



COMMISSION OF THE EUROPEAN COMMUNITIES

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GREEN PAPER FROM THE COMMISSION

**Procedural Safeguards for Suspects and Defendants in Criminal Proceedings
throughout the European Union**

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GREEN PAPER FROM THE COMMISSION

Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union

INTRODUCTION

This Green Paper is the next step in the consultation process on achieving minimum common standards of procedural safeguards throughout the Member States in respect of persons suspected of, accused of, prosecuted for and sentenced in respect of criminal offences. It will consider what those minimum common standards could be and the areas in which they may be applied.

It is important for the judicial authorities of each Member State to have confidence in the judicial systems of the other Member States. From May 2004, this will apply to twenty-five rather than fifteen Member States. Faith in procedural safeguards and the fairness of proceedings operate so as to strengthen that confidence. It is therefore desirable to have certain minimum common standards throughout the European Union, although the means of achieving those standards must be left to the individual Member States.

For the past year, the Commission has been carrying out a review of procedural safeguards. To this end, it published a broad Consultation Paper in several languages on the Justice and Home Affairs website in January and February 2002. That paper set out the areas that might become the focus of subsequent measures and asked for comments and responses from interested parties.

At the same time, a questionnaire on various aspects of trial procedures under their own existing domestic system was sent to the Member States.

Using the responses to those two documents, the Commission identified the following areas as appropriate for immediate consideration:

- access to legal representation, both before the trial and at trial,
- access to interpretation and translation,
- notifying suspects and defendants of their rights (the “Letter of Rights”),
- ensuring that vulnerable suspects and defendants in particular are properly protected,
- consular assistance to foreign detainees.

Accordingly, after a discussion of why EU action in this area is appropriate, this Green Paper will focus on these five areas and consider how to evaluate whether the Member States are complying with their obligations. The remaining rights identified as needing to be examined will form the basis of subsequent Commission work. Priorities will need to be reviewed in the light of enlargement.

The Green Paper lists a number of specific questions. Answers to these questions and general comments can be sent, preferably by 15 May 2003, to the following address:

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The Commission intends to organise a public hearing on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union in 2003.

1. WHY EU ACTION IN THIS AREA IS APPROPRIATE

1.1. Background

For many years, the European Union, or European Community, did not have any explicit jurisdiction as far as the human rights aspects of criminal proceedings were concerned. The European Court of Justice (ECJ) was occasionally called upon to consider the relationship between the Community legal order and human rights and it made some constructive pronouncements¹ but there was no European Community instrument or position on fair trial rights. However, the ECJ had held that it was important that these be respected². In the absence of any relevant treaty provisions, the ECJ had been the main source of any Community fair trial rights policy. In 1996, the ECJ ruled that "as Community law now stands", the Community lacked competence to accede to the European Convention on Human Rights (ECHR)³, but by then fair trials provisions had started to apply at Community level. Signed in 1992, the Maastricht Treaty⁴ provided that matters in the newly created field of Justice and Home Affairs were to be "dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950"⁵. These "matters of common interest" included judicial co-operation and police co-operation for the purposes of combating terrorism and other forms of serious crime. In 1997, the Amsterdam Treaty explicitly amended the Treaty on European Union (TEU) strengthening the EU's competence in police and judicial cooperation in criminal matters so as to create an area of freedom, security and justice. One of its underlying principles, expressed in Article 6, was that human rights and fundamental freedoms would be respected within the Union.

1.2. The Treaty on European Union

From 1997, date on which the Amsterdam Treaty was signed, the European Union, declaring itself to be "founded on" respect for human rights and fundamental freedoms, has set about ensuring that those rights and freedoms are respected within its borders. Article 7 TEU lays down very strict sanctions for breaches of the obligation to respect those rights. The history of this initiative can be traced back to that declaration.

The TEU, as amended by the Nice Treaty, came into force in February 2003.

Its Articles 6 and 7 provide:

"Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome

¹ E.g. Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419 in which the ECJ accepted that Community law should not override nationally protected human rights, and *Nold v. Commission* [1974] ECR 491, in which the ECJ held that "fundamental rights form an integral part of the general principles of law, the observance of which it ensures" (para.13).

² E.g. in Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v. Council* [1991] ECR I-3187, the ECJ stressed the importance of the right to a fair hearing and in Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, it held "...regard must be had in particular to the rights of the defence, a principle whose fundamental nature has been stressed on numerous occasions..."

³ *Opinion 2/94 on Accession of the Community to the ECHR* [1996] ECR I-1759.

⁴ The Treaty on European Union, signed at Maastricht on 7 February 1992.

⁵ Article K.2 of Title VI - Provisions on Co-operation in the fields of Justice and Home Affairs

on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community Law.

(...)

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.”

1.3. The Charter of Fundamental Rights of the European Union

In December 2000, the European Commission, the Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union (CFREU). The CFREU covers the whole range of civil, political, economic and social rights of European citizens, by synthesising the constitutional traditions and international obligations common to the Member States. A significant aspect of the Charter is that it affirms that the European Union is indeed a political community, rather than solely an economic organisation. Moreover, it asserts that respect for fundamental rights will be at the foundation of all European law.

The rights described are divided into six sections: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. The relevant section of the CFREU here is that entitled "Justice" (Articles 47-50). Like the ECHR, it lays down the right to a fair trial. It provides for the presumption of innocence, legality and proportionality of criminal offences and penalties. Furthermore, it extends the principle of *ne bis in idem* to the whole of the EU.

1.4. The Commission Communication "Towards an Area of Freedom, Security and Justice"

In July 1998, the Commission set out its vision for an "Area of Freedom, Security and Justice" in a Communication⁶. It stated that its aims were to examine what the area of "justice" should seek to achieve. "The ambition is to give citizens a common sense of justice throughout the Union". This was to be achieved by facilitating the bringing to justice of those who threaten the freedom and security of individuals and society whilst ensuring that individual rights were respected. A minimum standard of protection for individual rights was the necessary counterbalance to judicial co-operation measures that enhanced the powers of prosecutors, courts and investigating officers. The Communication committed the Commission to pursuing "respect for individual rights".

1.5. The Tampere Conclusions

The 1999 Conclusions of the Tampere European Council⁷ endorsed the principle of mutual recognition as "the cornerstone of judicial co-operation"⁸ and went on to say that "enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the *judicial protection of individual rights*"⁹ (point 33).

1.6. The Mutual Recognition Programme of Measures

The Commission Communication to the Council and the European Parliament dated 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters¹⁰ provides, in its paragraph 10, entitled "Protection of Individual Rights" that "it must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process".

⁶ COM(1998) 459 final, 14 July 1998, "Towards an Area of Freedom, Security and Justice".

⁷ Presidency Conclusions, Tampere European Council 15 /16 October 1999.

⁸ Point 33 - Presidency Conclusions – Tampere European Council 15/16 October 1999.

⁹ Point 33, Tampere Conclusions

¹⁰ COM(2000) 495 final

The Council's Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters¹¹ dated 15 January 2001 provided, in its preamble, that "Mutual recognition is designed to strengthen co-operation between Member States but also to enhance the protection of individual rights".¹² The Programme listed 24 specific mutual recognition measures, some of which, such as the European Arrest Warrant, have been achieved¹³. It is also stated that "in each of these areas the extent of mutual recognition is very much dependent on a number of parameters which determine its effectiveness". These parameters include "mechanisms for safeguarding the rights of [...] suspects" (parameter 3) and "the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition" (parameter 4). It is important now to ensure that the Programme's stated aim of enhancing the protection of individual rights should be given a concrete form, taking appropriate account of these parameters.

In order to implement the commitment given in the foregoing measures, the Commission launched this initiative with a view to setting minimum safeguards for suspects and defendants in criminal proceedings throughout the European Union. The preliminary work in the area has given rise to a number of underlying considerations that it is now appropriate to cover.

1.7. Enhancing mutual trust

Mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. . The purpose of this Green Paper is also to ensure that rights are not "theoretical or illusory" in the EU, but rather "practical and effective". Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR. However, divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as "European best practice" aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

1.8. Freedom of movement

As the Commission indicated in its Communication of 14 July 1998, Towards an Area of Freedom, Security and Justice "procedural rules should respond broadly to the same guarantees ensuring that people will not be treated unevenly according to the jurisdiction

¹¹ 2001/C 12/02

¹² (Council and Commission) Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C12, 15.1.2001, p. 10

¹³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L190/1 of 18.7.2002

dealing with their case”. European citizens and residents can reasonably expect to encounter equivalent standards in respect of safeguards in criminal proceedings throughout the EU

1.9. Acceding states

At the 1993 Copenhagen European Council, the Member States laid down the accession criteria¹⁴ for candidate countries, including a guarantee that human rights will be respected. At the 2002 Copenhagen European Council, accession negotiations were completed with 10 countries¹⁵. They will accede on 1 May 2004, subject to the respective ratification procedures. Obviously, the conclusion of negotiations implies that the acceding states are deemed to satisfy the accession criteria.

The Accession Treaty will include a safeguard clause on Justice and Home Affairs for cases where in a new Member States there are serious shortcomings, or an imminent risk thereof, regarding the transposition, implementation or application of the *acquis* on mutual recognition in civil or criminal matters.

The Commission will continue, up to accession, its monitoring of commitments taken in the negotiations by the acceding states, including in the area of Justice and Home Affairs

1.10. Responding to the demand

There is a growing demand from several quarters (for example civil society and human rights organisations, relevant media and the European Parliament) for the Commission to take action in this direction. This is all the more so since it is the logical counterbalance to other mutual recognition measures¹⁶. There is also an argument that it is appropriate for the Commission to take the initiative in order to ensure that equivalence is achieved throughout the EU, and so that any agreement reached eschews the risk of any particular national or geographical legal tradition affecting the final text. It is to be hoped that a Commission initiative will ensure neutrality.

1.11. The Commission Green paper on a European Prosecutor

In its Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, which was adopted on 11 December 2001¹⁷ the Commission also addressed the problem of appropriate procedural safeguards at EU level, from the particular viewpoint of a possible future European Prosecutor who would direct investigations throughout the Union. The consultation process launched with the Green Paper on the European Prosecutor further stimulated the debate on the general question of the appropriate EU wide protection of individual rights, and thus contributed to highlight the need of a specific initiative on this issue. .

¹⁴ “Membership requires that the candidate country has achieved *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities*, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”

¹⁵ COM(2002)700 final of 9 October 2002. The 10 countries are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia.

¹⁶ Such as the European Arrest Warrant (see footnote 13).

¹⁷ COM(2001)715 final.

1.12. Subsidiarity

Notwithstanding the above, some consideration must be given to the argument that the principle of subsidiarity dictates that Member States should be entitled to exercise autonomy in this area¹⁸. The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen and that, if action is taken at the Community level, it is justified, having regard to the options available at national, regional or local level. This means that the EU should not take action unless to do so would clearly be more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaty.

The Commission considers that in this area, only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied with their fair trial obligations, deriving principally from the ECHR, on a national basis and this has led to discrepancies in the levels of safeguards in operation in the different Member States.

As explained above under point 1.7, such discrepancies may prevent the process of mutual recognition to be fully developed in practice. Therefore there is a perceived need to support, by way of concrete measures aimed at defining common standards, a genuine mutual confidence in the way those rights are respected throughout the EU. Any Commission proposals would take account of national specificities. The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice¹⁹ specifically states that: “*the principle of subsidiarity, which applies to all aspects of the union’s action, is of particular relevance to the creation of an area of freedom, security and justice*”.

As regards the specific objectives of the TEU, which form the legal basis and the justification for this initiative, the relevant provisions are:

Article 31 TEU:

“*Common action on judicial cooperation in criminal matters shall include:*

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

[..]

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation;[...]” which must be balanced against:

Article 33 TEU:

“*This Title [Title VI] shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*”

Making procedural rules more comparable is a way of “ensuring their compatibility” and this can only be achieved by action at the EU level.

¹⁸ Article 5 of the Treaty establishing the European Community (which applies here by virtue of Article 2 of the TEU) provides:

“*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

¹⁹ OJ C 19/1 of 23.1.1999

1.13. Compliance and monitoring

It is essential that rights may be enforced expeditiously and in a uniform manner in the Member States., Member States have a duty to ensure that their domestic criminal justice schemes operate efficiently and fairly so that the ECtHR retains its function as a court of last resort and is not so submerged by applications that it too becomes unwieldy.

The final area for consideration in this Green Paper will therefore be how to measure and ensure compliance with any subsequent EU measure taken. It is appropriate for the Commission to have a role in monitoring and evaluation, using information provided by the Member States or by an independent team of experts. Once a Framework Decision is adopted, it is incumbent on the Commission to ensure both that the Member States have adopted the necessary legislation to give effect to the Framework Decision and that it is properly implemented..

Question 1:

Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

2. IDENTIFYING THE BASIC RIGHTS

2.1.Introduction

This Green Paper is the outcome of a lengthy consultation process, both with interested parties (such as lawyers and experts in the fields) and with government representatives. The Commission needed information on what rights were currently protected by the legislation of the Member States and what rights were considered by experts in the field to be essential for fair trials. Additionally, the Commission wanted to act as fast as possible since this measure was at the heart of the programme of mutual recognition, and several of the measures forming the mutual recognition programme were underway. Largely for this reason, the Commission decided not to carry out a survey. Experience has shown that a survey, undertaken by an independent research institute, can be a lengthy process and the results are variable. The Commission therefore decided to carry out as much research as it could itself and to consult widely in order to have the benefit of the views of as many parties as possible. Its main research tool was therefore consultation, in particular via its website, but it also received experts from various NGOs and was glad to have their views, and sent representatives to relevant conferences and seminars. The Commission also carried out a modest survey of the current provisions in the Member States by way of a questionnaire.

In early 2002, a Consultation Paper was posted in several languages on the JAI website²⁰ to which there was a considerable response. The Commission received about 100 contributions (from government departments, professional bodies, NGOs and individuals).

At that time, the Commission also sent the questionnaire to the Ministries of Justice of all the Member States on the current situation within their criminal justice systems. Once the Commission had received and analysed replies to the Consultation Paper and the questionnaire it was able to convene a group of experts for an intensive discussion.

An experts' meeting was held on 7/8 October, gathering 50 experts made up of nationally appointed representatives (1 per Member State), academics/professionals chosen by the Commission (1 per Member State) and representatives from NGOs.

²⁰ http://europa.eu.int/comm/justice_home/index_en.htm

2.2. The JAI Website Consultation

The Consultation Paper was the first step in collecting the views of experts. At that early stage, the Commission was not sure what areas would be perceived as priorities, nor how much could be covered in a single measure. It therefore listed all the rights that might be covered in any future Green Paper in the Consultation Paper with a view to assessing external perceptions of the most important rights to be safeguarded at the European level.

The Commission received over 100 replies, ranging from simple enquiries to lengthy discussion papers covering all the issues raised in the Consultation Paper. The responses come from students, practitioners, lawyers' professional associations (such as Bar Associations), government departments, civil liberties organisations and academics. There were responses from nationals of nearly all the Member States.

In its Consultation Paper, the Commission specifically sought comments on the following areas:

- (i) whether it was appropriate to introduce a mechanism ensuring that suspects/defendants were aware of their rights ("the Letter of Rights"),
- (ii) how to offer vulnerable groups a high degree of protection, and
- (iii) these specific rights:
 - a. The right to be presumed innocent until proved guilty;
 - b. The right to have someone informed of the detention;
 - c. The right to legal advice and assistance;
 - d. The right to a competent, qualified (or certified) interpreter and/or translator;
 - e. The right to bail (provisional release) where appropriate;
 - f. The right against self-incrimination;
 - g. The right to consular assistance (if not a national of the State of prosecution);
 - h. Fairness in obtaining and handling evidence (including the prosecution's duty of disclosure);
 - i. The right to review of decisions and/or appeal proceedings;
 - j. Specific guarantees covering detention, either pre- or post-sentence;
 - k. *Ne bis in idem*.

The Commission was also interested in hearing about *in absentia* proceedings.

The Consultation Paper was greeted enthusiastically by those working in the field and the Commission was very grateful to respondents for offering such constructive encouragement and advice. The translators' and interpreters' organisations were particularly helpful, as this specialist area was the one the Commission had the least information about. Numerous respondents considered that the suggestion of a "Letter of Rights", a short document to be

given to suspects as early as possible, possibly on arrest, was a good one. For this reason, and because it appeared to be a cost-effective and easily implemented measure, the Commission decided to include it among the proposals to be made in the Green Paper.

2.3.The questionnaire to the Member States

Also in early 2002, a questionnaire was sent, via the representations of the Member States in Brussels to their governments. It contained questions covering many aspects of their criminal justice systems, including the budget devoted to legal aid, to the provision of legal aid, to the provision of translation/interpretation in criminal proceedings and the identification and treatment of vulnerable suspects. In most cases, the questions were answered by the Ministries of Justice and of the Interior in the Member States, but some questions also had replies from the governments' statistical and other services.

From the replies the Commission was able to build up a picture of existing levels of provision and identify where action from the Commission would be most effective. In particular, it became clear that legal aid was provided in very different ways in the different Member States and that when it came to vulnerable suspects, there was only unanimity in considering children to be vulnerable.

2.4.The experts' meeting

A Discussion Paper was drafted in preparation for the experts' meeting. By then it had already become clear that the most promising areas for immediate consideration were the provision of legal aid, the provision of translators and interpreters, the "Letter of rights" and the identification of vulnerable suspects. From the European vantagepoint, it was also clear to the Commission that foreign suspects could easily be at a disadvantage, and may be particularly vulnerable. The Commission planned to consider the question of translators and interpreters and the inclusion of non-nationals in our categories of vulnerable suspects. It was also decided to complement these measures with another that applied to foreign suspects - that of ensuring that they were offered consular assistance, in accordance with an existing convention to that effect and to which all Member States were already parties.

The Discussion Paper therefore set out the five areas the Commission had decided to focus on at this stage and these formed the basis of our discussions.

2.5.The "basic rights"

The Commission concluded that whilst all the rights that make up the concept of "fair trial rights" were important, some rights were so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights. Next, the suspect or defendant must understand what he is accused of and the nature of the proceedings so it is vital for those who do not understand the language of the proceedings to be provided with interpretation of what is said and translation of essential documents. The consultation showed a high level of support for the "Letter of Rights" by which a suspect would be given information regarding his fundamental rights in writing and in a language he understands. Several respondents agreed with us that rights are only effective if the suspect is aware of them - this seemed to the Commission to be a simple, inexpensive way of ensuring that all suspects were aware of their rights. The Commission wanted to include a section on the most vulnerable in society, although it has not proved easy to identify who is actually

covered by this. The Commission has therefore suggested that Member States require their police authorities and judicial authorities to consider the question of a suspect or defendant's potential vulnerability and to take appropriate measures without going as far as to lay down exactly who is to be considered "vulnerable". The Commission considers that if the potential vulnerability is raised at an early stage of proceedings, together with a duty to take appropriate action, this will constitute an improvement for the persons concerned. Finally, having identified non-nationals as at a disadvantage in criminal proceedings, the Commission wanted to include a measure that is of undoubted assistance to the foreigner, namely the offer of consular assistance. This right has existed in principle for many years but the Commission wanted to take this opportunity to ensure that it was fully complied with by including it in this Green Paper as a corollary of the other rights for non-nationals that it proposes.

This Green Paper does not seek to create new rights nor to monitor compliance with rights that exist under the ECHR or other instruments, but rather to identify the existing rights the Commission sees as basic and to promote their visibility.

2.6.Rights not covered in the Green Paper

All the rights set out in the Consultation Paper will in time be covered by the Commission in accordance with the priorities emerging from a European Union with 25 Member States .

Two of the rights the Commission had identified appeared to warrant separate measures of their own in order to do them justice. These were the right to bail (provisional release pending trial) and the right to have evidence handled fairly.

The work on the right to bail (which also covers detention conditions), which is an important and substantial one in its own right, was separated from the work on other safeguards at an early stage. It forms the subject-matter of a measure in the Mutual Recognition programme (measure 10) and would be more appropriately dealt with as a single issue. A Communication on the subject is included in the Commission's Work Programme for 2003. Also in the Work programme for this year is a Communication on approximation, execution and recognition of criminal sanctions in the EU. This is designed to ensure equality of treatment for convicted persons throughout the EU so that, for example, those sentenced in a Member State other than their own are not discriminated against by virtue of their foreign nationality.

Fairness in handling evidence actually covers many rights and many aspects of the proceedings. It soon became clear that this area should be covered in a separate measure as it was too vast to cover in a Green Paper that already proposed several rights. The Commission therefore decided to devote more time and a specific study to this topic as soon as the first stage of the procedural safeguard work was completed. The Commission has now started work on a study of safeguards in fairness in gathering and handling of evidence. This will cover, *inter alia*, the right to silence, the right to have witnesses heard, the problem of anonymous witnesses, the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed) and many other aspects of the law of evidence. Article 48 of the CFREU provides that "everyone who has been charged shall be presumed innocent until proved guilty according to law". The treatment of non-convicted defendants in relation to remands in custody and the question of the reversal of the burden of proof are aspects of the same principle and will be considered both in the work on the right to bail and on evidence.

A study of *ne bis in idem* (a measure included in the Mutual Recognition Programme) is also underway. Article 50 CFREU provides that "no-one shall be liable to be tried or punished

again criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". Greece has announced that it will soon table an initiative on the subject, which will be taken into account to assess the necessity of submitting additional proposals in the light of very recent case-law. On 10 February 2003, the ECJ gave its judgment in joined Cases C-187/01 and C-385/01 on the implementation of Article 54 of the Convention implementing the Schengen Agreement. It held that a person may not be prosecuted in a Member State on the same facts as those of which his case has been "finally disposed of", even if no court has been involved in the procedure, in another Member State.

In absentia (or default) judgments were not considered to be among the first priorities for the work on safeguards and consequently were postponed to a later date. It is now hoped to devote a Green Paper to the subject in 2004, with a view to a proposal for legislation perhaps at the end of 2004 or early in 2005.

As far as victims of crime are concerned, there have been a number of initiatives undertaken, further to the Commission Green Paper on Crime Victims in the EU – reflections on standards and action²¹. A Framework Decision on the Standing of Victims in Criminal Proceedings was adopted on 15 March 2001²². On October 16 2002, the Commission proposed a Council Directive on Compensation to Crime Victims²³.

3. TREATY OBLIGATIONS AND EXISTING PROVISIONS

3.1. Introduction

The TEU provides, in its Article 6 that "*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community Law*". For that reason, the Commission has taken the ECHR as the starting point for assessing common minimum standards. It sets minimum standards which are common by virtue of the fact that all Member States are parties to it. The ECHR is fleshed out by the caselaw so where clarification is needed, it may often be found in the judgments of the European Court of Human Rights (ECtHR). That said, the Green Paper is not designed to ensure that Member States comply with the ECHR but rather to make sure that those rights identified here are applied in a more consistent and uniform manner throughout the European Union.

3.2. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 6 of the ECHR lays down fair trial guarantees. It is worded as follows:

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced

²¹ COM(1999)349 final.

²² OJ L 82/1 of 22.3.2001.

²³ COM(2002)562 final.

publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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;

(b) to have adequate time and the facilities for the preparation of his defence;

(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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings²⁴. The “purpose” of the ECHR is set out forcefully in the case of *Artico v. Italy*²⁵ in which the ECtHR held: “*The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.*”

3.3.The Charter of Fundamental Rights of the European Union

The legal status of the Charter has been under consideration for some time.

Already the CFREU has been cited with increasing frequency by the Court of First Instance of the European Communities (CFI)²⁶, and in numerous Opinions of the Advocates General²⁷.

²⁴ *Deweert v. Belgium* Judgment of 27 February 1980, Series A no. 35, para. 56

²⁵ *Artico v. Italy*, 13 May 1980, Series A, N°37, paras. 32 and 33.

²⁶ See for example Case T-112/98 Mannesmannröhren-Werke v Commission [2001] ECR II-729, Case T-54/99 Max.mobil v Commission (judgment of 30 January 2002), paragraphs 48 and 57, Case T-177/01 Jégo-Quére v Commission (judgment of 3 May 2002), paragraphs 42 and 47 that ruling is currently under appeal (Case C-263/02P).

²⁷ See for example: AG Alber in Case C-340/99 TNT v Poste Italiane [2001] ECR I-4109, para. 94; AG Geelhoed in Case C-313/99 Mulligan v. AG, para. 28, C-413/99 Baumbast v Secretary of State for the Home Department, para. 59 and Case C-491/01 The Queen v Secretary of State for Health *ex parte* BAT, paras. 47 and 259; AG Jacobs in Cases C-377/98 Netherlands v Parliament and Council (biotechnology Directive) (judgment of 9 October 2001), paras. 97 and 210, C-270/99P Z v Parliament

Where they have discussed its status, they have consistently declared it not to be binding²⁸. Nevertheless, they have stated that the Charter "*includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments*"²⁹ and that certain articles of the Charter proclaim generally recognised principles³⁰. The ECJ itself has not, to date, referred to the Charter at all, even in cases where the Advocate General's Opinion had done so.

At the Laeken European Council on 15 December 2001, the Heads of State of the EU Member States made a Declaration on the future of Europe in which it is stated that : "*Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.*"

The Praesidium proposed on 6 February 2003 a draft text of the first articles of the treaty establishing a constitution for Europe to the Members of the Convention on the future of Europe³¹. It proposes that the CFREU should be an integral part of the constitution:

"Article 5: Fundamental rights

1. *The Charter of Fundamental Rights shall be an integral part of the Constitution. [...]*
2. *The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union's competences as defined by this Constitution.*
3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*

There is a growing consensus in support of this draft.

3.4. Other instruments

Other international instruments offering procedural safeguards to individuals involved in criminal proceedings to which all Member States³² are parties are:

-the 1945 Charter of the United Nations,

(judgment of 21 November 2001), para. 40, and C-50/00P *Unión de Pequeños Agricultores v Council* (judgment of 25 July 2002), para. 39; AG Léger in Cases C-353/99P *Council v Hautala* (judgment of 6 December 2001), paras. 51, 73 and 78-80, and C-309/99 *Wouters v Nederlandse Orde van Advocaten* (judgment of 19 February 2002), paras. 173 and 175; AG Mischo in Cases C-122 and 125/99 *D v Council* [2001] ECR I-4319, para. 97, and C-20/00 and 64/00 *Booker Aquaculture v The Scottish Ministers*, para. 126 AG Stix-Hackl in Case C-49/00 *Commission v Italy*, para. 57, and C-459/99 *MRAX v Belgium* (judgment of 25 July 2002), para. 64; and AG Tizzano in Case C-173/99 *The Queen v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881, para. 27. Paragraph references are to the Opinions of the Advocates General, not the judgments.

²⁸ *Baumbast* para. 59, *BECTU* para. 27, *Council v Hautala* para. 80, *Mulligan* para 28, *Unión de Pequeños Agricultores* para. 39, *Z*, para 40.

²⁹ *BECTU*, para. 27

³⁰ *Unión de Pequeños Agricultores*, para. 39;

³¹ CONV 528/03

³² The candidate countries, including Bulgaria and Romania, are also parties to these treaties, with the exception of the Rome Statute which all candidate countries have ratified except the Czech Republic, Lithuania and Malta. As of November 2002, these three countries have signed but not ratified the Rome Statute.

-the 1966 International Covenant on Civil and Political Rights, (“ICCPR”)

-the 1963 Vienna Convention on Consular Relations, (“VCCR”)

-the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, (“ICTY Statute”). Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations.

-the 1994 Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”). Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations.

-the 1998 Rome Statute for an International Criminal Court. (“Rome Statute”).

The International Covenant on Civil and Political Rights

This instrument was adopted as a resolution of the General Assembly of the United Nations³³. This means that it is not generally binding³⁴ but since the rights it lays down are codified in a treaty, it is binding on the states that ratify or accede to it. Furthermore, it establishes the Human Rights Committee, a body providing authoritative guidance on fair trial rights. The relevant articles for present purposes are Articles 9 and 10 which may be found in the Annex to this Green Paper.

The Rome Statute

Under the Rome Statute, suspects and defendants have extensive rights under Article 55 (Rights of a person during an investigation) and Article 67 (Rights of the accused) which may be found in the Annex. It is clear that the Rome Statute goes somewhat further than the ECHR. It is interesting to note that this instrument, decided on an intergovernmental basis, provides very comprehensive safeguards to persons accused of serious violations of international humanitarian law. It was drawn up by representatives of the international community, including all the Member States. It is worth noting that the international community has accepted these safeguards as the “minimum” for future suspects and defendants at the International Criminal Court whilst suspects and defendants in “ordinary” criminal proceedings throughout the European Union do not always benefit from this level of protection.

³³ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

³⁴ The UN Charter provides that the General Assembly may “make recommendations” (Article 11 and 12). However, the International Court of Justice stated in its 1996 Advisory Opinion on the *Legality of the threat or use of nuclear weapons*:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.

4. THE RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION

4.1.Introduction

The key issue is probably that of access to legal assistance and representation. The suspect or defendant who has a lawyer is in a far better position as regards enforcement of all his other rights, partly because his chances of being informed of those rights is greater and partly because a lawyer will assist him in having his rights respected. It would therefore seem appropriate to start by considering the right of access to legal assistance and representation.

4.2.Existing provisions

The right to a lawyer is well established – it is contained in the ECHR and stated again in the Charter of Fundamental Rights of the European Union as well as in other instruments³⁵.

4.2.(a) Under the ECHR

Article 6(3) lays down the “minimum rights” of “everyone charged with a criminal offence”:

“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; [...]”³⁶

4.2.(b) Under the CFREU

Article 47(Right to an effective remedy and to a fair trial) provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

4.2.(c) The European Court of Justice

In *Hoechst v. Commission*³⁷, the ECJ held explicitly that the right to legal representation is one of the basic rights governing the administrative procedure, the violation of which may

³⁵ International Covenant on Civil and Political Rights (“ICCPR”) and rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe Res. CM(73)5).

³⁶ In the *Artico v. Italy* case (cited in footnote 27 above) the ECtHR held: “Article 6(3) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1)[...] When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots”.

³⁷ Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, Paras 15 and 16.

lead to the imposition of penalties. The proceedings were not criminal ones, but the ECJ's statement was broad "*although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation [...] must be respected as from the preliminary inquiry stage*".

4.2.(d) Under other international instruments

ICCPR

Article 14 of the ICCPR provides as follows:

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, 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 Rome Statute

The rights of the accused are covered in two articles of the Rome Statute. Article 55(2), which covers the pre-trial stage, provides, as follows:

[...]2. 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:[...]

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

And Article 67, which covers the trial, provides:

"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;

(c) To be tried without undue delay;

(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 ICTY Statute:

Article 18 of the ICTY Statute provides as follows:

“3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, [...].”

The ICTR Statute lays down similar rights in its Article 20.

4.2.(e) Legal representation in civil cases at EU level – a comparison

In January 2002, the Commission presented a Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings throughout the EU³⁸. This measure, was adopted on 27 January 2003³⁹. It provides that “natural persons” are to be entitled to “appropriate legal aid” in certain conditions. Although the conditions for granting legal aid in civil proceedings are somewhat different from those applying to criminal proceedings, and civil proceedings come under the ambit of the first pillar, this will provide a model of harmonisation in relation to standards for legal representation. Naturally different considerations apply in the civil law sphere and in areas coming within the ambit of the first pillar.

4.3. Discussion and questions

The ECHR and the case-law of the ECtHR lay down the right to legal assistance and representation. In recent years, the international community has seen the creation of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda and the establishment of the International Criminal Court and for all of them, the statute provides that the accused has the right to be represented by Counsel, and to have that legal assistance free of charge if he has not the means to pay for it. This reflects acceptance of the right to legal assistance and representation as a fundamental right. The issue here is therefore not should this right arise but how may it best be enforced.

4.3.(a) When does the right arise?

The right to legal representation arises immediately on arrest (whether this is actually in a police station or elsewhere)⁴⁰ although of course a reasonable time must be allowed for the lawyer to arrive. Pre-trial proceedings are covered⁴¹. A suspect is entitled to have legal

³⁸ Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings, COM(2002)13 final of 18.01.2002

³⁹ OJ L26/41 of 31.1.2003.

⁴⁰ In *John Murray v. UK* (Judgment of 8 February 1996, Series A 1996-I) a violation of the ECHR was found as the accused was arrested for terrorist offences and refused access to a lawyer for 48 hours. Also Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe Res. CM(73)5 provides that “Untried prisoners shall be entitled, *as soon as imprisoned*, to choose a legal representative...”.

⁴¹ *Imbrioscia v. Switzerland* (Judgment of 24 November 1993, Series A, N°275, para. 36).

representation throughout the questioning and interview stages of the proceedings. If the suspect has declined the offer of legal assistance at this early stage, is then charged with the offence, and still does not have legal representation, he should be reminded of his right and provided with a lawyer as soon as possible if he then wants to exercise that right.

4.3.(b) What is the accused entitled to?

The rights conferred by Art. 6(3)(c)ECHR, taking into account its “basic purpose” of ensuring a fair trial, and by other relevant provisions cited above, can be summarised as follows:

- The defendant, once charged with a criminal offence, has:
- the right to defend himself in person, if he so chooses, or
- by counsel of his own choosing, and
- if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Art. 6(3)(b)ECHR lays down the right “to have adequate time and facilities for the preparation of his defence”. This right must be respected without the time between charge and trial being excessive since Article 5(3)ECHR and Article 9(3) ICCPR both provide that persons arrested or detained should be tried “promptly”.

The right to defend oneself

Should the accused decide to avail himself of this right, he must be present at the proceedings in order to “defend himself in a practical and effective manner”. It goes without saying that the right conferred by Art. 6(3)(b)ECHR “to have adequate time and facilities for the preparation of his defence” is of vital importance to the defendant choosing to defend himself. The Commission, whilst recognising the right to defend oneself, is, for obvious reasons, not concerned with the situation of the defendant seeking to defend himself. The situation which causes concern is the reverse, of the defendant wanting legal assistance and representation and not able to exercise this right.

The right to counsel of his own choosing

Art. 6(3)(c)ECHR, Art. 14 ICCPR, Art. 55 Rome Statute and Art. 18 ICTY Statute explicitly provide for the defendant’s right to choose his legal counsel. However, this right generally only applies when the defendant has the means to pay for his legal representation.

The right to free legal representation

Art. 6(3)(c)ECHR, Art. 14 ICCPR, Art. 55 Rome Statute and Art. 18 ICTY Statute and other instruments explicitly provide for the defendant’s right to free legal representation “if he has not sufficient means to pay for legal assistance”

The defendant does not have to prove “beyond all doubt” that he lacks the means to pay for his defence⁴². Some Member States operate a means test to establish whether the defendant “has not sufficient means to pay for his defence”. Others provide free legal representation to all on the basis that a means test is expensive to operate and that some of the costs can be recovered from the defendant in certain circumstances. This would seem to be an area where it is appropriate for Member States to operate the system that appears to them to be the most cost effective.

The right to free legal representation is not unconditional. The ECHR, the ICCPR and the Rome Statute all provide that this right arises “when the interests of justice so require”. The

⁴² *Pakelli v. Germany*, judgment of 25 April 1983, Series A n° 64 para. 34

difficulty lies in establishing criteria that may be applied throughout the EU for determining when the “interests of justice” so require. In *Quaranta v. Switzerland*, the ECtHR indicated three factors which should be taken into account:

- the seriousness of the offence and the severity of the potential sentence,
- the complexity of the case, and
- the personal situation of the defendant⁴³.

It should be noted that these categories are broad and cover many cases where perhaps free legal aid is not currently being granted.

The right to free legal representation does not confer a right to a choice of lawyer, but some Member States will allow this and in any event, any lawyer appointed, whether by the defendant or under a national legal aid scheme, must offer “effective assistance”⁴⁴.

In *Benham v United Kingdom* (1996) the ECtHR held that “*Where the deprivation of liberty is at stake, in principle the interests of justice call for legal representation*”. Some Member States extend this principle to cover offences that carry not only a risk of a custodial sentence but also loss of employment or livelihood. Some Member States extend it even further to cover all offences except “minor” ones such as road traffic offences or shoplifting⁴⁵.

Minimum requirements

It is not enough that the State appoint a lawyer – the legal assistance provided must also be effective and the State is under a duty to ensure that the lawyer has the information necessary to conduct the defence⁴⁶. The accused should receive from his lawyer all the information necessary to understand the nature and consequences of the accusation he faces. He should be advised of any right to silence he may have (or conversely of the adverse inferences that may subsequently be drawn from his silence), of the consequences of making any confession and of the weight to be given in any subsequent proceedings to any answers he makes.

Art 6 read in conjunction with other Articles

Article 1 ECHR (Obligation to respect human rights) provides:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 14 ECHR (Prohibition of discrimination) provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

These Articles taken together imply that the fair trial safeguards provided by Article 6 must be guaranteed to all persons within the territory of a Member State, regardless of their nationality and whether they are lawfully on the territory of the State. Consequently, the right to legal representation in criminal proceedings, and all the attendant rights discussed above

⁴³ *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A n° 205, para. 35 describes Mr Quaranta as “a young adult of foreign origin from an underprivileged background...[having] no real occupational training and a long criminal record. He has taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit”.

⁴⁴ *Artico v. Italy* 1980 cited above.

⁴⁵ E.g. Sweden, but N.B. shoplifting is not considered a “minor” offence in all Member States.

⁴⁶ In *Goddi v. Italy* (Judgment of 9 April 1984), failure on the part of the State to notify Mr Goddi’s lawyer of the hearing date meant that he did not have the benefit of a “practical and effective” defence.

must be available to everyone in the country. Article 14 precludes most forms of discrimination.

4.3.(c) What provision should the Member States make?

In the Commission's questionnaire to the Member States, there was a question about access to legal assistance and representation. The arrangements in the Member States varied considerably. The Commission is interested in the idea of having national schemes in the Member States so that the rules on eligibility are applied uniformly throughout one Member State. This would lead to a more equitable system, since all arresting officers would be familiar with the nationally applicable provisions. If these were also explained in writing to arrested persons (see Part 6 - The Letter of Rights - below), this would lead to a situation of greater transparency and increased general awareness of the right.

In some Member States, legal advice on arrest is given on a *pro bono* basis by trainees and students. Lawyers giving legal assistance in these circumstances must be competent in order for the proceedings to comply with the ECHR. If there are not enough qualified lawyers prepared to undertake this type of work, this could be in part because the remuneration is not attractive enough. In the case of trainees giving legal assistance to arrested persons, and indeed for all lawyers undertaking this work, there should be some form of quality control. This quality control must apply also to the preparation for trial and the trial itself. A mechanism for ensuring competence should therefore be established by the Member States.

The Commission recognises that schemes that provide legal assistance and representation at the State's expense are very costly. Naturally, this begs the question of whether the duty extends to those who can afford to pay for some or all of their legal costs and to persons charged with minor offences only. Some Member States apply a means test, such as "earning less than twice the minimum monthly salary" as the threshold for eligibility. Others have no threshold and deem it more expensive to assess the defendant's means than to grant legal aid without a means test. The Commission wonders whether in view of the costs of the system, there should be common standards regarding the level of seriousness of the offence for which free legal representation should be provided, and whether certain trivial offences can be excluded. The following questions reflect these concerns.

Question 2:

In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should all Member States be required to establish a national scheme for providing legal representation in criminal proceedings?

Question 3:

If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?

Question 4:

If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?

Question 5:

Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation “if he has not sufficient means to pay for legal assistance”. How should Member States determine whether the defendant is able to pay for legal representation or not?

Question 6:

Article 6(3) (c) of the ECHR provides that a person charged with a criminal offence be given free legal representation “when the interests of justice so require” Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?

Question 7:

If free legal representation is to be provided for all offences except “minor” ones, what definition of “minor offences” would be acceptable in all Member States?

Question 8:

Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

5. THE RIGHT TO A COMPETENT, QUALIFIED (OR CERTIFIED) INTERPRETER AND/OR TRANSLATOR SO THAT THE ACCUSED KNOWS THE CHARGES AGAINST HIM AND UNDERSTANDS THE PROCEDUR

5.1.Introduction

The right of access to a competent interpreter and translation of the key documents is fundamental. It is clear that the suspect or defendant must understand what he is accused of. This right is well established – it is contained in the ECHR as well as in other instruments set out below. It is all the more pertinent today when many more people travel from one country to another, not only on holiday or to look for work, but to make another country their home. The difficulty is not in establishing the existence of this right, but rather one of implementation. The professions of legal translator and interpreter are not as well established as other branches (such as conference interpreter), but they are in the throes of getting organised, drawing up common standards of education, devising methods of registration or certification and drafting a code of conduct. The aim of this section is to consult on this specific point rather than to confirm the right of access to translation and interpretation. However, a short review of the legal provisions is necessary to set out the minimum requirements.

(The rights of deaf people, who also need a sign language interpreter, will be covered in Part 6 – Proper Protection for Especially Vulnerable Groups.)

Under the ECHR

Article 5 (2) stipulates that:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

And 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;

(...)

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Other international instruments

Under the ICCPR

Article 14 (3) provides:

“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; [...]

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court”

Under the Rome Statute

Article 55 (Rights of persons during an investigation) provides:

“1. In respect of an investigation under this Statute, a person:

[...] (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; [...] “

and Article 67 (Rights of the accused [at trial]) provides:

“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:

(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; [...]

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks; [...].”

Grotius Projects 98/GR/131 and 2001/GRP/015

The Commission’s Grotius Programme supported a two-year study of how to promote equivalent standards in legal interpreting and translation throughout the Member States. The participating institutions were from Belgium, Denmark, Spain and the United Kingdom. The results of that project (98/GR/131) are published in book form under the title *Aequitas – Access to Justice Across Language and Culture*⁴⁷. The recommendations of the project cover selection, training, assessment and accreditation of legal translators and interpreters. It offers a model Code of Conduct and Good Practice, together with suggested registration and disciplinary procedures and an analysis of interdisciplinary arrangements between legal services and linguists. A second phase of this work is being financed under the Grotius Programme (2001/GRP/015) to disseminate the information gathered in the first phase. This research project has very much informed the Commission’s position on provision of legal translators and interpreters.

5.2. Discussion and questions

Defendants who do not speak or understand the language of the proceedings (e.g. either because they are non-nationals) are clearly at a disadvantage. They might be on holiday or in the foreign country for a temporary work assignment and due home shortly. There is every chance that they do not have any knowledge of the country’s legal system or court procedures. Whatever their circumstances, they are especially vulnerable. Consequently, this right, which is enshrined in numerous instruments as set out above, strikes the Commission as particularly important. The difficulty is, as already alluded to, not one of acceptance on the

⁴⁷ ISBN 90 804438 8 3; Contact Professor Erik Hertog at erik.hertog@lessius-ho.be or website <http://www.legalinttrans.info/Grotius>

part of the Member States⁴⁸, but one of levels and means of provision, and perhaps most importantly, costs of implementation. Accordingly, the questions fall into two categories, the first considering the level of provision, the second considering the means of provision.

5.2.1. Level of provision

5.2.1 (a) When should language assistance be provided?

The Commission is not aware of any mechanisms for determining whether a suspect or defendant “cannot understand or speak the language used in court”⁴⁹. This seems to be decided on an *ad hoc* basis by the people the suspect or defendant comes into contact with (police officers, lawyers, court staff etc.)⁵⁰. The ultimate duty to ensure fairness of the proceedings, in this respect as in others, rests with the trial judge who have a duty to consider this matter with “scrupulous care”⁵¹. However, clearly it is desirable for any language difficulties to come to light long before the trial begins.

5.2.1.(b) Should the assistance of an interpreter be free?

In the case of *Luedicke, Belkacem and Koç v. Germany*, the ECtHR held that Article 6(3)(b) entails that “for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred”⁵². In that case, the State (Germany) tried unsuccessfully to recover the costs of interpretation after conviction. Then in *Kamasinski v. Austria*⁵³, the ECtHR held that the principle also extended to translation of “documentary material”. All other instruments that refer to interpretation and translation provide that, in the normal course of events, the defendant should not have to pay for these services. It can therefore be stated categorically that the assistance of legal translators and interpreters during the criminal proceedings must be free of charge to the defendant.

5.2.1.(c) Extent of the duty to provide translators and interpreters

The ECtHR has held that Art. 6(3)(e) “does not go so far as to require a written translation of all items of written evidence or official documents in the procedure”.

As regards translation, the ECtHR has held that “documentary material” must be translated but this duty is limited to those documents which the defendant must understand in order to have a fair trial⁵⁴. The rules on how much material is translated vary from one Member State to the next and also in accordance with the nature of the case. This variation is acceptable as long as the proceedings remain “fair”.

As regards interpretation, all the oral proceedings have to be interpreted. If a conflict of interest may arise, two interpreters may be needed, one for the defence and one for the

⁴⁸ Our questionnaire shows that all the Member States are conscious of their ECHR obligations and make provision for translators and interpreters during at least part of the proceedings if circumstances seem to dictate that there is a need for them.

⁴⁹ *Kamasinski v. Austria* (judgment of 19 December 1989 A Series N° 168) para74.

⁵⁰ In *Brozicek v. Italy*, Judgment of 19 December 1989, A Series N°167, the ECtHR held that it was for the judicial authorities to prove that the defendant did speak the language of the court adequately and not for the defendant to prove he did not.(Para.41).

⁵¹ In *Cuscani v. United Kingdom*, judgment of 24 September 2002, application n° 32771/96, the ECtHR held: “ However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused's interest with “scrupulous care” (Luedicke, Belkacem and Koç v. Germany – judgment of 28 November 1978, Series A N°29 paragraph 46)

⁵² *Kamasinski v. Austria* (cited above).

⁵³ *Kamasinski v. Austria*, cited above, para 74

prosecution (or the court, depending on the legal system). It is not sufficient only to provide interpretation of questions directly put to the defendant and answers given by the defendant. The defendant must be in a position to understand everything that is said (such as speeches by both prosecuting and defending lawyers, what the judge says and the testimony of all witnesses). The ECtHR held that “the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events”⁵⁵.

5.2.2. Means of provision

5.2.2.(a) Training, accreditation and registration

The Commission considers that in order to comply with the requirements of the ECHR and numerous other international instruments, all Member States should ensure that training, accreditation and registration of legal translators and interpreters is provided. The Aequitas proposals set out the following minimum requirements:

- (1) that Member States must have a system of training specialist interpreters and translators, with training in the legal system, visits to courts police stations and prisons, leading to a recognised qualification,
- (2) that Member States must have a system of accreditation/certification for these translators and interpreters,
- (3) that Member States should operate a registration scheme that is not unlimited (for 5 years for example) so as to encourage professionals to keep their language skills and knowledge of court procedures up to date in order to renew their registration,
- (4) that Member States should institute a system of Continuous Professional Development, so that legal translators and interpreters can keep their skills up to date,
- (5) that Member States adopt a Code of Ethics and Guidelines for Good Practice, which should be the same or very substantially similar throughout the EU,
- (6) that Member States undertake to offer training to lawyers and judges so that they can better understand the role of the translator and interpreter and consequently work with them more efficiently.
- (7) that Member States adopt an interdisciplinary approach to the above requirements, involving either the Ministry of Justice or of the Interior in the recruitment, training and accreditation of legal translators and interpreters.

5.2.2.(b) Two different professions

Although they are often considered as one group, interpreters and translators, having different skills and different roles to play during the criminal proceedings, should be treated as two distinct professional groups.

(a) Interpreters are required during the police investigation stage (questioning of suspect, and maybe of witnesses) and during all court hearings. Additionally, the defendant may need an interpreter present when he instructs his lawyer (at the police station, in prison if he remains in custody, at the lawyer’s office and in court).

⁵⁵ *Kamasinski v. Austria*, cited above, para 74

(b) Translators are required to translate all the procedural documents (charge sheet, indictment) in the file, but also all the statements of witnesses that are provided in writing, and evidence to be tendered by both sides.

Any national registers should take account of this, and indeed it may be more efficient for Member States to operate two separate registers.

5.2.2.(c)) Special linguistic regime

Some languages can present a problem. It is for the Member States to make arrangements to cover such languages, either by ensuring that they have on their register at least a minimum cover for all languages or by using methods such as “relay interpreting” via a more common language. It may also be possible to relax the qualifications required for unusual languages in order to be able to provide translators and interpreters able to work in them. The Commission is aware of the special problem raised by these languages, but considers that the principle of subsidiarity dictates that arrangements are more appropriately to be made at the national level.

5.2.2.(d) Costs

Cost is often mentioned as a reason why Member States do not fulfil their ECHR obligations in this respect. Member States must make funds available for this purpose. Court interpreters and translators must be offered competitive rates of pay so as to make this career option more attractive to language graduates. But it should not be limited to language graduates. Law graduates who find that practice is not for them, but who have excellent language skills should be encouraged to join the profession and offered appropriate training. The European Communities have a term for these professionals with dual qualifications – “juristes-linguistes” or “lawyer-linguists”.

5.2.2.(e) Recruitment

Apart from the costs of full provision, Member States contend that they do not have enough translators and interpreters at their disposal. It is therefore important to promote recruitment into the profession. The drive to recruit well-qualified professionals should not be seen simply as a question of salary. Better rates of pay will attract more people into the profession, but there are other factors too such as treating language professionals with more respect, consulting them about court procedures and involving them in such a way as to ensure that their specialist skills are acknowledged and valued.

Level of provision:

Question 9:

Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?

Question 10:

Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial, should be interpreted for the suspect/defendant?

Question 11:

What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

Question 12:

Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?

Means of provision:

Question 13:

Should Member States be required to draw up national registers of legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous professional development be established?

Question 14:

If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?

Question 15:

Would there be any benefit if Member States were required to establish a national scheme for training legal translators and interpreters?

Question 16:

Should the Member States be required to appoint an accrediting body to govern a system of accreditation, renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior work with the accrediting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?

Question 17:

If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?

Question 18:

How may and by whom should a Code of Conduct be drawn up and regulated?

Question 19:

The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can be done to make this a more attractive profession?

Question 20:

Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide adequate interpretation and translation where a person is entitled to it?

6. PROPER PROTECTION FOR ESPECIALLY VULNERABLE CATEGORIES

6.1.Introduction

In the Consultation Paper, the Commission asked whether it was appropriate to require Member States to provide vulnerable groups with proper degree of protection as far as procedural safeguards were concerned to offset their disadvantages. This suggestion was well received but it presents two substantial difficulties: (1) defining vulnerable groups and (2) establishing the mechanisms for offering this level of protection.

A non-exhaustive list of potentially vulnerable groups could include:

(a) foreign nationals, especially but not limited to those who do not speak the language.

The foreign national is vulnerable by virtue of his nationality, linguistic disadvantage and also possibly other factors (on holiday or only temporarily in the country so may be at risk of losing his employment or livelihood etc in his country of origin). Other than being offered linguistic assistance, foreign nationals may be assisted by their Consulate (see Part 7 below). Practical assistance should be available, under the auspices of the relevant Consulate or other appropriate organisation. The legal systems of the Member States could be required as a minimum requirement, not to allow this assistance to be impeded.

(b) children.

The especially vulnerable position of children has already been recognised in the UN Convention on the Rights of the Child⁵⁶. The relevant provision, Article 40, may be found in the Annex.

Under the Convention on the Rights of the Child, all persons under the age of eighteen are considered children, except where the national legislation provides for a lower age of majority. The higher level for protection envisaged should apply to all “children” under the Convention definition. However, the age of criminal liability varies throughout the EU from 8 in Scotland to 16 in Portugal, which means that there are substantial differences inherent in the legal systems of the Member States.

(c) those who are vulnerable as a result of their mental or emotional state (for instance the mentally handicapped, those suffering from a psychiatric condition such as schizophrenia, persons of subnormal IQ and persons with a disability on the autistic spectrum) Defendants with a low IQ, low reading age or a poor understanding may be more likely to make damaging assertions, including false confessions, at the police interview stage⁵⁷. One suggestion would be to require police officers arresting a suspect to have to answer a specific question on the suspect’s mental state in the custody record on arrest. If police officers are required to consider the question (and make a written note of their assessment), it may be that suspects who are vulnerable for those reasons will become easier to identify over time. With

⁵⁶ Which every State in the world has signed except the United States and Somalia.

⁵⁷ Gudjonsson, Clare, Rutter and Pearse *Persons at Risk During Interviews in Police custody: the Identification of Vulnerabilities*. Research Study n° 12. The Royal Commission on Criminal Justice. HMSO. London (1993)

this category, there is a real problem with identification. Training of police officers and lawyers should go some way towards solving it.

(d) those who are vulnerable as a result of their physical state (the physically handicapped, including the deaf, those with illnesses such as diabetes, epilepsy, pacemakers etc and persons with speech impediments, as well as more obviously physically handicapped suspects).

This group also includes suspects with very serious medical conditions such as HIV/AIDS, necessitating frequent medication and/or monitoring and pregnant women, especially those who are at risk of miscarrying.

Suspects stating that they have a health problem, even one which has no visible signs or symptoms, could be given the automatic right to be examined by a doctor. The medical examination could be used to establish that the person is well enough to be questioned and also well enough to be kept in custody (especially if the period of custody is to be longer than a few hours).

Police keeping a person who says that they have a health problem in custody could be required to ensure that the person is also offered medication. Monitoring may also be required. Given that police officers cannot have the necessary expertise, it may be necessary to ensure a mechanism for offering a medical examination to all suspects stating that they have a health problem,.

(e) those who are vulnerable by virtue of having children or dependants (for example pregnant women and mothers of young children, especially single mothers, and, where the father has sole charge of young children, single fathers).

The risk arises, especially in police custody, that a person with sole care of young children will take steps that they perceive as likely to shorten the time in custody. This is particularly so where the person in custody believes they can be released on bail rapidly if for example they confess to the offence or make some other statement that seems to be required by the police.

(f) persons who cannot read or write.

Those falling into this category may be more vulnerable by virtue of not fully understanding the proceedings.

(g) persons with refugee status under the 1951 Refugee Convention, other beneficiaries of international protection and asylum seekers⁵⁸.

Refugees and other persons in need of international protection, including asylum seekers, are vulnerable for a number of reasons. These include: possible language and cultural difficulties, fears of antagonism on the part of law enforcement officers and owing to the limited rights they enjoy within the host State, having lost the protection of their country of origin and not being able to avail themselves of consular protection of their country of origin. A person in need of international protection may be suspected by the authorities of being unlawfully in the country, whether this is the case or not, and may therefore feel particularly vulnerable in relation to the offence for which he is a suspect or a defendant. As a consequence of prosecution or conviction, these individuals may be excluded from or at risk of losing "refugee" status⁵⁹ or subsidiary protection status. "Temporary protection" within the meaning

⁵⁸ For these categories of persons, the European Union is developing measures and standards in accordance with Article 63 of the Treaty establishing the European Community.

⁵⁹ Article 12 of the 1951 Convention relating to the Status of Refugees provides that the status of refugee is governed by the law of the country of domicile or residence.

of Council Directive 2001/55/EC⁶⁰ may be excluded for a person having committed a “serious non-political crime” (Article 28). Consequently, the stakes are higher for persons in need of international protection for whom a conviction may be a heavier burden than for other suspects/defendants. Additionally, the threat of double jeopardy (deportation once the sentence is served) or “double peine” raises specific questions owing to the fact that refugees and persons in need of international protection cannot, in principle, be returned to their country of origin.

(h) persons dependent on alcohol or drugs (alcoholics and drug addicts, especially if under the influence of drugs/alcohol during questioning).

Persons falling into this category may be vulnerable for a number of reasons. The extent of the vulnerability will depend on a number of factors such as the level of addiction, age, underlying general health and of course whether the individual is suffering from withdrawal symptoms. They may be unwell and not fit to answer police questions, in which case, they should be treated as persons with a health problem and offered medical assistance, as in (d) above. This can only be done if the person states that they have a health problem or police officers have sufficient training to make this assessment themselves. Additionally, the provision of medical assistance in these circumstances must be unconditional and should never be part of a trade-off for agreeing to answer questions or provide information.

In the case of drug addicts, they may be subject to various pressures to disclose the source of the drugs with a view to locating and prosecuting the pushers and traffickers. Alternatively, they may have been threatened by pushers and traffickers about retribution in the event of any disclosures made to the police.

However, the criminal proceedings may be the opportunity for the suspect/defendant to be offered help, or to feel motivated to seek help for the addiction. Accordingly, sensitivity should be shown in relation to suspects in this category.

6.2. Discussion and questions

The Commission proposes that there be a general obligation for Member States to ensure that their legal system recognises the higher degree of protection that must be offered to all categories of vulnerable suspects and defendants in criminal proceedings. The Commission acknowledges that the assessment of vulnerability can be difficult to make and that simply using a category-based method may not always be appropriate. The ECtHR, in considering whether a young man should have been awarded free legal aid, identified "the personal situation" of the defendant as a factor to be taken into account in assessing whether it was in the interests of justice to make such an award⁶¹. In the judgment, the defendant is described as "a young adult of foreign origin from an underprivileged background, [having] no real occupational training and a long criminal record. He has taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit". Some aspects of this description are covered by the categories listed above, some are not. However, it is clear that the ECtHR considers legal aid awarding authorities capable of making an assessment of the "personal situation" of suspects and defendants. Police and law enforcement officials could also be called upon to make this type of assessment.

⁶⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L212/12 of 7.8.2001.

⁶¹ *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A n° 25, cited in footnote 43 above.

Prior to charge, that is to say, while the suspect is under arrest, at the police station or otherwise being questioned (or having his property searched) law enforcement officers should consider the question of the suspect's potential vulnerability. They could be required to show, by making a written record, that they have made an assessment of the suspect's vulnerability. If a finding that the suspect is particularly vulnerable has been made, law enforcement officers could be required to demonstrate that they have taken the appropriate steps (for example medical assistance, contacting family, enabling the suspect to inform someone of the detention etc) to provide for the higher degree of protection. They should be required to make a written note, which can be verified subsequently, of the steps they deemed it necessary to take if a finding of vulnerability is made and confirmation that those steps were actually taken.

Once the suspect is charged with a criminal offence, and becomes a defendant facing trial, any potential vulnerability, such as the need for linguistic or medical assistance, should be noted in the court record of the proceedings and in the defendant's custody record if he is kept in pre-trial detention.

If it subsequently comes to light that a defendant's vulnerability was either not recorded or that if a record was made, it was not acted upon, the Member State in question should provide for some recourse or remedy for the person concerned.

The assessment of the suspect's potential vulnerability is difficult to make, but training in this field could be offered.

Question21:

Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:

- (a) foreign nationals,**
- (b) children,**
- (c) persons suffering from a mental or emotional handicap, in the broadest sense,**
- (d) the physically handicapped or ill,**
- (e) mothers/ fathers of young children**
- (f) persons who cannot read or write,**
- (g) refugees and asylum seekers,**
- (h) alcoholics and drug addicts?**

Should any further categories be added to this list?

Question22:

Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, together with a note of the steps they have taken if a finding of vulnerability is made?

Question23:

If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, should there be an obligation to follow up the assessment with appropriate action?

Question24:

If the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, or fail to take the necessary steps after making a finding of vulnerability, are sanctions appropriate? If so, what should those sanctions be?

7. CONSULAR ASSISTANCE

7.1.Introduction

As already seen above in relation to interpreters and translators, one readily identifiable vulnerable group is that of non-nationals, both nationals of other EU Member States and of third countries. Numerous NGOs identify this group as one that does not always receive equitable treatment. Some considerable protection would be offered by full implementation of the provisions of the 1963 Vienna Convention on Consular Relations (VCCR), which provides, in its Article 36(1), that:

“(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison; custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (...)”

This provision also lays down a right to visit detained nationals.

Foreign nationals may refuse to see the representative of their government (this can be imagined, for example, in the case of asylum seekers and refugees fleeing persecution in their State of origin and who therefore might not expect or want help from their Consulate). Those falling into this category may contact representatives from another state that has agreed to look after their interests⁶² or a national or international organisation of their choice for this type of assistance⁶³. Implementation of the VCCR could entail appointing a dedicated official in each Consulate to cover cases where their nationals were accused of crimes while abroad (this consular official could also assist with victims of crime, since they would be required to know the local law and criminal procedure). The consular official could assist in liaising with the family of the accused, with lawyers, with any potential witnesses, with NGOs that offer assistance to prisoners abroad and if necessary in organising special procedures such as appeals in the newspapers etc.

The attraction of this idea is that it would reduce the burden on the Host State and increase the suspect/defendant’s chances of getting assistance, especially assistance in a language he understands.

7.2.Discussion and questions

The Commission understand that at present many defendants do not get the benefit of this right, sometimes because they are not aware of it (or made aware of it) and also because when

⁶² Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the UN Congress on the Prevention of crime and the Treatment of Offenders: (1) [...]. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

⁶³ Principle 16 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by the UN General assembly in 1988:
1.[...] 2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with [...] the representative of the competent international organisation, if he is a refugee or is otherwise under the protection of an intergovernmental organisation.

consular assistance is offered, defendants often refuse it for fear of the authorities in their home State learning of their arrest abroad. The right should be better understood by all concerned and Member States should address the question of how their consular officials can offer useful assistance to their nationals arrested abroad, without fear of subsequent prejudice on their return home. There is very little information available on how often consular assistance is offered and whether Member States are failing to comply with this right.

Currently, failure to comply with the VCCR may give rise to a cause of action in the International Court of Justice⁶⁴. However, proceedings in that court are lengthy. Actions are brought by States so the basis of the remedy is that the State has suffered prejudice as a result of the failure to treat its national in accordance with consular protocol. This does not represent a remedy for the actual individual who has been the victim of the breach. Even if his home State is prepared to bring an action against the offending State, it will not provide an effective and practical remedy for the individual concerned. It is therefore worth considering what remedies should or could be available to an individual in this situation.

Suspects and defendants could be made aware of the right by way of the Letter of Rights (Part 8). Police forces could be made aware of it during the course of training if Member States would cooperate to ensure that arresting officers are trained to contact the relevant consular authorities if and when they arrest a foreign national.

Question 25:

Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?

Question 26:

Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?

Question 27:

Should there be any sanction for failing to comply with the VCCR? If so, what should this be?

8. KNOWLEDGE OF THE EXISTENCE OF RIGHTS/ LETTER OF RIGHTS

8.1. Introduction

It is important for both the investigating authorities and the persons being investigated to be fully aware of what rights exist. The Commission suggests that a scheme be instituted requiring Member States to provide suspects and defendants with a written note of their basic rights – a “Letter of Rights”. This suggestion received a favourable response on the whole and variations on this theme were also put forward. Many respondents thought that if a measure such as this were introduced, it would significantly improve the position of suspects and defendants. The European Parliament has reacted favourably to the suggestion of a Letter of Rights and has proposed that a budget be made available for funding it. Producing such a document should be inexpensive, especially once the initial costs of drawing it up had been met.

⁶⁴ See ICJ cases: *Paraguay v. USA* (Breard case) Order of 9 April 1998 (case discontinued) and *Germany v USA* (Lagrand case) Judgment of 27 June 2001. Also the recent case of *Avena and other Mexican Nationals (Mexico v. United States of America)* in which an Order on Provisional Measures is expected on 5 February 2003.

8.2. Discussion and questions

Various suggestions were put forward, such as a Letter of Rights in several parts, with one common part for all the EU and a second part that Member States could draft according to their own national legislation. An important consideration is to ensure that the Letter of Rights can be understood, even by a suspect/defendant with poor reading ability or a low IQ. The Letter of Rights could have a common Part 1 and a Part 2 to be added by the Member States to take account of national provisions. It should contain enough information to be useful but be drafted in a simple form so as to be easily understood. The aim would be to keep it as short as possible. It could be produced in all EU languages in some centralised way or there could be some other mechanism to ensure that it is as uniform as possible.

The Letter of Rights should be given to the suspect at the point when the suspect's rights are first at risk and in need of protection. The difficulty is in pinpointing that moment. This could be on arrest, or before. The letter could be given once the suspect is in custody at the police station but no later since in order to be useful, the Letter of Rights must be given as soon as the person is "detained" and rights conferred by Articles 5 and 6 ECHR arise. If it is not given to the suspect until arrival at the police station, the question of ensuring that he is aware of his rights before receipt of the letter arises. For practical reasons, it would seem logical that it be given at the police station since stocks of the letters themselves would presumably be kept there, together with the different language versions.

It is difficult to assess whether the defendant should be required to sign for the Letter of Rights. The Commission consulted representatives from the Member States on the point. Many were happy that it should not need to be signed for. Some experts wondered what the status of the Letter of Rights would be and what the consequences of failing to give it to the defendant would be.

The Commission is aware of some of the difficulties perceived by Member States. Some consider that the ECHR already exists as a statement of rights. Others argue that their legislation is too complicated to boil down to an easily digestible document or that the rights of the defendant evolve during the course of proceedings so that any "Letter of Rights" would have to be up to 50 pages long in order to cover all options and all stages. However this latter problem should not apply since once the suspect has a lawyer acting for them (a right the person will be made aware of in the Letter of Rights if not before), that lawyer will be in a position to explain the person's rights to them.

Question 28:

Is a common EU wide Letter of Rights feasible? If so, what should it contain?

Question 29:

When should the Letter of Rights be given to the suspect?

Question 30:

Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?

Question 31:

What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

9. COMPLIANCE AND MONITORING

9.1. Introduction

It is worth repeating that the intention behind the initiative on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union is not in any way to replace or even to complement the ECtHR. The hope is that as a result of this initiative, Member States will achieve better standards of compliance with the ECHR in the areas covered by this Green Paper. The ECtHR cannot be relied upon as a safety net to remedy all breaches of the ECHR. This is unrealistic in view of a number of factors. The ECtHR is a court of *last resort* and additionally it has expressed concern over its ability to handle its ever-increasing caseload⁶⁵. If there are repeated allegations of violations of the ECHR, the Member States should have the means to remedy them of their own motion. Since the principle of mutual recognition may only be implemented efficiently where there is mutual trust, it is, as discussed above⁶⁶, important that these common minimum standards be complied with for this reason also. The level of compliance should be demonstrably high. In order for each Member State to be certain of the level of compliance in the other Member States, there should be some form of evaluation. Mutual trust must go beyond the perceptions of the governments of the Member States—it must also be established in the minds of practitioners, law enforcement officers and all those that will administer decisions based on mutual recognition on a daily basis. This cannot be achieved overnight, and cannot be achieved at all unless there is some reliable means of assessing compliance with common minimum standards across the European Union. This will be all the more so after accession of the candidate countries. Furthermore, once a mechanism for evaluation has been decided upon, assessment should be carried out on a regular, continuous basis.

At present there is a growing demand for evaluation of Justice and Home Affairs measures. Several contributions to Working Group X (“Freedom, security and justice”) of the Convention on the Future of Europe⁶⁷ have called for evaluation and monitoring of the implementation of the Area of Freedom, Security and Justice. Working Group X has been set up to consider “Freedom, Security and justice” issues more closely. Justice and Home Affairs Commissioner Antonio Vitorino favours “*enhancing[...], evaluation and monitoring mechanisms to check the real application of Union legislation at operational level*”⁶⁸. Other suggestions are an early warning mechanism for breaches of fundamental rights⁶⁹ and evaluation together with a greater involvement on the part of the ECJ⁷⁰.

⁶⁵ Report of the Evaluation Group on the means to guarantee the continued effectiveness of the European Court of Human Rights, Strasbourg, September 2002.

⁶⁶ See Part I—“Enhancing mutual trust”

⁶⁷ Convention on the Future of Europe—for information and documents, refer to the website: <http://european-convention.eu.int/bienvenue.asp?lang=EN> Working Group X has been set up to consider “Freedom, Security and justice” issues more closely.

⁶⁸ Working Group X “Freedom, Security and justice”, WD 17, 15 November 2002.

⁶⁹ Working Group X “Freedom, Security and Justice”, WD 13, 15 November 2002

⁷⁰ Working Group X, as above, Comments of Ana Palacio, Member of the Convention, Representative of the Spanish Government, on WD05, 18 November 2002. Mrs Palacio states: “As far as operational action is concerned, the main responsibility to monitor Member States would lay on the Council, which should ensure proper control through a system of “peer evaluation”. Finally, the Court of Justice would have full powers under the new Treaty, corresponding to those it enjoys today for “first pillar” issues, to exercise judicial control in JHA matters

9.2. Carrying out the evaluation

The Commission considers it appropriate that it should play the major role in the evaluation and monitoring process. It needs to be informed about how measures are being implemented in practice. Once a Framework Decision has been adopted, one of its final provisions lays down an obligation for Member States to inform the Commission of the arrangements they have made in order to transpose the obligations stemming from the Framework Decision into their national legislation. An example of such a provision is:

*"Member States shall transmit to [...]the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.[...]"*⁷¹

The Commission is then also under a duty to ensure that the Framework Decision is properly implemented, that is to say that the national legislation adequately achieves the aim of the EU measure.

It would therefore seem appropriate for the Commission to extend its task of collecting information on the transposition into national legislation of the EU obligations to a regular monitoring exercise on compliance. This could be on the basis of the Member States themselves submitting reports or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could also use the services of a team of experts. There is a newly appointed independent network of experts on fundamental rights commissioned by DG-Justice and Home Affairs "to assess how each of the rights listed in the CFREU is applied at both national and Community levels...[taking] account of developments in national legislation, the case law of constitutional courts [...] as well as the case law of the Court of Justice of the European Communities and the European Court of Human Rights". The tasks of this team will be the production of a written report summarising the situation of fundamental rights in the context of both European Union law and national legal orders⁷². That network will report to the Commission. It is currently operating on the basis of a contract for a first evaluation to be carried out over a one-year period and which may be renewed for up to five years. If the outcome is satisfactory, the role of this team of experts could be expanded to encompass all the provisions of any Framework Decision on procedural safeguards. Since Article 47 of the Charter of Fundamental Rights of the EU provides for the right to a fair trial, this network is already mandated to consider many of the provisions included in this Green Paper. In any event, evaluation of common minimum standards for procedural safeguards should be carried out on a continuous basis at regular intervals rather than as a once-off or on an *ad hoc* basis. In this way, any persistent breaches will come to light, together with any patterns of standards falling below the agreed minimum.

9.3. Tools for evaluation

The evaluation should cover compliance at all levels and stages of proceedings. There are many possible tools for evaluation. The more obvious are the statistics to be provided by Member States regarding numbers of proceedings and trials, the percentage of defendants with legal representation, percentages of cases where legal translators and interpreters were used and other similar indicators. However, there should be a mechanism for reporting and investigating complaints of non-compliance. Allegations of non-compliance, especially where they persistently refer to the same entity (court, police station or even geographical area) are good indicators of an underlying problem. Some Member States make recordings (audio and video) of police interviews. Not only does this protect police officers from subsequent

⁷¹ Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L190 of 18.7.2002

⁷² Network of experts on the Charter appointed in July 2002, Unit A5, DG-JHA; its terms of reference are set out in Contract notice 2002/S60 – 046435, OJ S60 of 26.3.2002.

allegations of unfair treatment but it also provides excellent evidence of what actually occurred. If Member States accepted the introduction of recording, this would be a good tool for evaluating compliance with the agreed common minimum safeguards.

For evaluation to serve its desired purpose, the scope of the evaluation and the expected results must be precisely indicated. Thus clarity in setting the terms of the monitoring body will be an absolutely necessary prerequisite.

9.4.Sanctions

The question of evaluation and monitoring also begs the question of what action to take in the event of non-compliance or of a persistent falling below agreed common standards. There are remedies for individual violations of the ECHR, decided on a case by case basis by the ECtHR. Article 7 TEU provides very grave sanctions for “serious and persistent breaches” on the part of Member States⁷³. It is necessary to consider whether there could be any other type of sanction, for example for persistent breaches not serious enough to fall within the ambit of Article 7 TEU.

9.5.Conclusions

Setting common minimum standards for procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union will help clarify what is expected of police and judicial authorities. Efficient and continuous monitoring will ensure that those standards are adhered to in reality.

Question 32:

Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?

Question 33:

What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?

Question 34:

Is recording of police interviews a desirable tool for efficient monitoring? What other tools would be effective?

Question 35:

Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

⁷³ See Part 1(2) above.

QUESTIONS :

General

- 1 Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

Legal Representation

- 2 In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should Member States be required to establish a national scheme for providing legal representation in criminal proceedings?
- 3 If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?
- 4 If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?
- 5 Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation “if he has not sufficient means to pay for legal assistance”. How should Member States make the assessment of whether the defendant is able to pay for legal representation or not?
- 6 Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation “when the interests of justice so require”. Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?
- 7 If free legal representation is to be provided for all offences except “minor” ones, what definition of “minor offences” would be acceptable in all Member States?
8. Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

Provision of legal translators and interpreters

- 9 Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?
- 10 Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial should be interpreted for the suspect/defendant?
- 11 What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

- 12 Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?
- 13 Should Member States be required to draw up national registers of legal translators and interpreters?
- 14 If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?
- 15 Should Member States be required to establish a national scheme for training legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous professional development be established?
- 16 Should Member States be required to appoint an accrediting body to govern a system of accreditation renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior work with the accrediting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?
- 17 If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?
- 18 How may and by whom should a Code of Conduct be drawn up and regulated?
- 19 The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can the Member States do to make this a more attractive profession?
- 20 Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide interpretation and translation where a person is entitled to it?

Protecting vulnerable groups

- 21 Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:
 - (1) foreign nationals,
 - (2) children,
 - (3) persons suffering from a mental or emotional handicap, in the broadest sense,
 - (4) the physically handicapped or ill,
 - (5) mothers/ fathers of young children,

- (6) persons who cannot read or write,
- (7) refugees and asylum seekers,
- (8) alcoholics and drug addicts,

Should any further categories be added to this list?

- 22 Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings?
- 23 If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, should there be a mechanism for following up the assessment with appropriate action?
- 24 if the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, are sanctions appropriate? If so, what should those sanctions be?

Consular assistance

- 25 Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?
- 26 Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?
- 27 Should there be any sanction for failing to comply with the VCCR? If so, what should this be?

The Letter of Rights

- 28 Is a common EU wide Letter of Rights feasible? If so, what should it contain?
- 29 When should the Letter of Rights be given to the suspect?
- 30 Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?
- 31 What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

Evaluation and monitoring

- 32 Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?
- 33 What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?

- 34 Is recording of police interviews a desirable tool for efficient monitoring?
- 35 Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

ANNEX

Relevant provisions of existing treaties

The International Covenant on Civil and Political Rights

Article 9

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

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.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

The Rome Statute establishing the International Criminal Court

Article 55

"Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) 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.

2. 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 [...], that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

Article 67

"Rights of the accused

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:

(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;

(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;

(c) To be tried without undue delay;

(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;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(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;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide."

The United Nations Convention on the Rights of the Child

Article 40:

"1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in

particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”