 42 or in any other Rule which requires such disclosure at that stage of the investigation. All that is necessary under Rule 42 is that the suspect be informed of his rights as set out in that Rule").
\textsuperscript{1510} ICTY, Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence, Prosecutor v. Haraquija and Morina, Case No. IT-04-84-R77.4, T. Ch. I, 28 August 2008, par. 29-30.
\textsuperscript{1511} See in particular Art. 14 (3) (a) ICCPR, Art. 6 (3) (a) ECHR and Art. 8 (2) (b) ACHR. While the ICCPR and the ACHR speak of a right of the accused to know the charges against him, the ECHR speaks of a right for the accused to be informed about the nature and cause of the accusation against him.
\textsuperscript{1512} See supra, Chapter 4, II.1.4.
for the purposes of Article 6, may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instances take the form of other measures which carry the implication of such an allegation and which, likewise, substantially affect the situation of the suspect.”

It was discussed how a person may already be ‘charged’ when an individual makes self-incriminating statements during questioning leading the investigators to suspect the person’s involvement in a crime. With regard to the comparable right under Article 14 (3) (a) ICCPR, the General Comment on Article 14 notes that “information must be provided with the lodging of the charge or directly thereafter, with the opening of the preliminary investigation or with the setting of some other hearing that gives rise to official suspicion against a specific person.” According to NOWAK, “charge” does not merely refer to the formal act of lodging a complaint but rather to “the date on which state activities substantially affect the situation of the person concerned. This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as arrest.”

The ECtHR has underlined the close link between the right to be informed about the charge or accusation and the right to prepare a defence. The latter right serves as a yardstick to interpret the right to be informed about the accusation under Article 6 (3) (a). The fact that an accused has already been questioned at length will, according to the ECtHR, have an influence on the level of information that is required.

It appears that it is difficult to abstractly determine the precise moment when a person becomes ‘charged’ and should be informed about the nature and cause of the accusations. However, since the ECtHR links this right with the right to prepare a defence, it is clear that

1514 ECtHR, Corigliano v. Italy, Application No. 8304/78, Judgement of 10 December 1982, par. 34.
1515 See supra, Chapter 4, II.1.4.
1519 ECtHR, Kamasinski v. Austria, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989, par. 80 (“Previously Mr Kamasinski had been questioned at length and in the presence of interpreters about the suspected offences, firstly by the police and then by the investigating judges. On this basis alone he must have been made aware in sufficient detail of the accusations leveled against him”).
this right may only have a limited meaning during the evidence gathering process.\textsuperscript{1520} TRECHEL convincingly reasons that, since the obligation is to inform the accused \textit{in detail} about the allegation, such information cannot be given at the beginning of an investigation as the very purpose of the investigation is to gather evidence.\textsuperscript{1521} Such argumentation is confirmed in \textit{Kamasinski}, where the Court seems to have interpreted the term `accusation' under Article 6 (3) (a) as referring to the indictment.\textsuperscript{1522}

\textbf{IV.3.2. The International Criminal Court}

Every \textit{accused} should be promptly informed in detail about the nature, cause and content of the charge, in a language which the accused fully understands and speaks.\textsuperscript{1523} Unlike the \textit{ad hoc} tribunals and the SCSL, the accused should not only be informed about the nature and cause, but also about the `content' of the charge.\textsuperscript{1524} Some have argued that while no meaningful difference seems to exist between the `cause', which refers to the material facts, and the `content' of the charge, the latter may include a “message of exhaustivity."\textsuperscript{1525}

For \textit{suspects}, no explicit right to be informed about the allegations against him or her has been included in the Statute or the Rules. Under Article 55 (2) (a), there is only an obligation for the Prosecutor to inform the suspect that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the Court. It is doubtful as to whether such an obligation also includes a duty to inform the suspect about the nature and cause of the allegations against him or her.\textsuperscript{1526} Nevertheless, when the suspect has been arrested prior to

\begin{itemize}
\item \textsuperscript{1520} Although it can be argued that the information of the allegations at that early stage provide the suspect with a possibility to influence the decision whether or not charges will be laid.
\item \textsuperscript{1522} ECtHR, \textit{Kamasinski v. Austria}, Application No. 9783/82, Series A, No. 168, Judgment of 19 December 1989, par. 79.
\item \textsuperscript{1523} Article 67 (1) (a) ICC Statute.
\item \textsuperscript{1524} See ICTY, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, \textit{Prosecutor v. Simić}, Case No. IT-95-9-T, T. Ch. II, 11 March 2003, par. 6.
\item \textsuperscript{1526} Some authors seem to interpret this provision as to also include a duty to inform the suspect about the nature and cause of the allegations against him or her. For example, SAFFERLING argues that Article 55 (2) (a) includes information as to the crime(s) the person is believed to have committed as well as its (their) legal classification. Hence, the suspect has a right to be at least informed about the nature of the charges. See C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 291. \textit{Contra}, consider the following statement of Judge Fulford in the \textit{Luhanga} case: "Isn't the essence of the point you're making that under 55(2)(a) it says is that the individual has a right to be informed that there are grounds to
the first interrogation, he or she will already have been informed of any allegations through
the warrant of arrest. Alternatively, the suspect will already have been informed about the
allegations when the interrogation takes place after the suspect’s initial appearance following
either a summons to appear or a voluntary appearance. As noted by ALAMUDDIN, the
suspect’s right to be informed about their status may hamper investigative efforts where these
suspects are senior government officials. Hence, a careful planning may be required of the
timing of the interrogation of these suspects.

IV.3.3. Internationalised criminal courts and tribunals

Also all internationalised criminal tribunals under review provide for certain information
duties vis-à-vis the suspect or accused person on the (provisional) charges. First, according to
the ECCC Internal Rules, the suspect and the charged person enjoy the right to be informed
about charges brought against him or her. At the SPSC, the suspect and the accused person
had to be informed in detail, in a language he or she understands, of the nature and cause of
the charges. However, there was no indication that the persons should be ‘promptly’ so
informed.

Finally, at the STL, the suspect should be informed, prior to the interrogation, that there are
grounds to believe that he or she has committed a crime within the STL’s jurisdiction. The
same right applies when an accused is questioned. However, the amount of information
required before any questioning can take place differs. It follows from Article 16 (4) (a) STL
Statute that the accused should be informed promptly and in detail in a language which he or
she understands of the nature and cause of the charge against him or her.

believe? There is nothing within the article that indicates that, as well as being informed of there being grounds,
that the evidence backing up the grounds has to be provided to the person in question. Now I think that is, as it
were, fairly clear from the article.” See ICC, Transcript, Prosecutor v. Lubanga Dyilo, Situation in the DRC,
1527 Articles 58 and 59 ICC Statute, Rule 117 ICC RPE.
1528 A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.),
1529 Rule 21 (1) (d) ECCC IR, compare with Article 35 new (a) ECCC Law for accused persons.
1530 Rule 85 STL RPE.
1531 Article 15 (a) STL Statute, Rule 65 (A) (i) STL RPE (as amended November 2010).
1532 Rule 85 STL RPE.
IV.4. Right to the free assistance of an interpreter

IV.4.1. The ad hoc tribunals and SCSL

The Statutes of the ad hoc tribunals guarantee that every suspect has the right to necessary translation into and from a language he can speak or understand. Rule 42 (A) (ii) ICTY, ICTR and SCSL RPE encompasses a suspect’s right to have the free assistance of an interpreter when he or she cannot speak or understand the language that is used during the questioning. Similar safeguards apply when an accused is questioned. Such a right is in line with obligations in international human rights law. There is no case law by the ad hoc tribunals or the SCSL directly concerned with the specific issue of assistance by an interpreter during questioning. Therefore, one can assume that this minimum guarantee during questioning has been a less problematic or less contested issue. This does not mean that language problems as such have not been a subject of litigation before these tribunals. It suffices to look at the extensive case law to understand its importance.

The ICTY jurisprudence provides us with some guidance as to the proper understanding of the interpreter’s role during questioning. The Trial Chamber reiterated that the interpreter acts as an officer of the Tribunal and that his or her role during questioning is that of “a third party in the furtherance of the administration of justice.” His or her function is merely to pass information to one party what the other party has said in the proceedings. An interpreter is in no way obligated to keep a record of what either party says.

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1533 Article 18 (3) ICTY Statute and Article 17 (3) ICTR Statute.
1534 Article 20 (4) (f) ICTR Statute, Article 21 (4) (f) ICTY Statute and Article 17 (4) (f) SCSL Statute.
1535 Consider e.g. ICTY, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, Prosecutor v. Delalić et al., Case No. IT-96-21-T, T. Ch., 25 September 1995; ICTR, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, Prosecutor v. Muhimana, Case No 95-1B-1, T. Ch. I, 6 November 2001; ICTY, Order for the Translation of Documents, Prosecutor v. Pribić et al., Case No. IT-04-74-PT, PTJ, 17 January 2006; ICTY, Decision on the Defence Counsel’s Request for Translation of all Documents, Prosecutor v. Lipićić, Case No. IT-00-41-PT, T. Ch. II, 20 November 2002, p. 3; see also ICTY, Order on Translation of Documents, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, 6 March 2003; ICTY, Decision on Defence Motion Concerning Translation of All Documents, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, T. Ch. I-A, 18 October 2001; ICTY, Decision on Motion to Translate Procedural Documents into French, Prosecutor v. Talić, Case No. IT-98-36-PT, T. Ch. II, 16 December 1999.
1536 ICTY, Decision on the Motion Ex Parte by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, Prosecutor v. Delalić, Case No. IT-96-21-T, T. Ch., 8 July 1997.
1537 Ibid., par. 10.
1538 Ibid., par. 19.
IV.4.2. The International Criminal Court

The right to have the assistance of a competent interpreter free of charge and such translations as necessary for the requirements of fairness, if such person is questioned in a language other than the language the person fully understands and speaks, is provided for all persons questioned during the investigation.\(^{1539}\) The right seems to be broader than corresponding human rights provisions in that it requires a ‘competent’ interpreter and interpretation and translation if questioned in another language than the person fully understands and speaks.\(^{1540}\) Consequently, the mere fact of being conversant with a language does not seem to be sufficient. The Appeals Chamber clarified in the Katanga and Ngudjolo Chui case that “[a]n Accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer.”\(^{1541}\) In addition, ‘such translations as are necessary to meet the requirements of fairness’ should be provided for. This does not require translation in the native language of the suspect or the accused.

The requirement to have documents translated in order to be used during questioning is also in line with human rights jurisprudence. Both the ECtHR and the HRC have interpreted the right to the free assistance of an interpreter so as to apply to documentary materials as well. More precisely, the ECtHR ruled that “construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.”\(^{1542}\) No translation of all items of written evidence or official documents in the procedure is required; fairness is used as a yardstick. Likewise, the Human Rights Committee (HRC)

\(^{1539}\) Article 55 (1) (c) and Article 67 (1) (f) ICC Statute.

\(^{1540}\) Compare with Article 14 (3) (f) ICCPR, Article 6 (3) (e) ECHR and Article 8 (2) (a) ACHR. Human rights law has acknowledged the applicability of this right to the pre-trial phase and to interrogations of a suspect or an accused by the police or by an examining magistrate, see ECtHR, Kamasinski v. Austria, Application No. 9783/82, Judgment of 19 December 1989, par. 74; M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR commentary (2nd edition), Kehl am Rein, Engel, 2005, p. 344.

\(^{1541}\) See ICC, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Defence Request Concerning Languages”, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07, A. Ch., 27 May 2008, par. 61.

\(^{1542}\) ECtHR, Leudicke, Belkacem and Koç v. Germany, Application Nos. 6210/73; 6877/75; 7132/75, Judgment of 28 November 1978, par. 48; ECtHR, Hermi v. Italy, Application No. 18114/02, Judgment of 18 October 2006, par. 69.
confirmed that the accused’s right to translations of documents does not extend to all
documents in the case file.\footnote{1543} However, the Committee considered this right in light of the
accused’s right to have adequate time and facilities to prepare a defence.\footnote{1544} Since the ECtHR
and the HRC both refer to fairness as a yardstick, this reference to the ‘requirements of
fairness’ by the ICC Statute has been criticised insofar that “it does not offer any guidance on
its actual meaning.”\footnote{1545} It remains to be seen what translations the Court’s jurisprudence will
require to meet the requirements of fairness.

Human rights law can offer some guidance as to what is meant by a \textit{competent} interpreter.\footnote{1546}
\textit{Griffin v. Spain} established that the free assistance of an interpreter implies a certain
minimum quality of interpretation in order to ensure a fair trial.\footnote{1547} According to the ECtHR,
the person being questioned should be able to understand the questions that are put to him and
be able to make him or herself understood in his replies.\footnote{1547}

IV.4.3. Internationalised criminal courts and tribunals

Lastly, all internationalised criminal tribunals provide for the suspect’s or accused person’s
right to the free assistance of an interpreter in case they do not speak or understand the
language used in the interrogation. The ECCC’s procedural framework provides for a
suspect’s right to interpretation into and from a language they can speak and understand ‘as
necessary’.\footnote{1548} Similarly, accused persons enjoy the general right of the free assistance of an
interpreter if the accused person cannot understand or speak the language used in court.\footnote{1549} In
a similar vein, an interpreter had to be provided free of charge, if the suspect or accused could
not understand or speak one of the official languages of the SPSC.\footnote{1550} Nevertheless,
translation problems plagued the SPSC and SCU investigations. One SPSC Judge recalled

1994, par. 9.5.
\footnote{1544} \textit{Ibid.}, par. 9.4. It seems more problematic to include such right to translation of documents into Article 14 (3)
(f) ICCPR as the \textit{travaux préparatoires} show that motions to include the translation of relevant written
documents were rejected. See M. BOSSUYT, \textit{Guide to the Travaux Préparatoires of the ICCPR}, Dordrecht,
\footnote{1545} S. ZAPPALÀ, Human rights in International Criminal Proceedings, Oxford, Oxford University Press, 2003,
p. 50.
April 1995, par. 9.5.
\footnote{1547} ECtHR, \textit{Kamasinski v. Austria}, Application No. 9783/82, Judgment of 19 December 1989, par. 77.
\footnote{1548} Article 24 new ECCC Law.
\footnote{1549} Article 35 new (f) ECCC Law.
\footnote{1550} Section 6.3 (c) TRCP.
that on occasion, statements made by suspects to investigators were clearly not properly transcribed and translated.\footnote{D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 27 (the authors refers to an interview with Judge Samith de Silva).} Finally, the STL Statute and RPE provide the right to the free assistance of an interpreter if the suspect cannot understand or speak the language used for questioning or when the accused person does not understand or speak the language used in Court.\footnote{Rule 65 (A) (iii) STL RPE. Article 15 (d) STL Statute; Article 16 (4) (g) STL Statute.}

IV.5. The right not be subjected to torture or inhuman or degrading treatment

IV.5.1. The ad hoc tribunals and the SCSL

It follows from the application of the prohibition of torture and inhuman or degrading treatment or punishment to the context of criminal proceedings that torture and other forms of moral and physical violence are prohibited during questioning.\footnote{See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as adopted on 10 December 1984, entry into force on 26 June 1987 (Article 15 provides that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as adopted on 26 November 1987, entry into force 1 February 1989, European Treaties Series, No. 126, 1987; Article 7 ICCPR, Article 3 ECHR, Article 5 ACHR, Article 5 ACHPR.} Several accused have filed motions to exclude statements resulting from interrogations because of the alleged use of torture or duress.\footnote{E.g. ICTR, Decision on Defence Motion to Lodge Complaint and to Open Investigation into Alleged Acts of Torture under Rules 40 (C) and 73 (A) of the Rules of Procedure and Evidence, Prosecutor v. Kahligi, Case No. ICTR-97-34-I, T. Ch II, 6 October 1998; ICTR, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali’s Statements to Prosecution Investigators in July 1997, Prosecutor v. Ndaryamhaje et al., T. Ch. II, 15 May 2006, par. 80; ICTR, Decision on “Appeal of Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Investigators in July 1997, Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramunshuho, Case No. ICTR-97-21-AR73, A. Ch., 27 October 2006.} However, there are no instances where one of the ad hoc tribunals or the SCSL found these allegations to be proven. Requiring a video or audio recording—assuming that the recording is executed properly—offers an effective protection against such practices. Regarding the use of evidence obtained through such treatment, the ECtHR held that evidence resulting from torture should always be excluded insofar that it renders the trial unfair.\footnote{ECtHR, Jalloh v. Germany, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 105 (“incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court’s judgment in the Rochin case (see paragraph 50 above), to ‘afford brutality the cloak of law’”); ECtHR, Harutyunyan v. Armenia, Application 37544/97, Judgment (Grand Chamber) of 19 October 2005, par. 134 (“The Court therefore concludes that the respondent State’s failure to guarantee the right to habeas corpus under Article 5 § 3 of the Convention has violated Article 3 of the Convention.”).}
However, in *Jalloh*, the Court left the question open as to whether or not evidence obtained through *inhuman and degrading treatment* automatically rendered the trial unfair; that is, irrespective of the seriousness of the evidence, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial.¹⁵⁵⁶ Later case law has been reluctant when it comes to adopting a rule of automatic exclusion. In *Gäfgen*, for instance, the Court distinguished between *statements* obtained by an act that qualified as inhuman and degrading treatment and *real evidence* obtained by an act qualified as inhuman and degrading treatment.¹⁵⁵⁷ Statements resulting from an act qualified as inhuman and degrading treatment should always be excluded. Using statements obtained in breach of Article 3 ECHR always render the proceedings as a whole unfair. The same does not hold true for the latter category of real evidence, obtained by an act qualified as inhuman and degrading treatment.¹⁵⁵⁸ For this category, it should be shown that the breach of Article 3 had an impact on his or her conviction or sentence.¹⁵⁵⁹ These principles apply irrespective of whether the defendant was the actual victim of such conduct.¹⁵⁶⁰

¹⁵⁵⁶ ECtHR, *Jalloh v. Germany*, Application No. 54810/00, Judgment (Grand Chamber) of 11 July 2006, par. 106-107. Note that the same factors are referred to in *Gäfgen*, but the reference to the 'seriousness of the offence', which had been criticised in the literature, is not repeated. See ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, par. 167.


¹⁵⁵⁹ Ibid., par. 178. This holding was criticized by a minority of judges. They convincingly argued that "criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings. […] Instead of viewing the proceedings as an organic whole, the majority's modus operandi was to compartmentalise, parse andanalyse the various stages of the criminal trial, separately, in order to conclude that the terminus arrived at (conviction for murder warranting maximum sentence) was not affected by the route taken (admission of evidence obtained in violation of Article 3). Such an approach, in our view, is not only formalistic; it is unrealistic since it fails altogether to have regard to the practical context in which criminal trials are conducted and to the dynamics operative in any given set of criminal proceedings. See ECtHR, *Gäfgen v. Germany*, Application No. 22978/05, Judgment (Grand Chamber) of 1 June 2010, Reports 2010, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, par. 4-6.

IV.5.2. The International Criminal Court

Article 55 (1) (a) prohibits the use of coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment during interrogation. This formulation surpasses the protection offered by the procedural frameworks of the ad hoc tribunals and the SCSL. However, it was previously discussed how the right to remain silent and as well as the right to not be compelled to incriminate oneself have been interpreted by the jurisprudence of the ad hoc tribunals and the SCSL as also including prohibition of forms of ‘coercion, duress or threats’ when conducting interrogations.

IV.5.3. Internationalised criminal courts and tribunals

The ECCC Internal Rules prohibit any form of inducement, physical coercion or threats thereof during an interview, whether directed against the interviewee or others.\textsuperscript{1561} The consequence of using such inducement, physical coercion or threats is the exclusion of the evidence before the Chambers and the disciplining of the person responsible. Hence, there are severe consequences attached to such behaviour, including the automatic exclusion of the evidence so obtained.

The TRCP provided that no coercion, duress, threats, torture or other forms of cruel, inhuman or degrading treatment or punishment could be used against the suspect or the accused.\textsuperscript{1562}

Finally, the STL does not provide for an explicit prohibition of forms of oppressive conduct including coercion, duress, threats, torture or other forms of cruel, inhuman or degrading treatment. Nevertheless, it clearly follows from the RPE that evidence is not admissible when gathered in violation of international human rights standards or by means of torture.\textsuperscript{1563} The prohibition of torture or other forms of inhuman or degrading treatment is narrower in the STL RPE than the protection offered by provisions of the ICC, ECCC or SPSC, which include forms of coercion, duress or threats. Hence, it is recommended that such behaviour is explicitly prohibited by the RPE.

\textsuperscript{1561} Rule 21 (3) ECCC IR.
\textsuperscript{1562} Section 6.3 (i) TRCP.
\textsuperscript{1563} Rule 162 (B) STL RPE.
IV.6. Recording Procedure

IV.6.1. The ad hoc tribunals and the SCSL

§ Recording of the interview

The procedure for conducting interrogations is detailed in Rule 43 of the ICTY, ICTR and SCSL RPE.\textsuperscript{1564} Requiring audio or video recording offers an important safeguard against any pressure that the suspect could be subjected to. The suspect should be informed about the fact that the questioning is being recorded.\textsuperscript{1565} He or she should be given the opportunity to clarify anything that was said or add anything that he or she would like.\textsuperscript{1566} The time at which the interrogation concludes should be noted. The fact and time of breaks should be recorded along with the time that the recording is resumed. One of the original tapes should be sealed in the suspect’s presence.\textsuperscript{1567} After the interrogation, the content of the recording should be transcribed either ‘as soon as practicable’ (ICTR/SCSL)\textsuperscript{1568} or if the suspect becomes an accused (ICTY).\textsuperscript{1569} There is no definite time limit within which this must be accomplished.\textsuperscript{1570}

Although these provisions may be regarded as mere technicalities, they provide important safeguards to the suspect or the accused. Recording the interrogation allows the precision of an interview statement or translation to be challenged. Furthermore, it offers the possibility to effectively control the voluntariness of the interview. In this regard, recording interviews is the most suitable means of preventing undue pressure being put on the person being interrogated. Video recording would even be preferable as this makes it possible to assess the environment in which the statement was taken as well as the interviewee’s body language.\textsuperscript{1571}

\textsuperscript{1564} While Rule 43 concerns the recording of the questioning of suspects, it follows from Rule 63 (B) ICTY, ICTR and SCSL RPE that the provision also applies where accused persons are interrogated.

\textsuperscript{1565} Rule 43 (i) ICTY, ICTR and SCSL RPE.

\textsuperscript{1566} Rule 43 (iii) ICTY, ICTR and SCSL RPE.

\textsuperscript{1567} Rule 43 (ii) and (v) ICTY, ICTR and SCSL RPE.

\textsuperscript{1568} Rule 43 (iv) ICTR and SCSL RPE.

\textsuperscript{1569} Rule 43 (vi) ICTY RPE, as amended on 12 December 2002.

\textsuperscript{1570} ICTY, Decision on Lukić Request for Reconsideration of the Trial Chamber’s Admission into Evidence of his Interview with the Prosecution (Exhibit P948), Prosecutor v. Milutinović et al., Case No. IT-05-87-T, T. Ch., 22 May 2008, par. 10.

\textsuperscript{1571} ICTY, Judgement, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 16 October 2007, Separate Opinion of Judge Schomburg, par. 2 (according to Judge Schomburg, these technical rules are all the more important as “[i]t is a general observation in criminal proceedings that summaries, replacing the question/answer standard, and even the best translation or interpretation are among the most significant sources of error in the fact-finding process”).
Ideally, recording should be required for all interviews, regardless of the status of the person concerned and regardless of the position of the interrogator. Again, however, the changing status of persons during investigations can lead to uncertainties regarding the procedural safeguards that should be respected.

§ Breaks in the recording

The Rules do not explicitly require that an explanation be given as to what occurred during a break in the interview recording. However, the ICTY Appeals Chamber in Halilović stated that if a matter is discussed which potentially affects the non-voluntariness of the interview during a break, the interview should recommence with a full explanation of what occurred during the break.1572 In casu, it was clear that the recording was stopped to address an on-the-record question by the accused and his counsel on certain agreements reached with the Prosecutor.1573 The accused and his counsel asked for a break in order to clarify whether these agreements were to be respected. In the Sesay case, the SCSL Trial Chamber was faced with a similar situation where a Prosecution investigator testified that his role throughout the interviewing process had been to talk to the accused during the breaks and to ensure the continuation of cooperation “by continuously restating and reaffirming what the Prosecution could do for him in exchange for his cooperation.”1574 No recordings were made of what was said during the breaks, leaving the Chamber with no evidence as to what was said, the manner it was said and the way it was perceived by the accused person.1575 The Chamber endorsed the ICTY Appeals Chamber’s reasoning and concluded that “this irregularity raises a serious and reasonable doubt as to the voluntariness of the Accused’s statements recorded by the Prosecution.”1576 Consequently, as a rule, every time the recording is interrupted, the interrogators should analyse whether the discussion during the break possibly affects the voluntariness of the interview and, if so, should start the recording with a full explanation of break discussions.

1572 ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, par. 41.
1573 The accused alleged that the Prosecution agreed for the indictment to be withdrawn if he provided information showing that that course was warranted.
1574 See SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 30 June 2008, par. 47 (“Mr Morisette deemed it necessary to keep repeating the quid pro quo assurances because there had been a fear that he was going to stop cooperating”).
1575 Ibid., par. 48.
1576 Ibid., par. 51.
IV.6.2. The International Criminal Court

§ Recording procedure

A record should be made of every formal statement made by a person during the criminal investigation (as well as questioning in connection with trial proceedings). A distinction is made between records of questioning in general (Rule 111 ICC RPE) and recordings in particular cases (Rule 112 ICC RPE). These ‘particular cases’, which require a video or audio recording, relate to the situations in which Article 55 (2) of the ICC Statute applies or when a warrant of arrest or summons to appear has been issued. As a consequence, for all interrogations of persons who may have committed crimes within the jurisdiction of the Court, a recording will be required. Additionally, the Prosecutor is free to apply this procedure in other cases, “in particular where the use of such procedures could assist in reducing any subsequent traumatisation of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence.”

Upon request by the Prosecution, the Pre-Trial Chamber may order that this procedure be applied in case there is a ‘unique investigative opportunity’. It seems that the Pre-Trial Chamber may not propriu motu order this procedure to be followed in case of a unique investigative opportunity. Overall, this provision is a welcome addition as it favours a wide application of the recording procedure.

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1577 Rule 111 ICC RPE. Rule 112 is lex specialis to Rule 111, meaning that when the Prosecution records the questioning of a person in accordance with Rule 112, it is not required to create an additional record of the person's statements under Rule 111. See ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber IV of 12 September 2011 Entitled "Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation", Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09-295, A. Ch., 17 February 2012, par. 26 – 28. The Appeals Chamber thereby reversed the decision of Trial Chamber IV, which held that a written and signed record of the statements of witnesses questioned in accordance with Rule 111 is always required. Trial Chamber IV in turn based its conclusion on the earlier holding in ICC, Decision on the Prosecution Request for the Addition of Witness P-219 to the Prosecution List of Incriminating Witnesses and the Disclosure of Related Incriminating Material to the Defence, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-1553. T. Ch. II, 23 October 2009, par. 35 (“The Chamber is aware of the specific procedure laid down in rule 112, but it is of the view that this concerns an additional measure of protection for persons questioned under article 55(2) and not an alternative to the procedure laid down in rule 111”).

1578 Rule 112 (4) ICC RPE. The Rule further provides that the Prosecutor may make an application to the relevant Chamber.

1579 Rule 112 (5) ICC Statute only refers to Article 56 (2) ICC Statute (measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence, requested by the Prosecutor) but does not refer to Article 56 (3) (which includes the possibility for the Pre-Trial Chamber to consult with the Prosecutor on the taking of such measures and the possibility for the Pre-Trial Chamber to take such measures propio motu).
not only to respect the rights of suspects and accused but also to honour the specific interests of victims and other persons in a vulnerable position.\textsuperscript{1580}

The conduct of questioning is regulated in more detail than before the ad hoc tribunals and the SCSL.\textsuperscript{1581} The waiver of the right to assistance by counsel should be recorded. Similar to the procedural regime of the ad hoc tribunals, interruptions should be recorded as well as the time of interruptions and resumptions.\textsuperscript{1582} Before concluding the questioning, the person questioned should be given an opportunity to clarify anything said or add anything they would like to the statement. The time at which the questioning concludes should also be noted.\textsuperscript{1583} The tape should be transcribed ‘as soon as practicable after the conclusion of the questioning’ and the suspect or accused should be given a copy of the transcript and the recorded tape.\textsuperscript{1584} The original tape is to be sealed in the presence of the accused or suspect and his or her counsel, if present, and be signed by them and the Prosecutor.\textsuperscript{1585}

§ Waiver of the right to video recording

The suspect or accused person can object to audio or video recording. The person should be informed about this possibility and the answer should be noted in the record of the questioning.\textsuperscript{1586} The suspect or accused person can speak in private to his or her counsel before responding.\textsuperscript{1587} However, the Prosecutor can question a suspect or accused person without audio or video recording in exceptional circumstances that prevent such recording.\textsuperscript{1588} The reasons that prevent such recording should be stated in writing. If the person being questioned objects to recording the interview or if circumstances prevent a recording, a record


\textsuperscript{1581} In that regard, Friman recalls that at the time the proposals were discussed, some delegations thought they were “excessively detailed.” See H. FRIMAN, Investigation and Prosecution, in R.S. LEE (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, Ardsley, Transnational Publishers, 2001, p. 514.

\textsuperscript{1582} Rule 112 (1) (b) and (c) ICC RPE.

\textsuperscript{1583} Rule 112 (1) (d) ICC RPE.

\textsuperscript{1584} Rule 112 (1) (e) ICC RPE.

\textsuperscript{1585} Rule 112 (1) (f) ICC RPE.

\textsuperscript{1586} Rule 112 (2) ICC RPE.

\textsuperscript{1587} Rule 112 (1) (a) ICC RPE.

\textsuperscript{1588} Rule 112 (1) (a) ICC RPE.
shall be kept of the interrogation, in accordance with the procedure applicable to the questioning of witnesses (Rule 111 ICC RPE).1589

At the time of the adoption of the RPE, some proposals were made that the same procedure should be respected during questioning by national authorities, except where this is prohibited under national law.1590 However, such a provision would create new obligations for the states which are not provided for in the Statute. Nevertheless, the possibility exists for the Court to request that a national state conducts the recording of questioning in accordance with Rule 112.1591

IV.6.3. Internationalised criminal courts and tribunals

The rules of the internationalised criminal courts and tribunals on the conduct of the interrogations closely resemble the procedural safeguards of the other, international criminal tribunals. The Internal Rules of the ECCC provide that audio or video recording and a written record are required whenever possible along with the possibility for the suspect or charged person to object to such a recording.1592 A waiver of the right to assistance by counsel should be recorded.1593 Breaks in the recording and the time thereof should be explained and the person should be given an opportunity to clarify what was said or to add anything.1594 Similar to the ICC procedure, the Co-Prosecutors or Co-Investigative Judges may choose to apply audio or video recording to other persons, in particular when such recording would assist in reducing subsequent traumatisation.1595 Further in line with the ICC procedure is the possibility for the questioning to proceed without audio or video recording when circumstances prevent such recording from taking place.1596 Unlike the procedures of other tribunals, the questioning of deaf or mute persons is regulated in detail.1597

1589 See Rule 111 ICC RPE. In such case, the person interviewed should be given a copy of his or her statement. See infra, Chapter 5 on the questioning of witnesses.


1591 The Court can do so pursuant to Articles 93, 96 and 99 of the ICC Statute. Note that, as mentioned earlier, the rights of Article 55 (2) ICC Statute also apply in case the questioning is conducted by national authorities.

1592 Rule 25 ECCC IR.

1593 Rule 25 (1) (b) ECCC IR.

1594 Rule 25 (1) (c) and (d) ECCC IR.

1595 Rule 25 (4), compare with Rule 112 (4) ICC RPE, supra, Chapter 4, IV.6.2.

1596 Rule 25 (2) ECCC IR.

1597 Rule 27 ECCC IR.
The importance of the questioning of the charged person by the Co-Investigating Judges is peculiar to the procedural system of the ECCC and in line with the procedural system of a number of civil law jurisdictions. It is important to underline the difference between a ‘charged person’ and an accused person. What is meant by the former is a ‘personne mise en examen’; a person who is ‘put under judicial investigation’. It requires that a suspect be brought before the Co-Investigating Judges and officially informed, pursuant to Rule 55 (4) ECCC IR, that there is clear and consistent evidence that he or she may be criminally responsible for the commission of a crime included in an introductory or a supplementary submission, even where such person were not named in the submission. He or she should thus be informed of the ‘charges’. The Co-Investigating Judges may then interview the charged person during the initial appearance, if he or she agrees or soon thereafter. The charged person can also request to be interviewed him or herself. The Co-Investigating Judges can reject such a request and render a rejecting order stating the factual reasons for such a rejection. The charged person can appeal this rejecting order. Before an interview with a charged person takes place, the Co-Investigating Judges summon the lawyer (if he or she has one) to allow him or her to consult the case file. Apart from this five-day period to prepare for an interview, the Defence has no general right to have adequate time to prepare for the interview. In the Pre-Trial Chamber’s opinion, that refers to the ‘fair trial right’ to have sufficient time to prepare for trial. Since the purpose of an interview with the charged person is to put questions to him or her about what the person knows—and not to respond to

1598 See Rule 58 of the ECCC IR.
1599 According to the Glossary annexed to the Internal Rules, the term refers to any person who is subject to prosecution in a particular case, during the period between the introductory submission and indictment or dismissal of the case; see also G. ACQUAVIVA, New Paths in International Criminal Justice: The internal Rules of the Cambodian Extraordinary Chambers, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 136.
1600 Rule 55 (4) and 57 ECCC IR; ECCC, Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, Case No. 004/07-09-2009-ECCC-OCIJ, OCIJ, 17 May 2013, par. 52; ECCC, Order Concerning the Co-Prosecutor’s Request for Clarification of Charges, The case of Nuon Chea et al., Case No. 002/19-09-2007, OCIJ, 20 November 2009, par. 10.
1601 Rule 57 (2) and 58 ECCC IR. The Judicial Police or Investigators are not allowed to question the Charged Person, see Rule 62 (3) (b) ECCC IR.
1602 Rule 58 (6) ECCC IR.
1603 Rule 58 (1) ECCC IR.
1604 ECCC, Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, The case of Nuon Chea et al., Case No. 002/19-09-2007, PTC, 26 August 2008, par. 45. In casu, no international co-lawyer for the charged person had yet been selected.
accusations---, the right does not apply. The purpose of the interview is not for the charged person to respond to the accusations against him or her.

Similar to other interrogations, the interview with the charged person only takes place in the presence of his or her lawyer, unless the charged person has waived this right. An interview in the absence of counsel is also possible in ‘emergency situations’. These emergency situations relate to situations ‘when there is a high probability of irretrievable loss of evidence while awaiting the arrival of a lawyer, such as the impending death of the charged person’. The charged person’s consent to such questioning is required. The Co-Prosecutors can attend the interview and request that certain questions be put to the charged person by the Co-Investigating Judges. The Co-Investigating Judges decide whether to put the question to the charged person or not. A refusal by the Co-Investigating Judges should be noted in the record.

The rules on how to interview a charged person should be distinguished from (and do in principle not apply to) the adversarial hearing on provisional detention. The Pre-Trial Chamber held that this adversarial hearing is “distinct in its purpose”, as it provides the charged person with a possibility to respond to the request and arguments made by the Co-Prosecutors. An interview of the charged person, on the other hand, is aimed at obtaining a statement from the accused, which could then be used as evidence. Interestingly, however, the Pre-Trial Chamber left the door open for a broad application of the procedural safeguards of Rule 58 on the questioning of a charged person. The Pre-Trial Chamber acknowledged a functional interpretation of Rule 58, which implies that Rule 58 should be applied to any questioning of the charged person, irrespective of the procedure.

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1606 Ibid., par. 47.
1607 Ibid., par. 47.
1608 Rule 58 (2) ECCC IR. In case the lawyer had been correctly summoned but does not appear at the interview, the Co-Investigating Judges can temporarily assign a counsel. This designated counsel should be given sufficient time to review the case file.
1609 Rule 58 (3) ECCC IR.
1610 Rule 58 (4) ECCC IR.
1611 As regulated in Rule 63 IR.
1613 Ibid., par. 17.
1614 Ibid., par. 17.
In case of a confrontation, the same procedural rules apply. During the confrontation, the lawyers of the other parties can also request the Co-Investigating Judges to put certain questions to the charged person.\footnote{Rule 58 (5) ECCC IR.}

The TRCP did not detail the interrogation procedure. Technical rules, such as requiring a video or audio recording to ensure that procedural safeguards were respected during questioning, were lacking. For the fairness of the investigations, this omission may have had important consequences. One Judge of the SPSC suggested that SCU investigators “may have influenced answers or tried to make them ‘look nicer,’” with regard to statements taken during the investigation.\footnote{D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 27 (the author refers to an interview held with Judge de Silva).} It is easy to understand how audio or video recording of the interrogation would have allowed for \textit{ex post} control of the resulting statements.

The SPSC’s practice reveals that the Court made a distinction between using the interview statement during cross-examination and the use of such a statement as evidence. For example, in the case against \textit{Francisco Pedro}, statements made by the accused to the police during the investigation were not admitted into evidence, although the rights of the accused during the interrogation were upheld.\footnote{SPSC, Decision, \textit{Prosecutor v. Francisco Pedro (alias Chico)}, Case No. 1/2001, 22 May 2001, reprinted in A. KLIP and G. SLUITER, Annotated Leading Cases of International Criminal Tribunals, Vol. 13: Timor Leste—The Special Panels for Serious Crimes 2001–2003, Antwerp, Intersentia, 2008, p. 29.} The Court decided that only those statements that were made in front of the Investigative Judge during the investigation and in the presence of the Public Prosecutor as well as the defense counsel could be admitted. Statements that were made in front of the police or the Public Prosecutor could not be admitted.\footnote{Ibid., p. 7.} The Court derived this requirement from the limitations within the TRCP on the use of guilt admissions by the accused.\footnote{For any admission of guilt by the accused, it is necessary that such admission was made before a judge to use this statement in evidence. The court should (1) consider whether the accused understands the nature and consequences of the admission of guilt, and (2) the admission should be made voluntarily after sufficient consultation with defense counsel and the admission should be supported by the facts of the case, see Section 33.4 \textit{juncto} Section 29A.1 TRCP.} Judge Rapoza criticized this view. He held that no such limitation could be read into the TRCP.\footnote{SPSC, Dissenting Opinion on the Defendant’s Oral Motion to Exclude Statement of the Accused, \textit{Prosecutor v. Francisco Pereira}, Case No.34/2003, SPSC, 17 September 2004, pp. 6 –7. See also supra, Chapter 4, IV.2.3.}
The recording procedure relevant to the STL resembles the procedural rules of other tribunals. The technical rules on recording interviews mirror the provisions of the *ad hoc* tribunals and the SCSL. However, a provision was added, in line with the ICC RPE and the ECCC Internal Rules, to allow for the questioning of suspects or accused persons without video or audio recording on an exceptional basis, ‘where circumstances make it absolutely impractical for such recording to take place’. This standard seems lower than the standard in the ICC RPE or the ECCC Internal Rules, which allow for questioning without recording ‘where the circumstances prevent such recording taking place’.

V. COMPARATIVE ANALYSIS: SOME TENTATIVE CONCLUSIONS

The comparative analysis above allows us to make a number of tentative conclusions regarding the procedural rules applicable to the questioning of suspects and accused persons. A number of procedural safeguards could be identified that are shared by all courts and tribunals. The procedural rules encompassing these rights can be earmarked as firmly established in international criminal procedural law. Other procedural rules do not seem to be shared by all jurisdictions under review. While the jurisprudence of the ICC (and the jurisprudence of other courts with international elements) grows every day, it remains to be seen, with regard to a number of procedural rules on the interrogation of suspects and accused persons outlined in the jurisprudence of the *ad hoc* tribunals and the SCSL, whether the ICC will follow this jurisprudence. For example, it was shown how the case law of the *ad hoc* tribunals only prohibits the use of certain forms of inducements during questioning. On the other hand, the ECCC Internal Rules prohibit all forms of inducements. What the ICC’s attitude towards inducements will be remains to be seen.

Unsurprisingly, the procedural framework of all tribunals scrutinised above provide for the prosecutorial power to question suspects and accused persons. In the course of the preliminary investigation at the ECCC, the Co-Prosecutors, the judicial police officers or investigators at the Co-Prosecutor’s request, may summon and interview any person who may provide

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1621 Rule 66 STL RPE.
1622 Rule 66 STL RPE.
1623 Rule 112 (2) ICC RPE, see supra, Chapter 4, IV.6.2. The ECCC Internal Rules include a similar formulation, see Rule 25 (2) ECCC IR, see supra, Chapter 4, IV.6.3.
relevant information on the case. All courts and tribunals provide for the right to have the assistance of counsel during interrogation. This procedural right was not only found in the procedural frameworks of the ICC, the SCSL and the ad hoc tribunals but also in the ECCC and the STL. A potential exception were the SPSC. The TRCP only explicitly mentioned such a right in relation to custodial interrogations. Another notable exception is the possibility for the Co-Investigating Judges of the ECCC to question the charged person without counsel being present in emergency situations. However, in such a situation, the charged person’s consent is required. The suspect or accused should be informed about the right to the assistance of counsel with the possibility of waiving it, provided that such a waiver is given voluntarily. The ad hoc tribunals and the STL are clearer than the ICC in this regard as they also require that the waiver be express (and unequivocal). The RPE of the ad hoc tribunals, the SCSL and the STL provide that if such a waiver is revoked, the questioning should immediately stop and only start again when counsel has been assigned to the suspect or the accused. Neither the ICC Statute nor the RPE explicitly mention such a requirement. It follows from the case law of the ad hoc tribunals that the tribunal should investigate a counsel’s competence if substantive evidence is adduced which questions his or her competence to adequately represent the suspect’s or accused’s interests during the interview.

The right for suspects and accused persons to remain silent during questioning is equally established in international criminal procedure. The right can be waived, if such a waiver is given voluntarily. The suspect or accused should be informed of this right prior to questioning. According to the case law of the ICTY, a presumption exists that a person is informed about the right to remain silent during questioning if he or she is assisted by counsel. The procedural frameworks of the SCSL and the ad hoc tribunals, as well as the STL Statute and RPE, explicitly state that the suspect or accused should be cautioned that his or her statement can be used as evidence at trial. The right cannot be invoked retroactively. It follows from the case law of the ad hoc tribunals that no adverse inferences can be drawn from a suspect’s or accused’s silence. The Statutes of the ICC and the STL, as well as the TRCP, explicitly mention this prohibition. No methods can be used during questioning that lead an accused or suspect to speak where he or she otherwise would have remained silent. Forms of oppressive conduct including coercion, duress or threats as well as torture or other forms of cruel, inhuman or degrading treatment are clearly prohibited. This follows from the

\[1624\] Rule 50 (4) ECCC IR.
case law of the *ad hoc* tribunals, the ICC Statute, the TRCP and the ECCC Internal Rules. While the procedural framework of the STL does not explicitly mention such a prohibition, it is clear from the RPE that evidence is not admissible when gathered in violation of international human rights standards or by means of torture (Rule 162 (B) STL RPE). No clearly established rules can be identified regarding inducements. According to the case law of the *ad hoc* tribunals, inducements that render cooperation involuntary are prohibited. However, it remains to be seen whether, and to what extent, the ICC will consider some forms of inducement during questioning as acceptable. The ECCC clearly prohibit any form of inducement.

Prior to being questioned, the *accused person should be informed in detail, in a language he or she understands, about the nature and cause* (and according to the ICC Statute also the content) of the charges against him or her. Such a right is provided for under the procedural framework of all tribunals reviewed. Most international criminal tribunals (the *ad hoc* tribunals, the ICC and the STL) require that the suspect be informed prior to the start of the interrogation that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court. Where the SPSC and ECCC require that the suspect be informed about the charges at all stages of the proceedings, it is unclear what that means in the absence of confirmed charges. Some case law of the ICTR seems to put a requirement on the Prosecutor to inform the suspect about the provisional charges or allegations.

Furthermore, the suspect or accused person enjoys the *right to the free assistance of an interpreter* during interrogation if he or she cannot understand or speak the language being used. The ICC Statute includes a stronger protection in that it requires a ‘competent’ interpreter and that interpretation be provided to the accused or the suspect if questioned in any language other than the accused or suspect fully understands and speaks. It also includes a welcome addition in the form of a right to such translations prior to questioning insofar that this is necessary to meet the requirements of fairness.

All international criminal tribunals (with the exception of the SPSC) require *audio or video recordings* of the questioning of suspects or accused persons. There is a possibility for the Prosecutor to not make such a recording if the circumstances prevent it from taking place (ICC RPE and the ECCC Internal Rules), or where circumstances make it absolutely impractical (STL RPE).