

HUMAN RIGHTS DURING AN INVESTIGATION – – A NEW CONCEPTION WITHIN ICC STATUTE

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Abstract: The protection of human rights during investigation has reached in International Criminal Court Statute a higher quality comparing to the guarantees of the ad hoc criminal tribunals Statutes and of universal or regional human rights instruments (ICCPR, ECHR, AmCHR, Afr.CHRO). A higher standard of protection can be seen for example in the fact how ICC Statute is broadening the protection of persons during investigation. Such a protection is offered not only to the suspect persons but to all other persons to be in contact with the Office of the Prosecutor or cooperating States (according to Part 9 of ICC Statute). It involves so persons to be questioned, to give testimony, persons who could be suspected of a commission of crimes in the jurisdiction of the Court (where however the march of grounds to believe that the person has committed a crime, has not yet been overstepped). The broad protection of all persons during investigation serves as a basis for specialized rights protecting suspect persons then.

The Article 55-1 ICC Statute, as a general rule, was conceived as a reaction to the ad hoc criminal tribunals practice, which using a broad interpretation provided a protection to the persons during investigation. This stipulation provides explicitly to all persons the right not to be compelled to incriminate itself, not to be subjected to any form of coercion, the right to an interpreter and the right not to be subjected to arbitrary arrest or detention. These rights are often more precise in formulation comparing to universal or regional protection stipulations protecting suspected persons. The higher level of protection consists so first in the mere mentioning of these rights for “all” persons during investigation and second in their high inherent formulation quality.

Resumé: Ochrana lidských práv osob v průběhu vyšetřování dosáhla ve Statutu Mezinárodního trestního soudu vyšší úrovně než jakou zaručují statuty *ad hoc* trestních tribunálů a poskytují mezinárodněprávní instrumenty povahy univerzální (MPOOP) i regionální (EÚOLP, AmÚLP, Afr.ÚLPP). Vyšší standard ochrany je spatřován především v tom, že Statut MTS významným způsobem rozšiřuje ochranu osob v průběhu vyšetřování, když tato ochrana je poskytnuta vedle podezřelého i všem ostatním osobám, vůči kterým jsou činěny úkony Úřadu žalobce nebo spolupracujících států (podle části 9 Statutu MTS). Jedná se tedy zejména o vyslychané, svědky, osoby, které by mohly být podezřelé ze spáchání zločinů spadajících do pravomoci Soudu (u nichž však ještě práh důvodného podezření nebyl překročen). Škála těchto tzv. hlavních, obecných práv poskytuje následně základnu pro specifická práva podezřelého v průběhu vyšetřování.

Úprava předložená v čl. 55 odst. 1 Statutu MTS reaguje povětšinou na praxi *ad hoc* tribunálů, které mnohdy širokou interpretací dosahovaly ochrany osob v průběhu vyšetřování. Tak toto ustanovení Statutu *explicite* poskytuje osobám ve vyšetřování právo nebýt nucen vypovídat, právo nabýt vystaven nátlaku, právo na tlumočnicka a právo nebýt svévolně zatčen či zbaven osobní svobody. Přičemž mnohdy jsou tato práva pojata formulačně přesněji než srovnatelná ustanovení poskytující ochranu podezřelému na úrovni univerzálních či regionálních lidskoprávních dokumentů. Vysoká úroveň ochrany tedy spočívá, jednak v samotném přiznání těchto práv „všem“ osobám v průběhu vyšetřování, jednak v jejich samotné kvalitě.

Key words: human rights during investigation, international criminal procedure, rights of persons during investigation, right not to be compelled to testify, right not to be subject to coercion, right for an interpreter, right not to be subjected to arbitrary arrest or detention

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*“Justice must not only to be done,
but must appear to be done”¹*

From the International Military Tribunal in Nurnberg to the International Criminal Court, the protection of the human rights of convicted and accused persons charged with serious crimes has undergone significant development. The greatest step was taken at the Rome Conference in 1998, where States and non-state actors, and associations for the protection of human rights, strengthened the protection of human rights during international criminal procedure in a way that makes such protection comparable to national protection of human rights and exceeds the basic level of procedural rights laid down in international instruments such as ICCPR or regional human rights conventions.

The presented article addresses the issue of the level of protection of human rights during one phase of international criminal procedure, the investigation phase. It begins by illustrating the historical developments in this area and then examines, in a more detailed manner, the regulation set forth in the ICC Statute. A particular accent has been placed on the concept of persons being under the protection of the ICC Statute during an investigation. Finally, the article describes the basic range of specific rights granted to persons during an investigation, without regard to the specific rights of a suspect.

¹ Judgement ICC 0/1 – 0/7 – 572 of June 9, 2008, p. 10.

1. Introduction

Investigation is the first phase of international criminal procedure. Compared to national criminal procedure, this phase of proceedings appears to be much more “hazy”, especially due to the complexity of the circumstances under which the criminal acts concerned tend to be committed.² An investigation is initiated by the Prosecutor on the basis of information on the commission of crimes that fall within the jurisdiction of the International Criminal Court. The procedural mechanisms related to the initiation of prosecution and the position of the Prosecutor in the proceedings are different as well, mainly due to the different circumstances of and reasons for the establishment of *ad hoc* tribunals on the one hand and the International Criminal Court on the other hand.

The jurisdiction of international *ad hoc* tribunals was in this sense restricted *ratione temporis* and *ratione loci* and thus determined the privileged status of the Prosecutors. That is why the Prosecutor is the first to be empowered to initiate criminal proceedings and the Prosecutor has discretionary authority to decide whether to proceed with the investigation or not (Paragraph 1 of Article 18 of the ICC Statute or Article 17 of the ICTR Statute).

This is different in the case of the International Criminal Court, with its universal and permanent jurisdiction, and the fact that it has been provided with “a triggering mechanism”. Under Article 13 of the ICC Statute, the Court can exercise jurisdiction *ratione materiae* if a situation in which it appears that a crime within the jurisdiction of the Court has been committed is referred to the Prosecutor by a Party to the Statute, or the Security Council acting under Chapter VII of the Charter of the United Nations; or if the Prosecutor has initiated an investigation in respect of such a crime by him/herself.³ If the Prosecutor initiates an investigation *motu proprio* and concludes that there are reasonable grounds to continue the investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation (Article 15 of the ICC Statute). In contrast to proceedings before *ad hoc* tribunals, proceedings before the International Criminal Court differentiate between an investigation of a situation and an investigation of a case, the relevant milestone being the issuance of an arrest warrant or the serving of a summons on a specific person.⁴ This act of the Pre-Trial Chamber leads to the splitting of the investigation

² Zappala, S., Rights of Persons during an Investigation, p. 1181, in: A. Cassese, (ed.), *The Rome Statute of the International Criminal Court: a commentary*, Oxford University Press, 2000.

³ As concerns the problems of the “triggering mechanism”, compare, e.g. H. Olásolo, *The Triggering Procedure of the International Criminal Court*, Leiden Boston : M. Nijhoff, 2005.

⁴ Differences in the characteristics of a “situation” and a “case” are described in the decision of the ICC-01/04-101 of January 17, 2006, par. 65: „Les situations, généralement définies par des paramètres temporels, territoriaux et éventuellement personnels, telle que la situation sur le territoire de la République démocratique du Congo depuis le 1er juillet 2002, font l’objet de procédures prévues par le Statut afin de décider si une situation donnée doit faire l’objet d’une enquête pénale, et de l’enquête en tant que telle. Les affaires, comprenant des incidents spécifiques au cours desquels un ou plusieurs crimes de la compétence de la Cour semblent avoir été commis par un ou plusieurs suspects identifiés,

of a specific case – the commission of one or more crimes under the jurisdiction of the Court by one or more suspects - from the comprehensive investigation of a situation determined by “temporal, territorial and eventually personal parameters.” From the point of view of providing procedural guarantees in general, it is not important whether we are dealing with an investigation of a situation which may be terminated if the Prosecutor concludes that there do not exist reasonable grounds to proceed with the case (Article 53 of the ICC Statute) or whether we are dealing with an investigation of a case that may, on the other hand, be closed by a confirmation of charges before the main hearing is opened (Article 61 of the ICC Statute). The difference will become clearer in the course of a more detailed analysis of the individual guarantees relating to human rights.

Procedural guarantees that serve to protect persons during the investigation phase of international criminal procedure have material grounds in universal as well as regional instruments for the protection of human rights. These include, in particular, provisions regulating the protection of persons from torture or inhuman or humiliating treatment (Art. 5 UDHR, Art. 7 ICCPR, Art. 3 ECHR) an arbitrary arrest or detention (Art. 9 UDHR, Art. 9 ICCPR, Art. 5 ECHR) on one hand, and provisions guaranteeing the right to be heard by an impartial and independent court with the right of defence (Art. 6 UDHR, Art. 14 ICCPR, Art. 6 ECHR) on the other hand.

From a historical point of view, it may be pointed out that prior to the existence of post-war military tribunals, the accused were also provided with certain procedural guarantees in the course of an investigation (preliminary rulings), although *explicite* in a very limited scope. In order to ensure a fair trial for the accused (*largo sensu*), under the Charter of the International Military Tribunal, the accused receives a copy of the indictment in the language he or she understands a sufficient period of time in advance of the trial itself.⁵ Further, in the course of an investigation the accused had a right to give an explanation with regard to the charges brought against him or her.⁶ Also, the investigation of the accused was to be conducted in a language or translated into a language that the accused can understand.⁷ Nevertheless, similar provisions cannot be found in the Charter of the Military Tribunal for the Far East. For instance, under Article 9, paragraph b, “the trial and relating proceedings are to be performed in English and in the language of the accused.” Thus, we may conclude that relating proceedings meant the proceedings preceding the trial, i.e. the preliminary examination. Moreover, from the present-day point of view, post-war tribunals were not yet international in nature. In other words, if the proceedings before the tribunal are to be considered a precursor of international criminal

font l'objet de procédures qui ont lieu après la délivrance d'un mandat d'arrêt ou d'une citation à comparaître.”

⁵ Article 16, par. a, of the IMT Charter.

⁶ Article 16, par. b, of the IMT Charter.

⁷ Article 16, par. c, of the IMT Charter.

proceedings,⁸ or of the International Criminal Court, then the investigation that preceded them was the least internationalised⁹ phase, if not an entirely national phase. The Allied Powers (4 individual prosecutors) investigated individual acts separately, though in cooperation with the chief Prosecutor and other Prosecutors (Article 15 of the Charter of the IMT). In the case of military tribunal for the Far East, the situation was even more complicated as the team of Prosecutors consisted of eleven representatives of Allied countries. That is why, be it in the case of the Nuremberg Tribunal or the Tokyo Tribunal, in view of the very general provisions regulating rules for the protection of procedural guarantees of persons during an investigation, individual Prosecutors referred to national practices, adjusted to the specifics of (“internationalised”) criminal investigation practice.¹⁰

Fifty years later, provisions providing persons with procedural guarantees and rights during an investigation have become more precise. Although the procedural rules of *ad hoc* tribunals (Paragraphs 2 and 3 of Article 18 of the ICTY Statute, or Article 17 of the ICTR Statute) in the Statutes themselves are more on the order of an imperfect copy of those in the International Pact, they are amended in the Rules of Procedure and Evidence (Article 42 and 43 of the ITCY RPE or ICTR RPE). Especially extensive in this regard is Article 55 of the ICC Statute (Rights of Persons during an Investigation), which goes much further than universal instruments for the protection of human rights. That is why the analysis of individual procedural guarantees for persons during an investigation will draw on the provisions of the ICC Statute. However, first we need to describe the procedural position of persons during an investigation in general under the new conception of the ICC Statute.

2. The Concept of “a Person during an Investigation”

When examining the concept of a persons during an investigation, we shall refer to the broad and neutral conception as given in Article 55 of the ICC Statute.¹¹ As to the procedural position of a person during an investigation, the concept of person includes all persons upon whom the Court authorities perform procedural action in the course of an investigation (suspected person, witness, victim). The drafters of the ICC Statute have chosen such a broad conception on purpose. The extensive nature and complexity of the criminal acts under the jurisdiction of the International Criminal Court influences and determines the procedural action of the Office of the Prosecutor mainly in the primary phases that follow the initiation of criminal

⁸ Šturma, P., *Nové trendy vývoje mezinárodních trestních tribunál*, In. *Slovensko-české mezinárodnoprávní sympóziium*. 1. ed., Bratislava: Slovenská spol. pre medz. právo pri SAV, 2008, p. 133-152.

⁹ Concerning the concept of internationalised criminal tribunals see, e.g. H. Ascencio, *Les juridictions pénales internationalisées (Cambodge, Kosovo, Sierra Leone, Timor Leste)*, Société de législation comparée, 2006, or see Footnote 8.

¹⁰ Article 16, par. c, of the IMT Charter.

¹¹ The concept of a person during an investigation must be distinguished from the broader conception of participants in the proceedings, Parties to the proceedings – these can include bodies of the Court (Prosecutor, Chambers) or the Victims and Witnesses Unit etc.

procedure (Articles 13 and 15 of the ICC Statute or Article 53 of the ICC Statute). In view of the complex character of international crimes, the Prosecutor performs a large number of acts in order to obtain specific data containing information on when, how and by whom the crime was committed. Frequently, persons who are not *prima facie* regarded as suspected persons happen to give testimony or an explanation. Such a broad conception (of a person) was agreed on during an intergovernmental conference in Rome in 1998. In the draft of the Statute, one could still encounter the term “suspect” or “suspected person”.¹² The definition of “a suspect”, and provisions on the procedural action through which a person becomes a suspect, are not covered in the draft version of the Statute. At the Rome Conference, Article 54 of the draft of the ICC Statute, which covered the duties and rights of a Prosecutor as well as the rights of a suspect, was split into two articles and concurrently the scope of the conception, which originally focused only on the suspect, was broadened so as to also cover “persons under an investigation”.¹³

The present Article 55 of the ICC Statute (Rights of Persons during an Investigation) is based on a two-layer system of procedural rights of persons in the course of an investigation¹⁴. The first paragraph of Article 55 of the ICC¹⁵ Statute guarantees procedural protection for all persons who give testimony or provide an explanation during an investigation, be it victims, witnesses, or persons who could be suspected of having committed crimes within the jurisdiction of the Court. The express absence of the term “suspect” can be explained, as stated by Zappalà,¹⁶ as an attempt not to criminalise persons who are being investigated, in accordance with the presumption of innocence principle. Nevertheless, in practice the term is not strictly omitted.¹⁷ Within the two-layer conception,¹⁸ the second layer of procedural guarantees relates, as stated in the second paragraph of Article 55,¹⁹ to a person with

¹² Draft Statute of the International Criminal Court, A/CONF.183/2/Add.1, Art. 54.

¹³ E.g. Art. 54 par. 4 (a), of the Draft Statute states the power of the Prosecutor to demand the detention of the suspect, victims and witnesses and to demand their interrogation. In Art. 54, the Statute newly introduces the power of the Prosecutor to demand the detention of persons under investigation, victims and witnesses.

¹⁴ The Draft ICC Statute, in Art. 54, par. 10, did not distinguish between these two levels of procedural guarantees, as it proceeded on the basis of a narrower conception of persons during an investigation, one involving a suspect only.

¹⁵ This paragraph begins with “In respect of an investigation under this Statute, a person.”

¹⁶ Zappala, S., *Human Rights in International Criminal Proceedings*, Oxford, 2003, p. 49.

¹⁷ Compare, e.g. the decision of the Appeal Chamber in the *Katanga* case, where the Court concluded that the request not to make information public must be thoroughly considered by the Pre-Trial Chamber with regard to the rights of a suspect. See Decision No. ICC-01/04-01/07 (OA) of May 13, 2008, par. 3.

¹⁸ Zappalà adds to the description of this phenomenon that “guarantees of individual rights in criminal procedure before ICC are built to form a pyramid”. (See Zappala, *op.cit. supra* 2, p. 1200.) Nevertheless, we tend to cling to the two-layer conception due to the fact that it sets clear limitations – the transition between the first and second layer consisting of the conclusion that there exist reasonable grounds to believe that the investigated person committed crimes within the jurisdiction of the Court.

¹⁹ Article 55, par. 2, begins: “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,

regard to whom there is a justified suspicion that he or she has committed a crime within the jurisdiction of the Court. During the internal course of an investigation the investigative authorities shall come to a conclusion or a decision that there are grounds to believe that the person has committed a crime. The above described steps are regulated neither under ICC Statute nor in the Rules of Procedure and Evidence.²⁰ The Prosecutor is not explicitly bound to notify the person of the fact that the investigative authorities arrived at such conclusion, nevertheless, before the interrogation, he or she is, as stated in Article 55, paragraph 2, letter a, duty bound²¹ to notify the person. In view of the fact that the other specific rights applicable during the interrogation of a person are based on the right to be notified (the right to refuse to give testimony, the right to choose a counsel, the right to have counsel present), it may be assumed that the notification cannot be given immediately before the interrogation of a suspect but immediately after the investigative authorities come to the conclusion that the person in question is suspected of having committed crimes within the jurisdiction of the Court.

It should be added that an element common to both levels of procedural rights under Article 55 of the ICC Statute consists of the duty of the investigative authorities (the Prosecutor or domestic authorities) not only to respect the procedural rights of persons during investigation, but to also instruct the persons in question on their rights. Although this duty is expressly stated only in the second paragraph of Article 55, it is logical that such duty also applies to the first paragraph of Article 55 and that if a person is supposed to exercise his or her individual procedural rights during an investigation, he or she must be informed of them.²² This conclusion is supported by the articulation of certain rules within the Rules of Procedure and Evidence of the International Criminal Court.²³

Not only the two-level conception itself, as adopted in the ICC Statute, but also the content of individual levels covering procedural guarantees of persons during an investigation, endorses the basic hypothesis that in international criminal procedure before the International Criminal Court, human rights are much more elaborated and extensive in comparison with the former regulations that were part of the Rules of Procedure of *ad hoc* criminal tribunals. The recognition of this basic hypothesis within the general framework of Article 55 of the ICC Statute is followed by the

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...”

²⁰ A mention of this is to be found in the Regulations of the Office of the Prosecutor (Regulation 41 ROP).

²¹ This duty must be followed by domestic authorities – they are asked to provide cooperation to the Court within the framework of international cooperation or judicial aid.

²² This duty is given by Regulation 40 (Questioning), letter c, ROP.

²³ E.g. Rule 74 RPE in combination with Rule 190 RPE, which provides for the duty of the Court to inform the witness of the content of the prohibition against being compelled to testify in cases where such statements could put the person at risk of criminal proceedings – the duty of the Court to ensure that such notice is provided during an investigation by cooperating national authorities.

recognition of the hypothesis resulting from an analysis of the individual procedural rights of persons during an investigation, be it the first or second degree of protection.

3. The First Level of the Rights of Persons during an Investigation

These include procedural guarantees for all persons against whom the Prosecutor or cooperating national bodies of the Parties to the Statute perform procedural actions during an investigation. The general category of persons includes witnesses, victims, potential suspects and potentially their relatives. Article 55, paragraph 1, of the Statute guarantees four kinds of procedural rights to this category of persons (letters a – d). All four kinds of “general” procedural rights exercised in the course of an investigation are reflected in the treatment of the suspected person and the rights provided to him/her, and in the procedural guarantees for the accused person. Some procedural rights stated in Article 55, paragraph 1, of the ICC Statute are highlighted here on purpose, mainly because there is a strong requirement to observe such rights in the course of an investigation (the right not to be subjected to coercion, duress or threats, torture or other cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest or detention), other rights are to be found in a modified form in Article 55, paragraph 2, or Article 67, paragraph 1, of the ICC Statute (the right to remain silent, the right to be informed in a language that the person can fully understand and that the person is able to speak.) Despite the fact that the regulation of procedural rights within the framework of particular proceedings turns out to be somewhat similar, the analysis of the rights will be carried out separately with regard to the differences that characterize them.

a) The Right not to be Compelled to Testify

The broad concept of the right not to testify differs in character in the various phases of the proceedings. Its validity rests on the fundamental principle of international criminal proceedings – the principle of presumption of innocence. Any interpretation of the right should reflect this principle. That is what happens in Article 55, paragraph 1, letter a, under which a person during an investigation “shall not be compelled to incriminate himself or herself or to confess guilt”. The right not to be compelled to testify (the right to remain silent, the right to refuse to testify) thus relates only to the question of the innocence of an individual, while making use of one of the elements that constitute the presumption of innocence principle – the burden of proof residing with the Prosecutor. From this aspect is derived the right of all persons during an investigation not to incriminate oneself. That is why it is impossible to concur with the view that this right should be interpreted broadly, as a right not to be compelled to cooperate with investigative authorities.²⁴ Logically, the right not to incriminate oneself relating to all persons (victims, witnesses, potential suspects) cannot be expanded to the point where it would constitute an absolute possibility of refusing to provide testimony, thus refusing to cooperate

²⁴ See Zappalà, S., (2003), *op.cit.* p. 55.

with investigative authorities.²⁵ On the other hand, such limitation (the right not to incriminate oneself and the right to refuse cooperation) is one that is difficult to specify precisely due to the complex nature of the criminal activities investigated by a Prosecutor within the framework of a given situation.²⁶

b) *The Right Not to Be Subjected to Coercion*

The right to refuse testimony is directly connected with the broad concept of the right of a person not to be subjected to any form of coercion during an investigation. The provisions in Article 55, par. 1, letter b, of the ICC Statute are built up gradually, starting from the prohibition of “simple” coercion, through the prohibition of duress or threats, to the prohibition of torture or any other cruel, inhuman or degrading treatment or punishment. The interconnection with the right not to testify and the gradual character of the prohibition not to be subjected to coercion is evident in Article 54, paragraph 10, letters e and g, of the Draft ICC Statute. The Draft placed the right not to testify together with the prohibition of coercion, duress or threats and further separately banned torture, or any other cruel, inhuman or degrading treatment or punishment.²⁷ It can be assumed that the separate concept and interconnection of the prohibition of coercion with the finality of the right not to testify was more logical. The present conception of the right not to be subjected to coercion, understood as being linear²⁸ or purely gradual,²⁹ provides a great amount of scope for interpretation, especially as concerns the terms *coercion, duress or threat*. While the prohibition of torture or any other cruel, inhuman or degrading treatment or punishment stands on clear, contractual and customary grounds and has contours that are clearly defined by case-law, the prohibition of coercion, duress and threats are very vague terms that may in practice prove to be in conflict with investigative methods. In the Draft Statute, the original unification of the right of a person not to be compelled to testify, not to be compelled to confess and the right not to be subjected to coercion, duress or treats, provided a clearer definition of the content of the terms coercion, duress or threats due to the overall finality of the provision. Abandoning the interconnection with the right not to testify and adding the right not

²⁵ When the duty to testify arises directly from Rule 65 RPE.

²⁶ The extent of criminal action investigated by the Prosecutor is always a matter of lesser or greater participation on the part of the majority in the given society. It is only a question of the degree of participation whether the crimes committed by a specific suspect will be classified as falling within the category of “the most grave crimes that affect the international community as a whole” and will therefore fall within the jurisdiction of the Court.

²⁷ Draft Statute of the International Criminal Court, A/CONF.183/2/Add.1, Art. 54. par. 10 letter e, specifically g-e) not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat,

- g) not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

²⁸ Prohibition of coercion, duress or threats, torture or other cruel, inhuman or degrading treatment or punishment.

²⁹ Prohibition of coercion, prohibition of duress or threats, prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

to be subjected to coercion, duress or threats to the prohibition of torture has voided the content of the terms and causes difficulties in interpretation and application.

On the other hand, the potential difficulties with the interpretation of the content of the terms coercion, duress or threat do not diminish the importance of this concept within the framework of the protection of the procedural guarantees of persons during an investigation and the standard within which they are treated. The regulation in Article 55, paragraph 1, letter b, indicates a higher level of protection than the protection provided by universal or regional instruments for the protection of human rights.

c) *The Right to an Interpreter*

The right to have an interpreter provided free of charge in cases where a person does not understand or does not speak the language used by the court is also one of the essential procedural rights within the framework of the institution of the right to a fair trial.³⁰ It is basically an “operative” right the assertion of which will enable the implementation of other procedural rights of an individual and, in general, will enable the overall performance of procedural actions before a court and before prosecuting and adjudicating bodies.

The right to an interpreter in international criminal proceedings, as regulated in Article 55, paragraph 1, letter c, of the ICC Statute, is specific in three regards. One of its characteristics is a wide scope of operation of *ratione personae*, another characteristic is the narrow conception of *other language* and the third is the requirement that the translation provided be objective. All these three specifics are, as mentioned further in the text, further proof of the fact that international criminal proceedings provide a broader scope of protection than instruments for the protection of human rights.

The broad scope of operation of *ratione personae* is reinforced by the already mentioned concept of the rights of “all” persons during an investigation.

Substantial interpretation discrepancies relate to the concept of a language *other* than the language the person fully understands. The provision in Article 55, paragraph 1, letter c, of the ICC Statute again offers a broader interpretation than instruments related to human rights. These state the right (of the accused) to an interpreter if he/she does not understand or speak the language used before the court. A similar regulation of the right to an interpreter is to be found in the Statutes of *ad hoc* tribunals.³¹ In addition to this simple/stable differentiation (not understanding, not speaking the language used before the court), the ICC Statute

³⁰ As stated by the Appeal Chamber of the ICC in its decision in the *Katanga* case (ICC-01/04-01/0-522) of May 25, 2008, par. 41. “[...] the right to interpretation, one of the basic rights of the accused, is an essential component of a fair trial.”

³¹ ICTY and ICTR Statutes use the concept of a language that a person understands, the Rules of Procedure and Evidence of *ad hoc* tribunals use the concept of the language of the accused. This dual approach was explained in various decisions related to the right to an interpreter. Compare, e.g. the ICTY decisions in cases *Delalić et. al.* (IT-96-21-T) of September 25, 1996, *Erdemović* (IT-96-22-T) of May 28, 1996.

introduces a quantitative differentiation when it stipulates that a person has a right to an interpreter “if questioned in a language other than a language the person **fully** understands and speaks”.

The precise content of this vague concept has been presented recently in a judgement of the ICC in the *Katanga* case.³² The Appeal Chamber concluded that the content of both versions (English and French) was identical and provided an explication of the phrase “fully understand and speak” the language of the Court, which is a key term of the right to an interpreter as “*condition sine qua non* for the assurance of a just trial”.³³

The third particularity of the right to an interpreter as regulated by the ICC Statute is the determination of the quality of an interpreter and the extent of translation provided. In contrast to international instruments related to human rights and the statutes of *ad hoc* tribunals, which state only the right to an interpreter, if the person/accused does not speak the language of the Court, the ICC Statute focuses on a higher standard in the quality of the interpreter and his/her translation. If a person is “questioned in a language other than a language the person fully understands and speaks, [such person shall] have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness”.

A more significant novel aspect in this provision, one more significant than the quality of an interpreter, is the specification of the extent of translation provided.³⁴ This provides the answer to the basic question that tended to be asked before the *ad hoc* tribunals – to what extent shall the accused be provided with translations of documents and with interpretation at hearings? Does the accused have the right to be provided with a translation of all documents connected with his case or not? An affirmative answer would probably have a strong impact on the right to a trial and the requirement of promptness in criminal proceedings. The ICTY Chamber chose a moderate approach when it stated in its decision that “all evidence that the Parties intend to exhibit during the proceedings must be translated into the language that the accused understands and also into one of the official languages of the Court”.³⁵

The provision regarding the quantity of translations before ICC is aimed at the requirement of fairness. This conception thus allows a broad scope of interpretation and thereby makes it possible to specify the necessary extent of translation on a case-by-case basis. One aspect that could be questioned consists of whether this quantity

³² Decision of the Appeal Chamber in the *Katanga* case (ICC-01/04-01/07-522) of May 25, 2008.

³³ *Ibid.* par. 41.

³⁴ In this regard the official Czech translation of the Statute of Rome published in 84/2009 Sb.m.s., which states that the “translation must be objective”, is completely misleading. A more appropriate translation of the English, French, Spanish or Russian version would be that a person during an investigation has a right to be provided free of charge the assistance of a competent interpreter and all translations necessary to meet the requirements of justice. This formulation gives a better idea of the extent of translations provided than the official wording.

³⁵ Decision of the ICTY Chamber of October 18, 2001 in the case Prosecutor v. Naletilić et Martinović (IT-98-34) Decision on Defence’s motion concerning translation of all documents, p. 3.

relates to a “new” concept of fairness and not to the concept of a fair trial. Hence, we can presume that when interpreting the term of fairness the Court will identify it more or less with the concept of a fair trial and especially with the concept of equality of arms.

d) The Right Not to Be Subjected to Arbitrary Arrest or Detention

The right not to be subjected to arbitrary arrest or detention may be considered the basic manifestation of the right to freedom. In the Draft from 1994³⁶ or the one from 1998,³⁷ this right was not included. This was a result of the very lively discussions conducted at the intergovernmental conference in Rome. It was an attempt on the part of its authors to react to the experience gained from cases resolved before *ad hoc* tribunals³⁸ and the absence of any provision in their Statutes. That is why the right not to be arrested or detained was included in the ICC Statute as an afterthought. This fact to a large extent explains a certain lack of precision in style and the fact that this provision was not incorporated in a systematic manner.

The imprecise style is given by the fact that the wording of Article 55 par. 1 letter d is a copy of Article 9 of ICCPR.³⁹ A strict transposition to ICC Statute. While Art. 9 of ICCPR is based on a relationship between the right to liberty and the general possible exceptions laid down in national laws, the ICC Statute goes on to stipulate, in provisions the wording of which is quite general, that the person during an investigation “shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute”. One can understand why there would be provisions with a general wording in the case of ICCPR, where it would be difficult to converge all national exceptions in a precise and specific manner. But in the case of the ICC Statute, all exceptions, or at least the main ones, could be explicitly mentioned in the wording of that provision.

The same critique applies to the systematic incorporation of this provision, which is more connected with the situation of an arrest warrant (Art. 58), request for arrest and surrender (Art. 91) and provisional arrest (Art. 92). That is why this provision should be interlinked with the specific rights of a suspected person (Art. 55, par. 2), instead of with the first level of the general rights of persons during an investigation.

³⁶ Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Draft Code of Crimes against the peace and security of mankind, A/49/10, Art. 26, par. 6.

³⁷ Draft Statute of the International Criminal Court, A/CONF.183/2/Add.1, Art. 54, par. 10.

³⁸ Dokmanović (IT-95-13a-PT) of October 22, 1997, Todorović (IT-) of September 17, 2001, Nikolić (IT-95-2-PT) of October 2, 2002.

³⁹ Or other similar provisions in regional instruments.

4. Conclusion

The aim of this article was to show, on the example of the rights of persons during an investigation, that the level of protection of human rights before the International Criminal Court is much more developed and higher than in provisions of international instruments of both universal and regional character or in the statutes of *ad hoc* international tribunals. This higher standard of protection can be seen especially in case of the “general” rights of persons during an investigation. The rights of suspected persons are a subject matter for other analysis and were not treated in this article, although they constitute a sort of second level of the basic-general level of rights of persons during an investigation. In the case of all of the examined rights, i.e. the right not to be compelled to testify, not to be subjected to coercion, the right to an interpreter and the right not to be subjected to arbitrary arrest or detention, the level of protection is higher even though there are certain problems ensuing from this broader conception of such rights that could cause difficulties in interpretation.