



Chapter 6

The right to a fair trial

Part I: from investigation to trial

Facilitator's Guide

Learning objectives I

- To familiarize course participants with some of the principal international legal standards that exist concerning individual rights that must be secured during criminal investigations and the application of these standards by the international monitoring organs
- To make the participants aware of the importance of applying these legal standards in order to protect a wide number of human rights in a society based on the rule of law

Learning objectives II

- To create awareness among the participating judges, prosecutors and lawyers of their essential role as pillars of the enforcement of the rule of law, including individual rights during criminal investigations
- To create awareness of the fact that enforcement of fair trial standards is conducive not only to enhancing the protection of human rights sensu lato but also to encouraging economic investment and promoting national and international peace and security

Questions I

- Are you already conversant with the international legal standards and jurisprudence relating to criminal investigations?
- Do they form part of the national legal system in which you work?
- If so, what is their legal status and have you ever been able to apply them?

Questions II

- In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring a person’s human rights at the pretrial stage?
- If so, what were these concerns or problems and how did you address them, given the legal framework in which you are working?
- Which issues would you like to have specifically addressed by the facilitators during this course?

The right to equality before the law and in the law

Key legal texts I

The International Covenant on Civil and Political Rights, article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.

The right to equality before the law and in the law

Key legal texts II

The International Covenant on Civil and Political Rights, article 14 (1):

All persons shall be equal before the courts and tribunals. ...

The right to equality before the law and in the law

Key legal texts III

The African Charter on Human and Peoples' Rights, article 3:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

The right to equality before the law and in the law

Key legal texts IV

The American Convention on Human Rights,
article 24:

All persons are equal before the law. Consequently,
they are entitled, without discrimination, to equal
protection of the law.

The right to equality before the law and in the law

What it means I

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

The right to equality before the law and in the law

What it means II

The principle of equality also means that every human being must have equal access to the courts in order to vindicate their rights (i.e., equal access to justice). In particular, women must have equal access as compared to men, in order to be able to vindicate their rights effectively.

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

Key legal texts I

The International Covenant on Civil and Political Rights,
article 14 (2):

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18 (2):

Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

Key legal texts II

The African Charter on Human and Peoples' Rights,
article 7:

1. Every individual shall have the right to have his
cause heard. This comprises:

[. . .]

(b) The right to be presumed innocent until proved
guilty by a competent court or tribunal.

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

Key legal texts III

The American Convention on Human Rights,
article 8 (2):

Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. ...

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

Key legal texts IV

The European Convention on Human Rights,
article 6 (2):

Everyone charged with a criminal offence shall be
presumed innocent until proved guilty according to
law.

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

Key legal texts V

The Statute of the International Criminal Court,
article 66 (1):

Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

The right to be presumed innocent: The overall guarantee from suspicion to conviction or acquittal

What it means

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

No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle.

The right to respect for one's privacy, home and correspondence

Key legal texts I

The International Covenant on Civil and Political Rights, article 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The right to respect for one's privacy, home and correspondence

Key legal texts II

Universal Declaration of Human Rights,
article 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

The right to respect for one's privacy, home and correspondence

Key legal texts III

The American Convention on Human Rights, article 11:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

The right to respect for one's privacy, home and correspondence

Key legal texts IV

The European Convention on Human Rights, article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to respect for one's privacy, home and correspondence

As to the use of wiretapping, searches and control of correspondence

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

The right to respect for one's physical and psychological integrity

Key legal texts I

The International Covenant on Civil and Political Rights, article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The right to respect for one's physical and psychological integrity

Key legal texts II

The International Covenant on Civil and Political Rights, article 10 (1):

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The Universal Declaration of Human Rights, article 5:

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

The right to respect for one's physical and psychological integrity

Key legal texts III

The African Charter on Human and Peoples' Rights, article 5:

Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The right to respect for one's physical and psychological integrity

Key legal texts IV

The American Convention on Human Rights, article 5:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

The right to respect for one's physical and psychological integrity

Key legal texts V

The European Convention on Human Rights, article 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The right to respect for one's physical and psychological integrity

What it means

Torture and other kinds of maltreatment are prohibited *at all times*, including during criminal investigations: they can never be justified; these are acts that must be prevented, investigated and punished.

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

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

Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled ...
 - (a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them.

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

Key legal texts II

The American Convention on Human Rights, article 8:

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - (b) Prior notification in detail to the accused of the charges against him.

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

Key legal texts III

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

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

Key legal texts IV

The Statute of the International Criminal Court, article 67:

1. In the determination of any charge, the accused shall be entitled ...
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.

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

What it means

Every person charged with a criminal offence must be informed promptly in a language which he understands of the charges against him with details being given as to the facts and the law on which the charge is based. The right to be informed of the charge promptly requires that information is given as soon as the charge is made by a competent authority.

The right to legal assistance

Key legal texts I

The International Covenant on Civil and Political Rights,
article 14:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum rights, in full equality:

[. . .]

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The right to legal assistance

Key legal texts II

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled

[. . .]

(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay.

The right to legal assistance

Key legal texts III

The African Charter on Human and Peoples' Rights, article 7:

1. Every individual shall have the right to have his cause heard.
This comprises:
[. . .]
(c) The right to defence, including the right to be defended by counsel of his choice.

The American Convention on Human Rights, article 8:

2. . . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[. . .]
(d) The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.

The right to legal assistance

Key legal texts IV

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:

[. . .]

(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The right to legal assistance

Key legal texts V

The Statute of the International Criminal Court, article 67:

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

[. . .]

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

The right to legal assistance

Key legal texts VI

The United Nations Standards Minimum Rules for the Treatment of Prisoners, Rule 93:

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

The right to legal assistance

Key legal texts VII

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (1)–(3):

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

The right to legal assistance

Key legal texts VIII

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (4) and (5):

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

The right to legal assistance

What it means

On his or her deprivation of liberty a person has the right of access to legal counsel without delay and to be able to confer with counsel in private.

To have prompt access to a lawyer at an early stage of police investigations may be essential in order to avoid lasting prejudice with regard to the rights of the defence.

The prohibition on self-incrimination and the right to remain silent

Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[. . .]

- (g) Not to be compelled to testify against himself or to confess guilt.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled . . . :

[. . .]

- (g) Not to be compelled to testify against themselves or to confess guilt.

The prohibition on self-incrimination and the right to remain silent

Key legal texts II

The American Convention on Human Rights, article 8:

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[. . .]
 - (g) The right not to be compelled to be a witness against himself or to plead guilty . . .
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

The prohibition on self-incrimination and the right to remain silent

Key legal texts III

The Statute of the International Criminal Court, article 67:

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

[. . .]

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

The prohibition on self-incrimination and the right to remain silent

Key legal texts IV

Guidelines on the Role of Prosecutors, Guideline 16:

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

The prohibition on self-incrimination and the right to remain silent

What it means

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

The duty to keep records of interrogation I

General comment No. 20 (1992) of the Human Rights Committee:

11. The time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial and administrative proceedings.

The duty to keep records of interrogation II

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 23:

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

The duty to keep records of interrogation III

What it means

Detailed records of interrogations must be kept at all times and must be made available to the suspect and his or her legal counsel for purposes such as judicial or administrative proceedings.

The right to have adequate time and facilities to prepare one's defence

Key legal texts I

The International Covenant on Civil and Political Rights, article 14:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
[. . .]
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 18:

3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled . . . :
[. . .]
 - (b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.

The right to have adequate time and facilities to prepare one's defence

Key legal texts II

The American Convention on Human Rights, article 8:

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[. . .]

(c) Adequate time and means for the preparation of his defense.

The right to have adequate time and facilities to prepare one's defence

Key legal texts III

The European Convention on Human Rights, article 6:

3. Everyone charged with a criminal offence has the following minimum rights:

[. . .]

(b) To have adequate time and facilities for the preparation of his defence.

The right to have adequate time and facilities to prepare one's defence

Key legal texts IV

The Statute of the International Criminal Court, article 67:

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

[. . .]

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

The right to have adequate time and facilities to prepare one's defence

What it means

An accused person must always have adequate time and facilities to prepare his or her defence, including effective access to documents and other evidence which are essential for his or her defence, as well as the opportunity to engage and communicate with counsel.