



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on Article 6 of the European Convention on Human Rights

Right to a fair trial
(criminal limb)

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Table of contents

Note to readers.....	6
I. Scope: the notion of “criminal charge”	7
A. General principles.....	7
B. Application of the general principles.....	8
1. Disciplinary proceedings	8
2. Administrative, tax, customs, financial and competition-law proceedings.....	9
3. Political issues	10
4. Expulsion and extradition	10
5. Different stages of criminal proceedings, ancillary proceedings and subsequent remedies.....	10
II. Right of access to a court.....	11
Limitations	12
1. Parliamentary immunity	12
2. Procedural rules	12
3. Requirement of enforcement of a previous decision	13
4. Other restrictions in breach of the right of access to a court.....	13
III. General guarantees: institutional requirements	14
A. The notion of a “tribunal”	14
B. Tribunal established by law	14
C. Independence and impartiality.....	15
1. Independent tribunal.....	16
a. General principles	16
b. Criteria for assessing independence.....	16
i. Manner of appointment of a body’s members	16
ii. Duration of appointment of a body’s members.....	16
iii. Guarantees against outside pressure	16
iv. Appearance of independence.....	17
2. Impartial tribunal	17
a. Criteria for assessing impartiality	17
i. Subjective approach	17
ii. Objective approach.....	18
b. Situations in which the question of a lack of judicial impartiality may arise	18
i. Situations of a functional nature	18
α. The exercise of different judicial functions	18
β. Hierarchical or other links with another participant in the proceedings	19
• Hierarchical links	19
• Other links	20
ii. Situations of a personal nature	20
IV. General guarantees: procedural requirements.....	21
A. Fairness	21
1. Equality of arms and adversarial proceedings.....	21
a. Equality of arms	21
b. Adversarial hearing.....	22

2. Reasoning of judicial decisions	23
Reasons for decisions given by juries	23
3. Right to remain silent and not to incriminate oneself	24
a. Affirmation and sphere of application	24
b. Scope	24
c. A relative right	25
4. Use of evidence obtained unlawfully or in breach of Convention rights	26
5. Entrapment	27
a. General considerations	27
b. The substantive test of incitement	28
c. Judicial review of the entrapment defence	29
6. Waiver of the guarantees of a fair trial	30
B. Public hearing	30
1. The principle of publicity	30
2. The right to an oral hearing and presence at trial	30
3. Appeal proceedings	31
4. Exceptions to the rule of publicity	32
5. Public pronouncement of judgments	33
C. Reasonable time	33
1. Determination of the length of proceedings	33
a. Starting-point of the period to be taken into consideration	33
b. End of the period	33
2. Assessment of a reasonable time	34
a. Principles	34
b. Criteria	34
3. Several examples	35
a. Reasonable time exceeded	35
b. Reasonable time not exceeded	36
V. Specific guarantees	36
A. The presumption of innocence (Article 6 § 2)	36
1. Burden of proof	36
2. Presumptions of fact and of law	37
3. Scope of Article 6 § 2	37
a. Criminal proceedings	37
b. Subsequent proceedings	38
4. Prejudicial statements	38
5. Statements by judicial authorities	39
6. Statements by public officials	39
7. Adverse press campaign	39
8. Sanctions for failure to provide information	40
B. The rights of the defence (Article 6 § 3)	40
1. Information on the nature and cause of the accusation (Article 6 § 3 (a))	41
a. General	41
b. Information about the charge	41
c. Reclassification of the charge	42
d. "In detail"	42
e. "Promptly"	42
f. "Language"	42

2. Preparation of the defence (Article 6 § 3 (b)).....	43
a. General considerations.....	43
b. Adequate time.....	43
c. Adequate facilities.....	44
i. Access to evidence.....	44
ii. Consultation with a lawyer.....	45
3. Right to defend oneself in person or through legal assistance (Article 6 § 3 (c)).....	45
a. Scope of application.....	46
b. Defence in person.....	46
c. Legal assistance.....	47
d. Legal aid.....	48
e. Practical and effective legal assistance.....	48
4. Examination of witnesses (Article 6 § 3 (d))	49
a. Autonomous meaning of the term “witness”	49
b. Right to examine or have examined witnesses	49
i. General principles.....	49
ii. Duty to make a reasonable effort in securing attendance of a witness.....	50
iii. Duty to give reasons for refusal to hear a witness	50
iv. Reliance on witness testimony not adduced in court	50
v. Anonymous witnesses	51
vi. Witnesses in sexual abuse cases.....	52
vii. Advantages offered to witnesses in exchange for their statements.....	52
viii. Hearsay	53
ix. Right to call witnesses for the defence.....	53
5. Interpretation (Article 6 § 3 (e)).....	53
a. If the accused “cannot understand or speak the language used in court”	53
b. Protected elements of the criminal proceedings	54
c. “Free” assistance.....	54
d. Conditions of interpretation.....	54
e. Positive obligations.....	55
VI. Extra-territorial effect of Article 6	55
A. Flagrant denial of justice.....	55
B. The “real risk”: standard and burden of proof	56
List of cited cases	57

Note to readers

This Guide is part of the series of Guides on the Convention published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 6 (criminal limb) of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”) until 31 December 2013. Readers will find the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court’s judgments serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25.). The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012).

* The hyperlinks to the cases cited in the electronic version of the Guide refer to the original text in English or French (the two official languages of the Court) of the judgment or decision delivered by the Court and to the decisions or reports of the European Commission of Human Rights (hereafter “the Commission”). Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Article 6 of the Convention – Right to a fair trial

“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 publicly but the press and public may be excluded from all or part of the trial in the interests 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 to 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 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.”

I. Scope: the notion of “criminal charge”

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ...”

A. General principles

1. The concept of a “criminal charge” has an “autonomous” meaning, independent of the categorisations employed by the national legal systems of the member States (*Adolf v. Austria*, § 30).

2. The concept of “charge” has to be understood within the meaning of the Convention. It may thus be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (*Deweert v. Belgium*, §§ 42 and 46; *Eckle v. Germany*, § 73). The Court has also held that a person in police custody who was required to swear an oath before being questioned as a witness was already the subject of a “criminal charge” and had the right to remain silent (*Brusco v. France*, §§ 46-50).

3. As regards the autonomous notion of “criminal”, the Convention is not opposed to the moves towards “decriminalisation” among the Contracting States. However, offences classified as “regulatory” following decriminalisation may come under the autonomous notion of a “criminal” offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention (*Öztürk v. Germany*, § 49).

4. The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others v. the Netherlands*, §§ 82-83:

1. classification in domestic law;
2. nature of the offence;
3. severity of the penalty that the person concerned risks incurring.

5. The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

6. In evaluating the second criterion, which is considered more important (*Jussila v. Finland* [GC], § 38), the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character (*Bendenoun v. France*, § 47);
- whether the proceedings are instituted by a public body with statutory powers of enforcement (*Benham v. the United Kingdom*, § 56);
- whether the legal rule has a punitive or deterrent purpose (*Öztürk v. Germany*, § 53; *Bendenoun v. France*, § 47);
- whether the imposition of any penalty is dependent upon a finding of guilt (*Benham v. the United Kingdom*, § 56);
- how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany*, § 53).

7. The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides (*Campbell and Fell v. the United Kingdom*, § 72; *Demicoli v. Malta*, § 34).

8. The second and third criteria laid down in *Engel and Others v. the Netherlands* are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as “criminal” from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (*Lutz v. Germany*, § 55; *Öztürk v. Germany*, § 54). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*ibid.*, § 53; *Nicoleta Gheorghe v. Romania*, § 26).

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Bendenoun v. France*, § 47).

9. In using the terms “criminal charge” and “charged with a criminal offence” the three paragraphs of Article 6 refer to identical situations. Therefore, the test of applicability of Article 6 under its criminal head will be the same for the three paragraphs.

B. Application of the general principles

1. Disciplinary proceedings

10. Offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, fall within the ambit of the criminal head of Article 6 of the Convention (*Engel and Others v. the Netherlands*, § 85). On the contrary, strict arrest for two days has been held to be of too short a duration to belong to the “criminal law” sphere (*ibid.*).

11. With regard to professional disciplinary proceedings, the question remains open since the Court has considered it unnecessary to give a ruling on the matter, having concluded that the proceedings fell within the civil sphere (*Albert and Le Compte v. Belgium*, § 30). In the case of disciplinary proceedings resulting in the compulsory retirement of a civil servant, the Court has found that such proceedings were not “criminal” within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere (*Moulet v. France* (dec.)). It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline (*Suküt v. Turkey* (dec.)).

12. While making “due allowance” for the prison context and for a special prison disciplinary regime, Article 6 may apply to offences against prison discipline, on account of the nature of the charges and the nature and severity of the penalties (forty and seven additional days’ custody respectively in *Ezeh and Connors v. the United Kingdom* [GC], § 82; conversely, see *Štitić v. Croatia*, §§ 51-63). However, proceedings concerning the prison system as such do not in principle fall within the ambit of the criminal head of Article 6 (*Boulois v. Luxembourg* [GC], § 85). Thus, for example, a prisoner’s placement in a high-supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1 (*Enea v. Italy* [GC], § 98).

13. Measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are considered to fall outside the ambit of Article 6, because they are akin to the exercise of disciplinary powers (*Ravnsborg v. Sweden*, § 34; *Putz v. Austria*, §§ 33-37). However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as a criminal offence (*Kyprianou v. Cyprus* [GC], §§ 61-64, concerning a penalty of five days’ imprisonment).

14. With regard to contempt of Parliament, the Court distinguishes between the powers of a legislature to regulate its own proceedings for breach of privilege applying to its members, on the one hand, and an extended jurisdiction to punish non-members for acts occurring elsewhere, on the other hand. The former might be considered disciplinary in nature, whereas the Court regards the latter as criminal, taking into account the general application and the severity of the potential penalty which could have been imposed (imprisonment for up to sixty days and a fine in *Demicoli v. Malta*, § 32).

2. Administrative, tax, customs, financial and competition-law proceedings

15. The following administrative offences may fall within the ambit of the criminal head of Article 6:

- road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications (*Lutz v. Germany*, § 182; *Schmautzer v. Austria*; *Malige v. France*);
- minor offences of causing a nuisance or a breach of the peace (*Lauko v. Slovakia*; *Nicoleta Gheorghe v. Romania*, §§ 25-26);
- offences against social-security legislation (*Hüseyin Turan v. Turkey*, §§ 18-21, for a failure to declare employment, despite the modest nature of the fine imposed);
- administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question (*Balsytė-Lideikienė v. Lithuania*, § 61).

16. Article 6 has been held to apply to tax surcharges proceedings, on the basis of the following elements:

- the law setting out the penalties covered all citizens in their capacity as taxpayers;
- the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending;

- the surcharge was imposed under a general rule with both a deterrent and a punitive purpose;
- the surcharge was substantial (*Bendenoun v. France*; conversely, see the interest for late payment in *Mieg de Boofzheim v. France* (dec.)).

The criminal nature of the offence may suffice to render Article 6 applicable, notwithstanding the low amount of the tax surcharge (10% of the reassessed tax liability in *Jussila v. Finland* [GC], § 38).

17. Article 6 under its criminal head has been held to apply to customs law (*Salabiaku v. France*), to penalties imposed by a court with jurisdiction in budgetary and financial matters (*Guisset v. France*), and to certain administrative authorities with powers in the spheres of economic, financial and competition law (*Lilly France S.A. v. France* (dec.); *Dubus S.A. v. France*; *A. Menarini Diagnostics S.r.l. v. Italy*).

3. Political issues

18. Article 6 has been held not to apply in its criminal aspect to proceedings concerning electoral sanctions (*Pierre-Bloch v. France*, §§ 53-60); the dissolution of political parties (*Refah Partisi (the Welfare Party) and Others v. Turkey* (dec.)); parliamentary commissions of inquiry (*Montera v. Italy* (dec.)); and to impeachment proceedings against a country's President for a gross violation of the Constitution (*Paksas v. Lithuania* [GC], §§ 66-67).

19. With regard to lustration proceedings, the Court has held that the predominance of aspects with criminal connotations (nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) could bring those proceedings within the ambit of the criminal head of Article 6 of the Convention (*Matyjek v. Poland* (dec.); conversely, see *Sidabras and Džiautas v. Lithuania* (dec.)).

4. Expulsion and extradition

20. Procedures for the expulsion of aliens do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings (*Maaouia v. France* [GC], § 39). The same exclusionary approach applies to extradition proceedings (*Peñafiel Salgado v. Spain* (dec.)) or proceedings relating to the European arrest warrant (*Monedero Angora v. Spain* (dec.)).

21. Conversely, however, the replacement of a prison sentence by deportation and exclusion from national territory for ten years may be treated as a penalty on the same basis as the one imposed at the time of the initial conviction (*Gurguchiani v. Spain*, §§ 40 and 47-48).

5. Different stages of criminal proceedings, ancillary proceedings and subsequent remedies

22. Measures adopted for the prevention of disorder or crime are not covered by the guarantees in Article 6 (*Raimondo v. Italy*, § 43, for special supervision by the police; *R. v. the United Kingdom* (dec.), for or a warning given by the police to a juvenile who had committed indecent assaults on girls from his school).

23. As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole. Therefore, some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (*Imbrioscia v. Switzerland*, § 36). Although investigating judges do not determine a “criminal charge”, the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation

procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (*Vera Fernández-Huidobro v. Spain*, §§ 108-114).

24. Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set, in *Phillips v. the United Kingdom*, § 39). Article 6 may also be applicable under its criminal limb to proceedings resulting in the demolition of a house built without planning permission, as the demolition could be considered a “penalty” (*Hamer v. Belgium*, § 60). However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code (*Nurmagomedov v. Russia*, § 50).

25. Proceedings concerning the execution of sentences – such as proceedings for the application of an amnesty (*Montcornet de Caumont v. France* (dec.)), parole proceedings (*A. v. Austria*, Commission decision), transfer proceedings under the Convention on the Transfer of Sentenced Persons (*Szabó v. Sweden* (dec.)), but see, for a converse finding, *Buijen v. Germany*, §§ 40-45) – and *exequatur* proceedings relating to the enforcement of a forfeiture order made by a foreign court (*Saccoccia v. Austria* (dec.)) do not fall within the ambit of the criminal head of Article 6.

26. In principle, forfeiture measures adversely affecting the property rights of third parties in the absence of any threat of criminal proceedings against them do not amount to the “determination of a criminal charge” (seizure of an aircraft in *Air Canada v. the United Kingdom*, § 54; forfeiture of gold coins in *AGOSI v. the United Kingdom*, §§ 65-66). Such measures instead fall under the civil head of Article 6 (*Silickienė v. Lithuania*, §§ 45-46).

27. The Article 6 guarantees apply in principle to appeals on points of law (*Meftah and Others v. France* [GC], § 40), and to constitutional proceedings (*Gast and Popp v. Germany*, §§ 65-66; *Caldas Ramírez de Arrellano v. Spain* (dec.)) where such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.

28. Lastly, Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not “charged with a criminal offence” within the meaning of that Article (*Fischer v. Austria* (dec.)). Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge (*Löffler v. Austria*, §§ 18-19). Similarly, Article 6 does not apply to a request for the reopening of criminal proceedings following the Court’s finding of a violation (*Öcalan v. Turkey* (dec.)). However, supervisory review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6 (*Vanyan v. Russia*, § 58).

II. Right of access to a court

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by [a] tribunal ...”

29. The “right to a court” is no more absolute in criminal than in civil matters. It is subject to implied limitations (*Deweert v. Belgium*, § 49; *Kart v. Turkey* [GC], § 67).

30. However, these limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there

must be a reasonable proportionality between the means employed and the aim sought to be achieved (*Guérin v. France* [GC], § 37; *Omar v. France* [GC], § 34, citing references to civil cases).

Limitations

31. Limitations on the right of access to a court may result from:

1. Parliamentary immunity

32. The guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task. Without a doubt, inviolability helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings and thereby protecting the opposition from pressure or abuse on the part of the majority (*Kart v. Turkey* [GC], § 90, citing references to civil cases). Furthermore, bringing proceedings against members of parliament may affect the very functioning of the assembly to which they belong and disrupt Parliament's work. This system of immunity, constituting an exception to the ordinary law, can therefore be regarded as pursuing a legitimate aim (*ibid.*, § 91).

33. However, without considering the circumstances of the case no conclusions can be drawn as to the compatibility with the Convention of this finding of the legitimacy of parliamentary immunity. It must be ascertained whether parliamentary immunity has restricted the right of access to a court in such a way that the very essence of that right is impaired. Reviewing the proportionality of such a measure means taking into account the fair balance which has to be struck between the general interest in preserving Parliament's integrity and the applicant's individual interest in having his parliamentary immunity lifted in order to answer the criminal charges against him in court. In examining the issue of proportionality, the Court must pay particular attention to the scope of the immunity in the case before it (*ibid.*, §§ 92-93). The less the protective measure serves to preserve the integrity of Parliament, the more compelling its justification must be (*ibid.*, § 95). Thus, for example, the Court has held that the inability of a member of parliament to waive his immunity did not infringe his right to a court, since the immunity was simply a temporary procedural obstacle to the criminal proceedings, being limited to the duration of his term of parliamentary office (*ibid.*, §§ 111-113).

2. Procedural rules

34. These are, for example, the admissibility requirements for an appeal.

35. However, although the right of appeal may of course be subject to statutory requirements, when applying procedural rules the courts must avoid excessive formalism that would infringe the fairness of the proceedings (*Walchli v. France*, § 29). The particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court (*Labergère v. France*, § 23), particularly in view of the importance of the appeal and what is at stake in the proceedings for an applicant who has been sentenced to a long term of imprisonment (*ibid.*, § 20).

36. The right of access to a court is also fundamentally impaired by a procedural irregularity, for example where a prosecution service official responsible for verifying the admissibility of appeals against fines or applications for exemptions acted *ultra vires* by ruling on the merits of an appeal himself, thus depriving the applicants of the opportunity to have the “charge” in question determined by a community judge (*Josseume v. France*, § 32).

37. The same applies where a decision declaring an appeal inadmissible on erroneous grounds led to the retention of the deposit equivalent to the amount of the standard fine, with the result that the fine was considered to have been paid and the prosecution was discontinued, making it

impossible for the applicant, once he had paid the fine, to contest before a “tribunal” the road-traffic offence of which he was accused (*Célice v. France*, § 34).

38. A further example: the applicant suffered an excessive restriction of his right of access to a court where his appeal on points of law was declared inadmissible for failure to comply with the statutory time-limits, when this failure was due to the defective manner in which the authorities had discharged their obligation to serve the lower court’s decision on the applicant, who was in detention and could therefore have been located (*Davran v. Turkey*, §§ 40-47).

3. Requirement of enforcement of a previous decision

39. As regards the automatic inadmissibility of appeals on points of law lodged by appellants who have failed to surrender to custody although warrants have been issued for their arrest:

- where an appeal on points of law is declared inadmissible on grounds connected with the applicant’s having absconded, this amounts to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society (*Poitrimol v. France*, § 38; *Guérin v. France*, § 45; *Omar v. France*, § 42);
- where an appeal on points of law is declared inadmissible solely because the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired. This imposes a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and the exercise of the rights of the defence on the other (*ibid.*, §§ 40-41; *Guérin v. France*, § 43).

40. The same applies where the right to appeal on points of law is forfeited because of failure to comply with the obligation to surrender to custody (*Khalfaoui v. France*, § 46; *Papon v. France (no. 2)*, § 100).

41. However, the requirement to lodge a deposit before appealing against a speeding fine – the aim of this requirement being to prevent dilatory or vexatious appeals in the sphere of road-traffic offences – may constitute a legitimate and proportionate restriction on the right of access to a court (*Schneider v. France* (dec.)).

4. Other restrictions in breach of the right of access to a court

42. They may occur, for example, where an accused person is persuaded by the authorities to withdraw an appeal on the basis of a false promise of remission of the sentence imposed by the first-instance court (*Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands*, §§ 46-51); or where a court of appeal has failed to inform an accused person of a fresh time-limit for lodging an appeal on points of law following the refusal of his officially assigned counsel to assist him (*Kulikowski v. Poland*, § 70).

III. General guarantees: institutional requirements

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ...”

A. The notion of a “tribunal”

43. A disciplinary or administrative body can have the characteristics of a “tribunal” within the autonomous meaning of Article 6, even if it is not termed a “tribunal” or “court” in the domestic system. In the Court’s case law a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (*Belilos v. Switzerland*, § 64; *Coëme and Others v. Belgium*, § 99; *Richert v. Poland*, § 43).

44. Conferring the prosecution and punishment of minor “criminal” offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (*Öztürk v. Germany*, § 56; *A. Menarini Diagnostics S.R.L. v. Italy*). Therefore, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent review by a “judicial body that has full jurisdiction”. The defining characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below (*ibid.*, § 59; *Schmautzer v. Austria*, § 36; *Gradingner v. Austria*, § 44): for instance, administrative courts carrying out a judicial review that went beyond a “formal” review of legality and included a detailed analysis of the appropriateness and proportionality of the penalty imposed by the administrative authority (*A. Menarini Diagnostics S.R.L. v. Italy*, §§ 63-67, in respect of a fine imposed by an independent regulatory authority in charge of competition). Similarly, a judicial review may satisfy Article 6 requirements even if it is the law itself which determines the sanction in accordance with the seriousness of the offence (*Malige v. France*, §§ 46-51, in respect of the deduction of points from a driving licence).

45. The power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of “tribunal” (*Findlay v. the United Kingdom*, § 77).

B. Tribunal established by law

46. Under Article 6 § 1 of the Convention, a tribunal must always be “established by law”. This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols (*Jorgic v. Germany*, § 64; *Richert v. Poland*, § 41). Indeed, an organ not established according to the legislation would be deprived of the legitimacy required, in a democratic society, to hear individual complaints (*Lavents v. Latvia*, § 114; *Gorgiladze v. Georgia*, § 67; *Kontalexis v. Greece*, § 38).

47. “Law”, within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (*Lavents v. Latvia*, § 114; *Richert v. Poland*, § 41; *Jorgic v. Germany*, § 64) but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case unlawful (*Pandjigidze and Others v. Georgia*, § 104; *Gorgiladze v. Georgia*, § 68). The phrase “established by law” covers not only the legal basis for the very existence of a tribunal, but also compliance by the tribunal with

the particular rules that govern it (*ibid.*), and the composition of the bench in each case (*Posokhov v. Russia*, § 39; *Fatullayev v. Azerbaijan*, § 144; *Kontalexis v. Greece*, § 42).

48. Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not “established by law” within the meaning of Article 6 § 1 (*Richert v. Poland*, § 41; *Jorgic v. Germany*, § 64).

49. The object of the term “established by law” in Article 6 “is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament” (*Richert v. Poland*, § 42; *Coëme and Others v. Belgium*, § 98). Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation (*ibid.*; *Gorgiladze v. Georgia*, § 69).

50. In principle, a violation of the domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent to examine whether the national law has been complied with in this respect. However, having regard to the general principle that it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court may not question their interpretation unless there has been a flagrant violation of domestic law (*Coëme and Others v. Belgium*, § 98 *in fine*; *Lavents v. Latvia*, § 114). The Court’s task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (*Jorgic v. Germany*, § 65).

51. Examples where the Court found that the body in question was not “a tribunal established by law”:

- the Court of Cassation which tried co-defendants other than ministers for offences connected with those for which ministers were standing trial, since the connection rule was not established by law (*Coëme and Others v. Belgium*, §§ 107-108);
- a court composed of two lay judges elected to sit in a particular case in breach of the statutory requirement of drawing of lots and the maximum period of two weeks’ service per year (*Posokhov v. Russia*, § 43);
- a court composed of lay judges who continued to decide cases in accordance with established tradition, although the law on lay judges had been repealed and no new law had been enacted (*Pandjigidze and Others v. Georgia*, §§ 108-111);
- a court whose composition was not in accordance with the law, since two of the judges were disqualified by law from sitting in the case (*Lavents v. Latvia*, § 115).

52. The Court found that the tribunal was “established by law” in the following cases:

- a German court trying a person for acts of genocide committed in Bosnia (*Jorgic v. Germany*, §§ 66-71);
- a special court established to try corruption and organised crime (*Fruni v. Slovakia*, § 140).

C. Independence and impartiality

53. The right to a fair trial in Article 6 § 1 requires that a case be heard by an “independent and impartial tribunal” established by law. There is a close link between the concepts of independence and objective impartiality. For this reason the Court commonly considers the two requirements together (*Findlay v. the United Kingdom*, § 73).

The principles applicable when determining whether a tribunal can be considered “independent and impartial” apply equally to professional judges, lay judges and jurors (*Holm v. Sweden*, § 30).

1. Independent tribunal

a. General principles

54. Article 6 § 1 of the Convention requires independence from the other branches of power – that is, the executive and the legislature – and also from the parties (*Ninn-Hansen v. Denmark* (dec.)).

55. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met (*Henryk Urban and Ryszard Urban v. Poland*, § 46).

b. Criteria for assessing independence

56. In determining whether a body can be considered to be “independent” the Court has had regard to the following criteria (*Findlay v. the United Kingdom*, § 73):

- i. the manner of appointment of its members and
- ii. the duration of their term of office;
- iii. the existence of guarantees against outside pressures;
- iv. whether the body presents an appearance of independence.

i. Manner of appointment of a body's members

57. The mere appointment of judges by Parliament cannot be seen to cast doubt on their independence (*Filippini v. San Marino* (dec.); *Ninn-Hansen v. Denmark* (dec.))

58. Similarly, appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (*Henryk Urban and Ryszard Urban v. Poland*, § 49; *Campbell and Fell v. the United Kingdom*, § 79).

59. Although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality (*Moiseyev v. Russia*, § 176).

ii. Duration of appointment of a body's members

60. No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present (*Campbell and Fell v. the United Kingdom*, § 80).

iii. Guarantees against outside pressure

61. Judicial independence demands that individual judges be free from undue influences outside the judiciary, and from within. Internal judicial independence requires that they be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence

and impartiality of a court may be said to have been objectively justified (*Parlov-Tkalčić v. Croatia*, § 86; *Daktaras v. Lithuania*, § 36; *Moiseyev v. Russia*, § 184).

iv. Appearance of independence

62. In order to determine whether a tribunal can be considered to be “independent” as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (*Sahiner v. Turkey*, § 44).

63. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether his doubts can be held to be objectively justified (*Incal v. Turkey*, § 71). No problem arises as regards independence when the Court is of the view that an “objective observer” would have no cause for concern about this matter in the circumstances of the case at hand (*Clarke v. the United Kingdom* (dec.)).

64. Where a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, the accused may entertain a legitimate doubt about those persons’ independence (*Sahiner v. Turkey*, § 45).

2. Impartial tribunal

65. Article 6 § 1 of the Convention requires a tribunal falling within its scope to be “impartial”. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways (*Kyprianou v. Cyprus* [GC], § 118; *Micallef v. Malta* [GC], § 93).

a. Criteria for assessing impartiality

66. The Court has distinguished between:

- i. a *subjective approach*, that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case;
- ii. an *objective approach*, that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (*Kyprianou v. Cyprus* [GC], § 118; *Piersack v. Belgium*, § 30; *Grievs v. the United Kingdom* [GC], § 69).

67. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct (*Kyprianou v. Cyprus* [GC], §§ 119 and 121).

i. Subjective approach

68. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (*Kyprianou v. Cyprus* [GC], § 119; *Hauschildt v. Denmark*, § 47).

69. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (*De Cubber v. Belgium*, § 25).

70. Although in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge’s subjective impartiality, the requirement of objective impartiality provides a further important guarantee. The Court has indeed recognised the difficulty of

establishing a breach of Article 6 on account of subjective partiality and has therefore in the vast majority of cases focused on the objective test (*Kyprianou v. Cyprus* [GC], § 119).

ii. Objective approach

71. Under the objective test, when applied to a body sitting as a bench, it must be determined whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality (*Castillo Algar v. Spain*, § 45).

72. In deciding whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (*Ferrantelli and Santangelo v. Italy*, § 58; *Padovani v. Italy*, § 27).

73. The objective test mostly concerns hierarchical or other links between the judge and other persons involved in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (*Micallef v. Malta* [GC], § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (*Pullar v. the United Kingdom*, § 38).

74. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (*Castillo Algar v. Spain*, § 45).

75. Account must also be taken of questions of internal organisation (*Piersack v. Belgium*, § 30 (d)). The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Micallef v. Malta* [GC], § 99; *Mežnarić v. Croatia*, § 27; *Harabin v. Slovakia*, § 132). The Court will take such rules into account when making its own assessment as to whether a “tribunal” was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (*Pfeifer and Plankl v. Austria*, § 6; *Oberschlick v. Austria (no. 1)*, § 50; *Pescador Valero v. Spain*, §§ 24-29).

b. Situations in which the question of a lack of judicial impartiality may arise

76. There are two possible situations in which the question of a lack of judicial impartiality arises (*Kyprianou v. Cyprus* [GC], § 121):

- i. the first is *functional in nature* and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links with another person involved in the proceedings;
- ii. the second is *of a personal character* and derives from the *conduct of the judges* in a given case.

i. Situations of a functional nature

α. The exercise of different judicial functions

77. The mere fact that a judge in a criminal court has also made pre-trial decisions in the case, including decisions concerning detention on remand, cannot be taken in itself as justifying fears as to his lack of impartiality; what matters is the extent and nature of these decisions (*Fey v. Austria*, § 30;

Sainte-Marie v. France, § 32; *Nortier v. the Netherlands*, § 33). When decisions extending detention on remand required “a very high degree of clarity” as to the question of guilt, the Court found that the impartiality of the tribunals concerned was capable of appearing open to doubt and that the applicant’s fears in this regard could be considered objectively justified (*Hauschildt v. Denmark*, §§ 49-52).

78. The fact that a judge was once a member of the public prosecutor’s department is not a reason for fearing that he lacks impartiality; nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality (*Piersack v. Belgium*, § 30 (b) and (d)).

79. The successive exercise of the functions of investigating judge and trial judge by one and the same person in the same case has also led the Court to find that the impartiality of the trial court was capable of appearing to the applicant to be open to doubt (*De Cubber v. Belgium*, §§ 27-30).

However, where the trial judge’s participation in the investigation had been limited in time and consisted in questioning two witnesses and had not entailed any assessment of the evidence or required him to reach a conclusion, the Court found that the applicant’s fear that the competent national court lacked impartiality could not be regarded as objectively justified (*Bulut v. Austria*, §§ 33-34).

80. No question of a lack of judicial impartiality arises when a judge has already delivered purely formal and procedural decisions in other stages of the proceedings; however, problems with impartiality may emerge if, in other phases of the proceedings, a judge has already expressed an opinion on the guilt of the accused (*Gómez de Liaño y Botella v. Spain*, §§ 67-72).

81. The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge’s impartiality in a subsequent case (*Kriegisch v. Germany* (dec.); *Khodorkovskiy and Lebedev v. Russia*, § 544). It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings (*Poppe v. the Netherlands*, § 26; *Schwarzenberger v. Germany*, § 42; *Ferrantelli and Santangelo v. Italy*, § 59).

82. The obligation to be impartial cannot be construed so as to impose an obligation on a superior court which sets aside an administrative or judicial decision to send the case back to a different jurisdictional authority or to a differently composed branch of that authority (*Thomann v. Switzerland*, § 33; *Stow and Gai v. Portugal* (dec.)).

β. Hierarchical or other links with another participant in the proceedings

• Hierarchical links

83. The determination by military service tribunals of criminal charges against military service personnel is not in principle incompatible with the provisions of Article 6 (*Cooper v. the United Kingdom* [GC], § 110). However, where all the members of the court martial were subordinate in rank to the convening officer and fell within his chain of command, the applicant’s doubts about the tribunal’s independence and impartiality could be objectively justified (*Findlay v. the United Kingdom*, § 76; *Miller and Others v. the United Kingdom*, §§ 30-31).

84. The trial of civilians by a court composed in part of members of the armed forces can give rise to a legitimate fear that the court might allow itself to be unduly influenced by partial considerations (*Incal v. Turkey*, § 72; *Ibrahim Ülger v. Turkey*, § 26). Even when a military judge has participated only in an interlocutory decision in proceedings against a civilian that continues to remain in effect, the

whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court (*Öcalan v. Turkey* [GC], § 115).

85. Situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence (*Ergin v. Turkey* (no. 6), § 49).

86. The determination of criminal charges against civilians in military courts could be held to be compatible with Article 6 only in very exceptional circumstances (*Martin v. the United Kingdom*, § 44).

- *Other links*

87. Objectively justified doubts as to the impartiality of the trial court presiding judge were found to exist when her husband was the head of the team of investigators dealing with the applicants' case (*Dorozhko and Pozharskiy v. Estonia*, §§ 56-58).

88. The fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case does not necessarily mean that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (*Pullar v. the United Kingdom*, § 38, concerning the presence in the jury of an employee of one of the two key prosecution witnesses; *Hanif and Khan v. the United Kingdom*, § 141, concerning the presence of a police officer in the jury).

ii. Situations of a personal nature

89. The judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (*Lavents v. Latvia*, § 118; *Buscemi v. Italy*, § 67). Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality (*ibid.*, § 68; see also *Lavents v. Latvia*, § 119, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty).

90. No violation of Article 6 was found in relation to statements made to the press by a number of members of the national legal service and a paper published by the National Association of judges and prosecutors criticising the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the defence strategy, but not making any pronouncement as to the applicant's guilt. Moreover, the court hearing the applicant's case had been made up entirely of professional judges whose experience and training enabled them to rise above external influence (*Previti v. Italy* (dec.), § 253).

IV. General guarantees: procedural requirements

A. Fairness

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair... hearing ... by [a] tribunal ...”

1. Equality of arms and adversarial proceedings

91. Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (*Foucher v. France*, § 34; *Bulut v. Austria*; *Bobek v. Poland*, § 56; *Klimentyev v. Russia*, § 95). Equality of arms requires that a fair balance be struck between the parties, and applies equally to criminal and civil cases.

92. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision. The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6 § 1 looking at the two concepts together.

93. There has been a considerable evolution in the Court’s case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (*Borgers v. Belgium*, § 24).

94. In criminal cases Article 6 § 1 overlaps with the specific guarantees of Article 6 § 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1.

a. Equality of arms

95. A restriction on the rights of the defence was found in *Borgers v. Belgium*, where the applicant was prevented from replying to submissions made by the *avocat général* before the Court of Cassation and had not been given a copy of the submissions beforehand. The inequality was exacerbated by the *avocat général*’s participation, in an advisory capacity, in the court’s deliberations.

96. The Court has found a violation of Article 6 § 1 combined with Article 6 § 3 in criminal proceedings where a defence lawyer was made to wait for fifteen hours before finally being given a chance to plead his case in the early hours of the morning (*Makhfi v. France*). Equally, the Court found a violation of the principle of equality of arms in connection with a Supreme Court ruling in a criminal case. The applicant, who had been convicted on appeal and had requested to be present, had been excluded from a preliminary hearing held in camera (*Zhuk v. Ukraine*, § 35).

97. In contrast, a complaint concerning equality of arms was declared inadmissible as being manifestly ill-founded where the applicant complained that the prosecutor had stood on a raised platform in relation to the parties. The accused had not been placed at a disadvantage regarding the defence of his interests (*Diriöz v. Turkey*, § 25).

98. The failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and it is therefore the

defence which is the most likely to suffer from omissions and lack of clarity in such rules (*Coëme and Others v. Belgium*, § 102).

99. Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role (*Bonisch v. Austria*, § 32; conversely, see *Brandstetter v. Austria*, § 45).

100. Non-disclosure of evidence to the defence may breach equality of arms (as well as the right to an adversarial hearing) (*Kuopila v. Finland*, § 38, where the defence was not given an opportunity to comment on a supplementary police report).

101. Equality of arms may also be breached when the accused has limited access to his case file or other documents on public-interest grounds (*Matyjek v. Poland*, § 65).

b. Adversarial hearing

102. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (*Rowe and Davis v. the United Kingdom* [GC], § 60).

103. In a criminal trial, Article 6 § 1 usually overlaps with the defence rights under Article 6 § 3, such as the right to question witnesses.

104. In cases where evidence has been withheld from the defence on public-interest grounds the Court will not itself review whether or not an order permitting non-disclosure was justified in a particular case. Rather, it examines the decision-making procedure to ensure that it complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

105. In *Rowe and Davis v. the United Kingdom* [GC], the Court found a violation of Article 6 § 1 on account of the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure, thereby depriving the applicants of a fair trial. However, in *Jasper v. the United Kingdom* [GC] (§ 58), the Court found no violation of Article 6 § 1, relying on the fact that the material which was not disclosed formed no part of the prosecution case whatever, and was never put to the jury.

106. However, the entitlement to disclosure of relevant evidence is not an absolute right. In criminal proceedings there may be competing interests, such as national security or the need to protect witnesses who are at risk of reprisals or to keep secret the methods used by the police to investigate crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (*Van Mechelen and Others v. the Netherlands*, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid.*, § 54; *Doorson v. the Netherlands*, § 72).

107. In *Edwards and Lewis v. the United Kingdom* [GC], the applicants were denied access to the evidence, and hence it was not possible for their representatives to argue the case on entrapment in full before the judge. The Court accordingly found a violation of Article 6 § 1 because the procedure

employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused.

108. A breach of the right to an adversarial trial has also been found where the parties had not received the reporting judge's report before the hearing, whereas the advocate-general had, nor had they had an opportunity to reply to the advocate-general's submissions (*Reinhardt and Slimane-Kaïd v. France*, §§ 105-106).

2. Reasoning of judicial decisions

109. According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (*Papon v. France* (dec.)).

110. Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case (*Ruiz Torija v. Spain*, § 29).

111. While courts are not obliged to give a detailed answer to every argument raised (*Van de Hurk v. the Netherlands*, § 61), it must be clear from the decision that the essential issues of the case have been addressed (*Boldea v. Romania*, § 30).

112. National courts should indicate with sufficient clarity the grounds on which they base their decision so as to allow a litigant usefully to exercise any available right of appeal (*ibid.*; *Hadjianastassiou v. Greece*).

Reasons for decisions given by juries

113. Juries in criminal cases rarely give reasoned verdicts and the relevance of this to fairness has been touched upon in a number of cases, first by the Commission and latterly by the Court.

114. The Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict (*Saric v. Denmark* (dec.)). Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness (*Taxquet v. Belgium* [GC], § 92; *Legillon v. France*, § 53).

115. In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions. In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers (*R. v. Belgium* (dec.); *Zarouali v. Belgium* (dec.); *Planka v. Austria* (dec.); *Papon v. France* (dec.)). Where an assize court refuses to put distinct questions in respect of each defendant as to the existence of aggravating circumstances, thereby denying the jury the possibility of determining the applicant's individual criminal responsibility the Court has found a violation of Article 6 § 1 (*Goktepe v. Belgium*, § 28).

116. In *Bellerín Lagares v. Spain* (dec.) the Court observed that the impugned judgment – to which a record of the jury's deliberations had been attached – contained a list of the facts which the jury had held to be established in finding the applicant guilty, a legal analysis of those facts and, for sentencing purposes, a reference to the circumstances found to have had an influence on the applicant's degree of responsibility in the case at hand. It therefore found that the judgment in question had contained sufficient reasons for the purposes of Article 6 § 1 of the Convention.

117. Regard must be had to any avenues of appeal open to the accused (*Taxquet v. Belgium* [GC], § 92). In this case only four questions were put as regards the applicant; they were worded in identical terms to the questions concerning the other co-accused and did not allow him to determine the factual or legal basis on which he was convicted. Thus, his inability to understand why he was found guilty led to an unfair trial (*ibid.*, § 100).

118. In *Judge v. the United Kingdom* (dec.), the Court found that the framework surrounding a Scottish jury's unreasoned verdict was sufficient for the accused to understand his verdict. Moreover, the Court was also satisfied that the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under the applicable legislation, the Appeal Court enjoyed wide powers of review and was empowered to quash any conviction which amounts to a miscarriage of justice.

3. Right to remain silent and not to incriminate oneself

a. Affirmation and sphere of application

119. Anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself (*Funke v. France*, § 44; *O'Halloran and Francis v. the United Kingdom* [GC], § 45; *Saunders v. the United Kingdom*, § 60). Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (*John Murray v. the United Kingdom*, § 45).

120. The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the most simple to the most complex (*Saunders v. the United Kingdom*, § 74).

121. The right to remain silent applies from the point at which the suspect is questioned by the police (*John Murray v. the United Kingdom*, § 45).

b. Scope

122. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (*Saunders v. the United Kingdom*, § 68; *Bykov v. Russia* [GC], § 92).

123. However, the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood and urine samples, and bodily tissue for the purpose of DNA testing (*Saunders v. the United Kingdom*, § 69; *O'Halloran and Francis v. the United Kingdom* [GC], § 47).

124. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the

privilege against self-incrimination. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently “practical and effective”, access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (*Salduz v. Turkey* [GC], §§ 54-55).

125. Persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned. These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, these rights are complementary, since persons in police custody must *a fortiori* be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent (*Brusco v. France*, § 54; *Navone and Others v. Monaco*, § 74). The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel (*ibid.*; *Stojkovic v. France and Belgium*, § 54).

126. The right to remain silent and the privilege against self-incrimination serve in principle to protect the freedom of a suspect to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which the suspect has elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning (in this particular case, a confession made to a police informer sharing the applicant’s cell), and where the confessions or statements thereby obtained are adduced in evidence at trial (*Allan v. the United Kingdom*, § 50).

127. Conversely, in the case of *Bykov v. Russia* [GC] (§§ 102-103), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court.

c. A relative right

128. The right to remain silent is not absolute (*John Murray v. the United Kingdom*, § 47).

129. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements:

- the nature and degree of compulsion;
- the existence of any relevant safeguards in the procedure;
- the use to which any material so obtained is put (*Jalloh v. Germany* [GC], § 101; *O'Halloran and Francis v. the United Kingdom* [GC], § 55; *Bykov v. Russia* [GC], § 104).

130. On the one hand, a conviction must not be solely or mainly based on the accused’s silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused’s silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused’s decision to remain silent throughout criminal proceedings should necessarily have no implications.

131. Whether the drawing of adverse inferences from an accused’s silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to

the weight attached to such inferences by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (*John Murray v. the United Kingdom*, § 47).

132. Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination (*Jalloh v. Germany* [GC], § 97). The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings (*Heaney and McGuinness v. Ireland*, § 57).

4. Use of evidence obtained unlawfully or in breach of Convention rights

133. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (*Schenk v. Switzerland*, §§ 45-46; *Heglas v. the Czech Republic*, § 84).

134. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (*Khan v. the United Kingdom*, § 34; *P.G. and J.H. v. the United Kingdom*, § 76; *Allan v. the United Kingdom*, § 42).

135. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (*Bykov v. Russia* [GC], § 89; *Jalloh v. Germany* [GC], § 96). In this connection, the Court also attaches weight to whether the evidence in question was or was not decisive for the outcome of the criminal proceedings (*Gäfgen v. Germany* [GC]).

136. As to the examination of the nature of the Convention violation found, the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, and in particular to the question of respect for the applicant's defence rights and the quality and importance of the evidence in question (*ibid.*, § 165).

137. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (*Jalloh v. Germany* [GC], §§ 99 and 105; *Harutyunyan v. Armenia*, § 63).

138. Therefore, the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6 (*El Haski v. Belgium*; *Gäfgen v. Germany* [GC], § 166). This also holds true for the use of real evidence obtained as a direct result of acts of torture (*ibid.*, § 167; *Jalloh v. Germany* [GC], § 105). The admission of such evidence obtained as a result of an act classified as inhuman treatment in breach

of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence (*El Haski v. Belgium*, § 85; *Gäffgen v. Germany* [GC], § 178).

139. These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (*El Haski v. Belgium*, § 85). In particular, the Court has found that the use in a trial of evidence obtained by torture would amount to a flagrant denial of justice even where the person from whom the evidence had thus been extracted was a third party (*Othman (Abu Qatada) v. the United Kingdom*, §§ 263 and 267).

5. Entrapment

a. General considerations

140. The Court has recognised the need for the authorities to have recourse to special investigative methods, notably in organised crime and corruption cases. It has held, in this connection, that the use of special investigative methods – in particular, undercover techniques – does not in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (*Ramanauskas v. Lithuania* [GC], § 51).

141. While the rise of organised crime requires the States to take appropriate measures, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (*ibid.*, § 53). In this connection, the Court has emphasised that the police may act undercover but not incite (*Khudobin v. Russia*, § 128).

142. Moreover, while the Convention does not preclude reliance, at the preliminary investigation stage and where this may be warranted by the nature of the offence, on sources such as anonymous informants, the subsequent use of such sources by the trial court to found a conviction is a different matter (*Teixeira de Castro v. Portugal*, § 35). Such a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (*Ramanauskas v. Lithuania* [GC], § 51). As to the authority exercising control over undercover operations, the Court has considered that, while judicial supervision would be the most appropriate means, other means may be used provided that adequate procedures and safeguards are in place, such as supervision by a prosecutor (*Bannikova v. Russia*, § 50).

143. While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as this would expose the accused to the risk of being definitely deprived of a fair trial from the outset (*Ramanauskas v. Lithuania* [GC], § 54).

144. Consequently, in order to ascertain whether the right to a fair trial was respected in a case involving the use of undercover agents the Court examines, first, whether there was entrapment (the “substantive test of incitement”) and, if so, whether the applicant was able to make an entrapment defence before the domestic courts (*Bannikova v. Russia*, §§ 37 and 51). If the actions of the agent, irrespective of whether he or she was employed by the State or a private person assisting the authorities, constituted entrapment and the evidence obtained as a result was used against the applicant in the criminal proceedings brought against him, the Court will find a violation of Article 6 § 1 of the Convention (*Ramanauskas v. Lithuania* [GC], § 73).

b. The substantive test of incitement

145. The Court has defined entrapment,¹ as opposed to a legitimate undercover investigation, as a situation where the officers involved - whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution (*Ramanauskas v. Lithuania* [GC], § 55).

146. In deciding whether the investigation was “essentially passive” the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out. In particular, it will determine whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (*Bannikova v. Russia*, § 38).

147. In its assessment the Court takes into account a number of factors. For example, in the early landmark case of *Teixeira de Castro v. Portugal* (§§ 37-38) the Court took into account, *inter alia*, the fact that the applicant had no criminal record, that no investigation concerning him had been opened, that he was unknown to the police officers, that no drugs were found in his home and that the amount of drugs found on him during arrest was not more than the amount requested by the undercover agents. It found that the agents’ actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention the offence in question would have been committed.

148. A previous criminal record is not by itself indicative of a predisposition to commit a criminal offence (*Constantin and Stoian v. Romania*, § 55). However, the applicant’s familiarity with the current price of drugs and his ability to obtain drugs at short notice, combined with his failure to withdraw from the deal despite a number of opportunities to do so, have been considered by the Court to be indicative of pre-existing criminal activity or intent (*Shannon v. the United Kingdom* (dec.)).

149. Another factor to be taken into account is whether the applicant was pressured into committing the offence in question. Taking the initiative in contacting the applicant in the absence of any objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (*Burak Hun v. Turkey*, § 44), reiterating the offer despite the applicant’s initial refusal, insistent prompting (*Ramanauskas v. Lithuania* [GC], § 67), raising the price beyond average (*Malininas v. Lithuania*, § 37) and appealing to the applicant’s compassion by mentioning withdrawal symptoms (*Vanyan v. Russia*, §§ 11 and 49) have been regarded by the Court as conduct which can be deemed to have pressured the applicant into committing the offence in question, irrespective of whether the agent in question was a member of the security forces or a private individual acting on their instructions.

150. A further question of importance is whether the State agents can be deemed to have “joined” or “infiltrated” the criminal activity rather than to have initiated it. In the former case the action in question remains within the bounds of undercover work. In *Miliniene v. Lithuania* (§§ 37-38) the Court considered that, although the police had influenced the course of events, notably by giving technical equipment to the private individual to record conversations and supporting the offer of financial inducements to the applicant, their actions were treated as having “joined” the criminal activity rather than as having initiated it as the initiative in the case had been taken by a private individual. The latter had complained to the police that the applicant would require a bribe to reach a favourable outcome in his case, and only after this complaint was the operation authorised and

1. The terms entrapment, police incitement and *agent provocateurs* are used in the Court’s case-law interchangeably.

supervised by the Deputy Prosecutor General, with a view to verifying the complaint (for similar reasoning, see *Sequeira v. Portugal* (dec.); *Eurofinacom v. France* (dec.)).

151. The manner in which the undercover police operation was launched and carried out is relevant in assessing whether the applicant was subjected to entrapment. The absence of clear and foreseeable procedures for authorising, implementing and supervising the investigative measure in question tips the balance in favour of finding that the acts in question constitute entrapment: see, for example, *Teixeira de Castro v. Portugal*, § 38, where the Court noted the fact that the undercover agents' intervention had not taken place as part of an official anti-drug-trafficking operation supervised by a judge; *Ramanauskas v. Lithuania* [GC], § 64, where there was no indication of what reasons or personal motives had led the undercover agent to approach the applicant on his own initiative without bringing the matter to the attention of his superiors; *Vanyan v. Russia*, §§ 46-47, where the Court noted that the police operation had been authorised by a simple administrative decision by the body which later carried out the operation, that the decision contained very little information as to the reasons for and purposes of the planned test purchase, and that the operation was not subject to judicial review or any other independent supervision. In this connection, the "test purchase" technique used by the Russian authorities was closely scrutinised in the case of *Veselov and Others v. Russia*, where the Court held that the procedure in question was deficient and that it exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them. It further found that the domestic courts had also failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants *vis-à-vis* the applicants (*ibid.*, § 127).

c. Judicial review of the entrapment defence

152. In cases raising issues of entrapment, Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. The mere fact that general safeguards, such as equality of arms or the rights of the defence, have been observed is not sufficient (*Ramanauskas v. Lithuania* [GC], § 69). In such cases the Court has indicated that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable.

153. If a plea of entrapment is made and there is certain *prima facie* evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention (*ibid.*, § 70). The mere fact that the applicant pleaded guilty to the criminal charges does not dispense the trial court from the duty to examine allegations of entrapment (*ibid.*, § 72).

154. In this connection the Court verifies whether a *prima facie* complaint of entrapment constitutes a substantive defence under domestic law or gives grounds for the exclusion of evidence or leads to similar consequences (*Bannikova v. Russia*, § 54). Although it is up to the domestic authorities to decide what procedure is appropriate when faced with a plea of incitement, the Court requires the procedure in question to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment (*ibid.*, § 57). Moreover, in the context of non-disclosure of information by the investigative authorities, the Court attaches particular weight to compliance with the principles of adversarial proceedings and equality of arms (*ibid.*, § 58).

155. Where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards (*Ramanauskas v. Lithuania* [GC], § 60).

156. If the available information does not enable the Court to conclude whether the applicant was subjected to entrapment, the judicial review of the entrapment plea becomes decisive (*Edwards and Lewis v. the United Kingdom* [GC], § 46; *Ali v. Romania*, § 101; see also, *Khudobin v. Russia*, where the domestic courts failed to analyse the relevant factual and legal elements to distinguish entrapment from a legitimate form of investigative activity; *V. v. Finland*, where it was impossible for the applicant to raise the defence of entrapment; and *Shannon v. the United Kingdom* (dec.), where the subterfuge used by a private individual was the subject of careful examination by domestic courts, which found the allegation of entrapment unsubstantiated).

6. Waiver of the guarantees of a fair trial

157. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest (*Hermi v. Italy* [GC], § 73; *Sejdovic v. Italy* [GC], § 86).

158. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (*Hermi v. Italy* [GC], § 74; *Sejdovic v. Italy* [GC], § 87).

B. Public hearing

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... public hearing ... by [a] tribunal Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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 to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

1. The principle of publicity

159. The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society (*Riepan v. Austria*, § 27; *Krestovskiy v. Russia*, § 24; *Sutter v. Switzerland*, § 26).

160. The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments (*ibid.*, § 27 ; *Tierce and Others v. San Marino*, § 93).

2. The right to an oral hearing and presence at trial

161. The entitlement to a “public hearing” in Article 6 § 1 necessarily implies a right to an “oral hearing” (*Döry v. Sweden*, § 37).

162. The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance (*Tierce and Others v. San Marino*, § 94; *Jussila v. Finland* [GC], § 40).

163. Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, i.e. the right to “defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”. The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 (*Hermi v. Italy* [GC], §§ 58-59; *Sejdovic v. Italy* [GC], §§ 81 and 84).

164. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (*ibid.*, § 82).

165. The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In the light of the broadening of the notion of a “criminal charge” to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are “criminal charges” of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head and not carrying any significant degree of stigma (*Jussila v. Finland* [GC], §§ 41-43).

166. The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (*ibid.*, §§ 41-42 and 47-48). In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy (*ibid.*, §§ 41-43 and 47-48, concerning tax-surcharge proceedings; *Suhadolc v. Slovenia* (dec.), concerning a summary procedure for road traffic offences).

3. Appeal proceedings

167. The personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (*Hermi v. Italy* [GC], § 60).

168. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance (*Monnell and Morris v. the United Kingdom*, § 58, as regards the issue of leave to appeal; *Sutter v. Switzerland*, § 30, as regards the court of cassation).

169. Even where the court of appeal has jurisdiction to review the case both as to the facts and as to the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (*Fejde v. Sweden*, § 31). In order to decide this question, regard must be had to the specific features of the proceedings in question and to the manner in which the applicant's interests were

actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (*Seliwiak v. Poland*, § 54; *Sibgatullin v. Russia*, § 36).

170. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (*Popovici v. Moldova*, § 68; *Lacadena Calero v. Spain*, § 38). The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights (*Tierce and Others v. San Marino*, § 95).

4. Exceptions to the rule of publicity

171. The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that “the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case (*Welke and Biatek v. Poland*, § 74; *Martinie v. France* [GC], § 40).

172. If there are grounds to apply one or more of these exceptions, the authorities are not obliged, but have the right, to order hearings to be held in camera if they consider that such a restriction is warranted (*Toeva v. Bulgaria* (dec.)).

173. Although in criminal proceedings there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (*B. and P. v. the United Kingdom*, § 37).

174. Security problems are a common feature of many criminal proceedings, but cases in which security concerns alone justify excluding the public from a trial are nevertheless rare (*Riepan v. Austria*, § 34). Security measures should be narrowly tailored and comply with the principle of necessity. The judicial authorities should consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve the same purpose (*Krestovskiy v. Russia*, § 29).

175. Considerations of public order and security problems may justify the exclusion of the public in prison disciplinary proceedings against convicted prisoners (*Campbell and Fell v. the United Kingdom*, § 87).

176. The holding of a trial in ordinary criminal proceedings in a prison does not necessarily mean that it is not public. However, in order to counter the obstacles involved in having a trial outside a regular courtroom, the State is under an obligation to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access (*Riepan v. Austria*, §§ 28-29).

177. The mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest (*Belashev v. Russia*, § 83; *Welke and Biatek v. Poland*, § 77).

5. Public pronouncement of judgments

178. The Court has not felt bound to adopt a literal interpretation of the words “pronounced publicly” (*Sutter v. Switzerland*, § 33; *Campbell and Fell v. the United Kingdom*, § 91).

179. Despite the wording, which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publication of the “judgment” under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 § 1 in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial. In making this assessment, account must be taken of the entirety of the proceedings (*Welke and Białek v. Poland*, § 83, where limiting the public pronouncement to the operative part of the judgments in proceedings held in camera did not contravene Article 6).

180. Complete concealment from the public of the entirety of a judicial decision cannot be justified. Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others (*Raza v. Bulgaria*, § 53; *Fazliyski v. Bulgaria*, §§ 67-68).

C. Reasonable time

Article 6 § 1 of the Convention

“1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ...”

1. Determination of the length of proceedings

181. In criminal matters, the aim of Article 6 § 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined (*Wemhoff v. Germany*, § 18; *Kart v. Turkey* [GC], § 68).

a. Starting-point of the period to be taken into consideration

182. The period to be taken into consideration begins on the day on which a person is charged (*Neumeister v. Austria*, § 18).

183. The “reasonable time” may begin to run prior to the case coming before the trial court (*Deweert v. Belgium*, § 42), for example from the time of arrest (*Wemhoff v. Germany*, § 19), the time at which a person is charged (*Neumeister v. Austria*, § 18) or the institution of the preliminary investigation (*Ringeisen v. Austria*, § 110).

184. “Charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” (*Deweert v. Belgium*, § 46), a definition that also corresponds to the test whether the situation of the suspect has been “substantially affected” (*ibid.*; *Neumeister v. Austria*, § 13; *Eckle v. Germany*, § 73; *McFarlane v. Ireland* [GC], § 143).

b. End of the period

185. The Court has held that in criminal matters the period to which Article 6 is applicable covers the whole of the proceedings in question (*König v. Germany*, § 98), including appeal proceedings (*Delcourt v. Belgium*, §§ 25-26; *König v. Germany*, § 98; *V. v. the United Kingdom* [GC], § 109). Article

6 § 1, furthermore, indicates as the final point the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge (*Neumeister v. Austria*, § 19).

186. The period to be taken into consideration lasts at least until acquittal or conviction, even if that decision is reached on appeal. There is furthermore no reason why the protection afforded to those concerned against delays in judicial proceedings should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared (*Wemhoff v. Germany*, § 18).

187. In the event of conviction, there is no “determination ... of any criminal charge”, within the meaning of Article 6 § 1, as long as the sentence is not definitively fixed (*Eckle v. Germany*, § 77; *Ringeisen v. Austria*, § 110; *V. v. the United Kingdom* [GC], § 109).

188. The execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6 (*Assanidze v. Georgia* [GC], § 181). The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit (*ibid.*, § 182). If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory (*ibid.*, § 183).

2. Assessment of a reasonable time

a. Principles

189. The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment (*Boddaert v. Belgium*, § 36). Where certain stages of the proceedings are in themselves conducted at an acceptable speed, the total length of the proceedings may nevertheless exceed a “reasonable time” (*Dobbertin v. France*, § 44).

190. Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between the various aspects of this fundamental requirement (*Boddaert v. Belgium*, § 39).

b. Criteria

191. When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities (*König v. Germany*, § 99; *Neumeister v. Austria*, § 21; *Ringeisen v. Austria*, § 110; *Pélissier and Sassi v. France* [GC], § 67; *Pedersen and Baadsgaard v. Denmark*, § 45).

192. *The complexity of a case*: it may stem, for example, from the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, or the international dimension of the case (*Neumeister v. Austria*, § 20, where the transactions in issue had ramifications in various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and 22 persons were concerned, some of whom were based abroad). A case may also be extremely complex where the suspicions relate to “white-collar” crime, that is to say, large-scale fraud involving several companies and complex transactions designed to escape the scrutiny of the investigative authorities, and requiring substantial accounting and financial expertise (*C.P. and Others v. France*, § 30).

193. Even though a case may be of some complexity, the Court cannot regard lengthy periods of unexplained inactivity as “reasonable” (*Adiletta v. Italy*, § 17, where there was an overall period of thirteen years and five months, including a delay of five years between the referral of the case to the investigating judge and the questioning of the accused and witnesses, and a delay of one year and nine months between the time at which the case was returned to the investigating judge and the fresh committal of the applicants for trial).

194. *The applicant’s conduct*: Article 6 does not require applicants to cooperate actively with the judicial authorities. Nor can they be blamed for making full use of the remedies available to them under domestic law. However, their conduct constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the length of the proceedings exceeds what is reasonable (*Eckle v. Germany*, § 82, where the applicants increasingly resorted to actions likely to delay the proceedings, such as systematically challenging judges; some of these actions could even suggest deliberate obstruction).

195. One example of conduct that must be taken into account is the applicant’s intention to delay the investigation, where this is evident from the case file (*I.A. v. France*, § 121, where the applicant, among other things, waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures).

196. An applicant cannot rely on a period spent as a fugitive, during which he sought to avoid being brought to justice in his own country. When an accused person flees from a State which adheres to the principle of the rule of law, it may be presumed that he is not entitled to complain of the unreasonable duration of proceedings after he has fled, unless he can provide sufficient reasons to rebut this presumption (*Vayış v. Turkey*, § 44).

197. *The conduct of the relevant authorities*: Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements (*Abdoella v. the Netherlands*, § 24; *Dobbertin v. France*, § 44).

198. Although a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take remedial action, with the requisite promptness, to deal with an exceptional situation of this kind (*Milasi v. Italy*, § 18; *Baggetta v. Italy*, § 23), the heavy workload referred to by the authorities and the various measures taken to redress matters are rarely accorded decisive weight by the Court (*Eckle v. Germany*, § 92).

199. What is at stake for the applicant must be taken into account in assessing the reasonableness of the length of proceedings. For example, where a person is held in pre-trial detention, this is a factor to be considered in assessing whether the charge has been determined within a reasonable time (*Abdoella v. the Netherlands*, § 24, where, the time required to forward documents to the Supreme Court on two occasions amounted to more than 21 months of the 52 months taken to deal with the case. The Court found such protracted periods of inactivity unacceptable, especially as the accused was in detention).

3. Several examples

a. Reasonable time exceeded

- 9 years and 7 months, without any particular complexity other than the number of people involved (35), despite the measures taken by the authorities to deal with the court’s exceptional workload following a period of rioting (*Milasi v. Italy*, §§ 14-20).
- 13 years and 4 months, political troubles in the region and excessive workload for the courts, efforts by the State to improve the courts’ working conditions not having begun until years later (*Baggetta v. Italy*, §§ 20-25).

- 5 years, 5 months and 18 days, including 33 months between delivery of the judgment and production of the full written version by the judge responsible, without any adequate disciplinary measures being taken (*B. v. Austria*, §§ 48-55).
- 5 years and 11 months, complexity of case on account of the number of people to be questioned and the technical nature of the documents for examination in a case of aggravated misappropriation, although this could not justify an investigation that had taken five years and two months; also, a number of periods of inactivity attributable to the authorities. Thus, while the length of the trial phase appeared reasonable, the investigation could not be said to have been conducted diligently (*Rouille v. France*, § 29).
- 12 years, 7 months and 10 days, without any particular complexity or any tactics by the applicant to delay the proceedings, but including a period of two years and more than nine months between the lodging of the application with the administrative court and the receipt of the tax authorities' initial pleadings (*Clinique Mozart SARL v. France*, §§ 34-36).

b. Reasonable time not exceeded

- 5 years and 2 months, complexity of connected cases of fraud and fraudulent bankruptcy, with innumerable requests and appeals by the applicant not merely for his release, but also challenging most of the judges concerned and seeking the transfer of the proceedings to different jurisdictions (*Ringeisen v. Austria*, § 110).
- 7 years and 4 months: the fact that more than seven years had already elapsed since the laying of charges without their having been determined in a judgment convicting or acquitting the accused certainly indicated an exceptionally long period which in most cases should be regarded as in excess of what was reasonable; moreover, for 15 months the judge had not questioned any of the numerous co-accused or any witnesses or carried out any other duties; however, the case had been especially complex (number of charges and persons involved, international dimension entailing particular difficulties in enforcing requests for judicial assistance abroad etc.) (*Neumeister v. Austria*, § 21).

V. Specific guarantees

A. The presumption of innocence (Article 6 § 2)

Article 6 § 2 of the Convention

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

1. Burden of proof

200. The principle of the presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him (*Barberà, Messegue and Jabardo v. Spain*, § 77; *Janosevic v. Sweden*, § 97). The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence (*Telfner v. Austria*, § 15). The burden of proof cannot be reversed in

compensation proceedings brought following a final decision to discontinue proceedings (*Capeau v. Belgium*, § 25).

201. Exoneration from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (*Ringvold v. Norway*, § 38; *Y v. Norway*, § 41; *Lundkvist v. Sweden* (dec.)).

2. Presumptions of fact and of law

202. A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention (*Falk v. the Netherlands* (dec.)), concerning the imposition of a fine on a registered car owner who had not been the actual driver at the time of the traffic offence). In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (*Salabiaku v. France*, § 27, concerning a presumption of criminal liability for smuggling inferred from possession of narcotics; *Janosevic v. Sweden*, § 100, concerning the imposition of tax surcharges on the basis of objective grounds and enforcement thereof prior to a court determination). However, Article 6 § 2 requires States to confine these presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (*Salabiaku v. France*, § 28; *Radio France and Others v. France*, § 24, concerning the presumption of criminal liability of a publishing director for defamatory statements made in radio programmes; *Klouvi v. France*, § 41, regarding the inability to defend a charge of malicious prosecution owing to a statutory presumption that an accusation against a defendant acquitted for lack of evidence was false).

203. In employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved (*Janosevic v. Sweden*, § 101; *Falk v. the Netherlands* (dec.)).

3. Scope of Article 6 § 2

a. Criminal proceedings

204. Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge (see, among many authorities, *Poncelet v. Belgium*, § 50; *Minelli v. Switzerland*, § 30; *Garycki v. Poland*, § 68).

205. The presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal (*Konstas v. Greece*, § 36).

206. Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning (*Böhmer v. Germany*, § 55; *Geerings v. the Netherlands*, § 43; *Phillips v. the United Kingdom*, § 35).

207. Nevertheless, a person's right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention which applies to a sentencing procedure (*ibid.*, §§ 39-40; *Grayson and Barnham v. the United Kingdom*, §§ 37 and 39).

b. Subsequent proceedings

208. The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been continued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public (*Allen v. the United Kingdom* [GC], § 94).

209. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt (*ibid.*, § 104).

210. The Court has considered the applicability of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings concerning *inter alia*:

- a former accused's obligation to bear court costs and prosecution costs;
- a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings;
- a former accused's request for defence costs;
- a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution;
- the imposition of civil liability to pay compensation to the victim;
- the refusal of civil claims lodged by the applicant against insurers;
- the maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse;
- disciplinary or dismissal issues; and
- the revocation of the applicant's right to social housing (see *Allen v. the United Kingdom* [GC], § 98 with numerous further references).

4. Prejudicial statements

211. Article 6 § 2 is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 of the Convention (*Zollmann v. the United Kingdom* (dec.); *Ismoilov and Others v. Russia*, § 160).

212. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question (*ibid.*, § 166; *Nešťák v. Slovakia*, § 89). The latter infringes the presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court (*Garycki v. Poland*, § 67).

213. Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (*Daktaras v. Lithuania*, § 42; *A.L. v. Germany*, § 31).

214. Statements by judges are subject to stricter scrutiny than those by investigative authorities (*Pandy v. Belgium*, § 43).

215. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation (*Sekanina v. Austria*, § 30). However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence (*Rushiti v. Austria*, § 31; *O. v. Norway*, § 39; *Geerings v. the Netherlands*, § 49; *Paraponiaris v. Greece*, § 32).

5. Statements by judicial authorities

216. The presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty (see, as the leading authority, *Minelli v. Switzerland*, § 37; and, more recently, *Nerattini v. Greece*, § 23; *Didu v. Romania*, § 41). A premature expression of such an opinion by the tribunal itself will inevitably fall foul of this presumption (*Nešťák v. Slovakia*, § 88; *Garycki v. Poland*, § 66).

217. What is important in the application of the provision of Article 6 § 2 is the true meaning of the statements in question, not their literal form (*Lavents v. Latvia*, § 126).

218. The fact that the applicant was ultimately found guilty cannot vacate his initial right to be presumed innocent until proved guilty according to law (*Matijašević v. Serbia*, § 49; *Nešťák v. Slovakia*, § 90, concerning decisions prolonging the applicants' detention on remand).

6. Statements by public officials

219. The presumption of innocence may be infringed not only by a judge or court but also by other public authorities (*Alenet de Ribemont v. France*, § 36; *Daktaras v. Lithuania*, § 42; *Petyo Petkov v. Bulgaria*, § 91). Article 6 § 2 prohibits statements by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (*Ismoilov and Others v. Russia*, § 161; *Butkevičius v. Lithuania*, § 53).

220. The principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*Fatullayev v. Azerbaijan*, § 159; *Alenet de Ribemont v. France*, § 38; *Garycki v. Poland*, § 69).

221. The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence (*Daktaras v. Lithuania*, § 41; *Arrigo and Vella v. Malta* (dec.); *Khuzhin and Others v. Russia*, § 94).

7. Adverse press campaign

222. In a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest (*Vioel Burzo v. Romania*, § 160; *Akay v. Turkey* (dec.)).

223. A virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused (*Kuzmin v. Russia*, § 62). What is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the

particular circumstances of the case, his fears can be held to be objectively justified (*Włoch v. Poland* (dec.); *Daktaras v. Lithuania* (dec.); *Priebke v. Italy* (dec.); *Mustafa (Abu Hamza) v. the United Kingdom* (dec.), §§ 37-40, concerning the effect of press coverage on the impartiality of the trial court).

224. National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence (*Craxi v. Italy (no. 1)*, § 104; *Mircea v. Romania*, § 75).

225. The publication of photographs of suspects does not in itself breach the presumption of innocence (*Y.B. and Others v. Turkey*, § 47). Broadcasting of the suspect's images on television may in certain circumstances raise an issue under Article 6 § 2 (*Rupa v. Romania (no. 1)*, § 232).

8. Sanctions for failure to provide information

226. The presumption of innocence is closely linked to the right not to incriminate oneself (*Heaney and McGuinness v. Ireland*, § 40).

227. The requirement for car owners to identify the driver at the time of a suspected traffic offence is not incompatible with Article 6 of the Convention (*O'Halloran and Francis v. the United Kingdom* [GC]).

228. Obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence (*Tirado Ortiz and Lozano Martin v. Spain* (dec.)).

B. The rights of the defence (Article 6 § 3)

Article 6 § 3 of the Convention

"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 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."

229. The requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (*Sakhnovskiy v. Russia* [GC], § 94; *Gäffgen v. Germany* [GC], § 169).

230. The specific guarantees laid down in Article 6 § 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings (*Mayzit v. Russia*, § 77; *Can v. Austria*, § 48).

1. Information on the nature and cause of the accusation (Article 6 § 3 (a))

Article 6 § 3 (a) of the Convention

“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;”

a. General

231. The scope of Article 6 § 3 (a) must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (*Pélissier and Sassi v. France* [GC], § 52; *Sejdovic v. Italy* [GC], § 90).

232. Sub-paragraphs (a) and (b) of Article 6 § 3 are connected in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence (*Pélissier and Sassi v. France* [GC], § 54; *Dallos v. Hungary*, § 47).

b. Information about the charge

233. Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the “accusation” to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (*Kamasinski v. Austria*, § 79; *Pélissier and Sassi v. France* [GC], § 51).

234. Article 6 § 3 (a) affords the defendant the right to be informed not only of the “cause” of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the “nature” of the accusation, that is, the legal characterisation given to those acts (*Mattochia v. Italy*, § 59; *Penev v. Bulgaria*, §§ 33 and 42).

235. The information need not necessarily mention the evidence on which the charge is based (*X. v. Belgium* (dec); *Collozza and Rubinat v. Italy*).

236. Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (*Pélissier and Sassi v. France* [GC], § 53; *Drassich v. Italy*, § 34; *Giosakis v. Greece (no. 3)*, § 29).

237. The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence (*Mattochia v. Italy*, § 65; *Chichlian and Ekindjian v. France*, § 71).

238. Information must actually be received by the accused; a legal presumption of receipt is not sufficient (*C. v. Italy* (dec.)).

239. If the situation complained of is attributable to the accused’s own conduct, the latter is not in a position to allege a violation of the rights of the defence (*Erdogan v. Turkey* (dec); *Campbell and Fell v. the United Kingdom*, § 96).

240. In the case of a person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him (*Vaudelle v. France*, § 65).

c. Reclassification of the charge

241. The accused must be duly and fully informed of any changes in the accusation, including changes in its “cause”, and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (*Mattoccia v. Italy*, § 61; *Bäckström and Andersson v. Sweden* (dec.)).

242. Information concerning the charges made, including the legal characterisation that the court might adopt in the matter, must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion from the prosecution as regards the qualification of an offence is clearly not sufficient (*I.H. and Others v. Austria*, § 34).

243. In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time (*Pélissier and Sassi v. France* [GC], § 62; *Block v. Hungary*, § 24).

244. A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation (*De Salvador Torres v. Spain*, § 33; *Sadak and Others v. Turkey (no. 1)*, §§ 52 and 56; *Juha Nuutinen v. Finland*, § 32).

245. Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects (*ibid.*, § 33; *Dallos v. Hungary*, §§ 49-52; *Sipavičius v. Lithuania*, §§ 30-33; *Zhupnik v. Ukraine*, §§ 39-43; *I.H. and Others v. Austria*, §§ 36-38).

d. “In detail”

246. While the extent of the “detailed” information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence.

247. In this connection, the adequacy of the information must be assessed in relation to Article 6 § 3 (b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6 § 1 (*Mattoccia v. Italy*, § 60; *Bäckström and Andersson v. Sweden* (dec.)).

e. “Promptly”

248. The information must be submitted to the accused in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 § 3 (a) (*C. v. Italy* (dec.)), where the notification of charges to the applicant four months before his trial was deemed acceptable; see, by contrast, *Borisova v. Bulgaria*, §§ 43-45, where the applicant had only a couple of hours to prepare her defence without a lawyer).

249. In examining compliance with Article 6 § 3 (a), the Court has regard to the autonomous meaning of the words “charged” and “criminal charge”, which must be interpreted with reference to the objective rather than the formal situation (*Padin Gestoso v. Spain* (dec.); *Casse v. Luxembourg*, § 71).

f. “Language”

250. If it is shown or there are reasons to believe that the accused has insufficient knowledge of the language in which the information is given, the authorities must provide him with a translation (*Brožicek v. Italy*, § 41; *Tabaï v. France* (dec.)).

251. Whilst Article 6 § 3 (a) does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands (*Hermi v. Italy* [GC], § 68; *Kamasinski v. Austria*, § 79).

252. However, sufficient information on the charges may also be provided through an oral translation of the indictment if this allows the accused to prepare his defence (*ibid.*, § 81; *Husain v. Italy* (dec.)).

253. There is no right under this provision for the accused to have a full translation of the court files (*X. v. Austria*, Commission decision).

254. The cost incurred by the interpretation of the accusation must be borne by the State in accordance with Article 6 § 3 (e), which guarantees the right to the free assistance of an interpreter (*Luedicke, Belkacem and Koç v. Germany*, § 45).

2. Preparation of the defence (Article 6 § 3 (b))

Article 6 § 3 (b) of the Convention

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

...

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

a. General considerations

255. Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused’s behalf may comprise everything which is “necessary” to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (*Can v. Austria*, § 53; *Gregačević v. Croatia*, § 51).

256. The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (*Iglin v. Ukraine*, § 65; *Galstyan v. Armenia*, § 84).

b. Adequate time

257. Article 6 § 3 (b) protects the accused against a hasty trial (*Kröcher and Möller v. Switzerland* (dec); *Bonzi v. Switzerland* (dec)). Although it is important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of one of the parties (*OA O Neftyanaya Kompaniya Yukos v. Russia*, § 540).

258. When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings (*Gregačević v. Croatia*, § 51). Account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case (*Mattick v. Germany* (dec.)).

259. Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which have not hitherto come to light and which require further preparation by the parties (*ibid.*).

260. The defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc. (*Miminoshvili v. Russia*, § 141). Such “occurrences” may include changes in the indictment (*Pélissier and Sassi v. France* [GC], § 62), introduction of new evidence by the prosecution (*G.B. v. France*, §§ 60-62), or a sudden and drastic change in the opinion of an expert during the trial (*ibid.*, §§ 69-70).

261. An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed (*Campbell and Fell v. the United Kingdom*, § 98; *Bäckström and Andersson v. Sweden* (dec.); *Craxi v. Italy (no. 1)*, § 72), save in exceptional circumstances (*Goddi v. Italy*, § 31) or where there is no basis for such a right in domestic law and practice (*Galstyan v. Armenia*, § 85).

262. In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time (*Sadak and Others v. Turkey (no. 1)*, § 57; *Sakhnovskiy v. Russia* [GC], §§ 103 and 106).

263. In order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision (*Hadjianastassiou v. Greece*, § 33). When a fully reasoned judgment is not available before the expiry of the time-limit for lodging an appeal, the accused must be given sufficient information in order to be able to make an informed appeal (*Zoon v. the Netherlands*, §§ 40-50; *Baucher v. France*, §§ 46-51).

264. States must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 § 3. Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the “diligence” which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (*Vacher v. France*, § 28).

c. Adequate facilities

i. Access to evidence

265. The “facilities” which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (*Huseyn and Others v. Azerbaijan*, § 175; *OAO Neftyanaya Kompaniya Yukos v. Russia*, § 538).

266. Where a person is detained pending trial, the notion of “facilities” may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration (*Mayzit v. Russia*, § 81; *Moiseyev v. Russia*, § 221). It is crucial that both the accused and his defence counsel should be able to participate in the proceedings and make submissions without suffering from excessive tiredness (*Makhfi v. France*, § 40; *Barberà, Messegue and Jabardo v. Spain*, § 70).

267. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence (*Padin Gestoso v. Spain* (dec.); *Mayzit v. Russia*, § 79).

268. An accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives (*Kremzow v. Austria*, § 52). However, an accused’s limited access to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan v. Turkey* [GC], § 140).

269. When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence (*Foucher v. France*, §§ 33-36).

270. In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken (*Rasmussen v. Poland*, §§ 48-49; *Moiseyev v. Russia*, §§ 213-218; *Matyjek v. Poland*, § 59; *Seleznev v. Russia*, §§ 64-69).

271. The right of access to the case file is not absolute. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest such as national security or the need to protect witnesses or safeguard police methods of investigation of crime. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. The Court will scrutinise the decision-making procedure to ensure that it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Natunen v. Finland*, §§ 40-41; *Dowsett v. the United Kingdom*, §§ 42-43; *Mirilashvili v. Russia*, §§ 203-209).

272. Failure to disclose to the defence material evidence containing items that could enable the accused to exonerate himself or have his sentence reduced may constitute a refusal of the facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention. The accused may, however, be expected to give specific reasons for his request and the domestic courts are entitled to examine the validity of these reasons (*Natunen v. Finland*, § 43; *C.G.P. v. the Netherlands* (dec)).

ii. Consultation with a lawyer

273. “Facilities” provided to an accused include consultation with his lawyer (*Campbell and Fell v. the United Kingdom*, § 99; *Goddi v. Italy*, § 31). The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence (*Bonzi v. Switzerland* (dec); *Can v. Austria*, § 52).

274. Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention (*Lanz v. Austria*, §§ 50-53; *Öcalan v. Turkey* [GC], § 148; *Trepashkin v. Russia (no. 2)*, §§ 159-168).

3. Right to defend oneself in person or through legal assistance (Article 6 § 3 (c))

Article 6 § 3 (c) of the Convention

“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;”

275. Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1 (*Correia de Matos v. Portugal* (dec.); *Foucher v. France*, § 30). This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence (*Pakelli v. Germany*, § 84). It comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one’s own choosing and, subject to certain conditions, to be given legal assistance free (*ibid.*, § 31).

a. Scope of application

276. Any person subject to a criminal charge must be protected by Article 6 § 3 (c) at every stage of the proceedings (*Imbrioscia v. Switzerland*, § 37). This protection may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (*ibid.*, § 36; *Öcalan v. Turkey* [GC], § 131; *Magee v. the United Kingdom*, § 41).

277. While Article 6 § 3 (b) is tied to considerations relating to the preparation of the trial, Article 6 § 3 (c) gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings (*Can v. Austria*, § 54).

278. The manner in which Article 6 § 3 (c) is to be applied in the pre-trial phase, i.e. during the preliminary investigation, depends on the special features of the proceedings involved and on the circumstances of the case (*Brennan v. the United Kingdom*, § 45; *Berliński v. Poland*, § 75). Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer from the initial stages of police questioning (*John Murray v. the United Kingdom*, § 63; *Öcalan v. Turkey* [GC], § 131; *Saldüz v. Turkey* [GC], § 54; *Averill v. the United Kingdom*, § 59; *Brennan v. the United Kingdom*, § 45; *Dayanan v. Turkey*, § 31). This right may, however, be subject to restriction for good cause (*Magee v. the United Kingdom*, § 41; *John Murray v. the United Kingdom*, § 63). The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (*ibid.*; *Brennan v. the United Kingdom*, § 45). Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction must not unduly prejudice the rights of the accused under Article 6 (*Saldüz v. Turkey* [GC], § 55).

279. Similarly, the manner in which Article 6 § 3 (c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved (*Pakelli v. Germany*, § 29; *Meftah and Others v. France* [GC], § 41). Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (*ibid.*; *Monnell and Morris v. the United Kingdom*, § 56). It is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the court of appeal, and the manner in which the applicant's interests were actually presented and protected before the court of appeal (*ibid.*).

b. Defence in person

280. The object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing (*Zana v. Turkey* [GC], § 68; *Monnell and Morris v. the United Kingdom*, § 58). Closely linked with this right Article 6 § 3 (c) offers the accused the possibility of defending himself in person. It will therefore normally not be contrary to the requirements of Article 6 if an accused is self-represented in accordance with his own will, unless the interests of justice require otherwise (*Galstyan v. Armenia*, § 91).

281. Yet the right to defend oneself in person is not guaranteed in absolute terms. Whether to allow an accused to defend himself in person or to assign him a lawyer falls within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means within their judicial system to guarantee the rights of the defence (*Correia de Matos v. Portugal* (dec.)). The domestic courts are therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer (*Croissant v. Germany*, § 27; *Lagerblom v. Sweden*, § 50). It is a measure in the interests of the accused designed to ensure the proper defence of his interests (*Correia de Matos v. Portugal* (dec.)).

282. Furthermore, Article 6 § 3 (c) does not provide for an unlimited right to use any defence arguments. Where the accused chooses to defend himself, he deliberately waives his right to be

assisted by a lawyer and is considered to be under a duty to show diligence in the manner in which he conducts his defence (*Melin v. France*, § 25). It would overstrain the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally aroused false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings (*Brandstetter v. Austria*, § 52). The mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe his rights under Article 6 § 3 (c). The position might be different if, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising his defence rights (*ibid.*, § 53).

c. Legal assistance

283. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (*Salduz v. Turkey* [GC], § 51). As a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention (*Dayanan v. Turkey*, § 31).

The right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary (*Lagerblom v. Sweden*, § 49; *Galstyan v. Armenia*, § 89). By the same token, the mere presence of the applicant's lawyer cannot compensate for the absence of the accused (*Zana v. Turkey* [GC], § 72).

284. The right to legal representation is not dependent upon the accused's presence (*Van Geyseghem v. Belgium* [GC], § 34; *Campbell and Fell v. the United Kingdom*, § 99; *Poitrimol v. France*, § 34). The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel (*Van Geyseghem v. Belgium* [GC], § 34; *Pelladoah v. the Netherlands*, § 40; *Krombach v. France*, § 89; *Galstyan v. Armenia*, § 89).

285. The right of everyone charged with a criminal offence to be defended by counsel of his own choosing is not absolute (*Meftah and Others v. France* [GC], § 45; *Pakelli v. Germany*, § 31). Although, as a general rule, the accused's choice of lawyer should be respected (*Lagerblom v. Sweden*, § 54), the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (*Meftah and Others v. France* [GC], § 45; *Croissant v. Germany*, § 29). For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations (*Meftah and Others v. France* [GC], § 47).

286. For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so (*Van Geyseghem v. Belgium* [GC], § 33; *Pelladoah v. the Netherlands*, § 41).

287. As with other fair-trial rights it is possible for an accused to waive his right to legal assistance (*Pishchalnikov v. Russia*, § 77). However, before an accused can be said to have implicitly, through his conduct, waived such an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected (*ibid.*, § 78).

d. Legal aid

288. The third and final right encompassed in Article 6 § 3 (c), the right to legal aid, is subject to two conditions.

289. First, the accused must show that he lacks sufficient means to pay for legal assistance. He need not, however, do so “beyond all doubt”; it is sufficient that there are “some indications” that this is so or, in other words, that a “lack of clear indications to the contrary” can be established (*Pakelli v. Germany*, § 34).

290. Second, the Contracting States are under an obligation to provide legal aid only “where the interests of justice so require”. This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case (*Granger v. the United Kingdom*, § 46).

291. In determining whether the interests of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation (*Benham v. the United Kingdom* [GC], § 61; *Quaranta v. Switzerland*, § 33; *Zdravko Stanev v. Bulgaria*, § 38).

292. As a further condition of the “required by the interests of justice” test the Court considers the complexity of the case (*Quaranta v. Switzerland*, § 34; *Pham Hoang v. France*, § 40; *Twalib v. Greece*, § 53) as well as the personal situation of the accused (*Zdravko Stanev v. Bulgaria*, § 38). The latter requirement is looked at especially with regard to the capacity of the particular accused to present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance (*Quaranta v. Switzerland*, § 35; *Twalib v. Greece*, § 53).

293. When applying the “interests of justice” requirement the test is not whether the absence of legal aid has caused “actual damage” to the presentation of the defence but a less stringent one: whether it appears “plausible in the particular circumstances” that the lawyer would be of assistance (*Artico v. Italy*, §§ 34-35; *Alimena v. Italy*, § 20).

294. Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel “of one’s own choosing” is necessarily subject to certain limitations where free legal aid is concerned. For example, when appointing defence counsel the courts must have regard to the accused’s wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (*Croissant v. Germany*, § 29; *Lagerblom v. Sweden*, § 54). Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced (*ibid.*, § 55). Furthermore, the interests of justice cannot be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (*Monnell and Morris v. the United Kingdom*, § 67).

e. Practical and effective legal assistance

295. Article 6 § 3 (c) enshrines the right to “practical and effective” legal assistance. Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties (*Artico v. Italy*, § 33).

296. The right to effective legal assistance includes, *inter alia*, the accused’s right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel (*Sakhnovskiy v. Russia* [GC], § 102).

If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness (*S. v. Switzerland*, § 48; *Brennan v. the United Kingdom*, § 58). Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled (*Sakhnovskiy v. Russia* [GC], § 102). To tap telephone conversations between an accused and his lawyer (*Zagaria v. Italy*, § 36) and to obsessively limit the number and length of lawyers' visits to the accused (*Öcalan v. Turkey* [GC], § 135) represent further possible breaches of the requirement to ensure effective assistance.

297. However, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused (*Lagerblom v. Sweden*, § 56; *Kamasinski v. Austria*, § 65). Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention (*ibid.*; *Imbrioscia v. Switzerland*, § 41; *Daud v. Portugal*, § 38). State liability may arise where a lawyer simply fails to act for the accused (*Artico v. Italy*, §§ 33 and 36) or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation (*Czekalla v. Portugal*, §§ 65 and 71).

4. Examination of witnesses (Article 6 § 3 (d))

Article 6 § 3 (d) of the Convention

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

...

(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;"

a. Autonomous meaning of the term "witness"

298. The term "witness" has an autonomous meaning in the Convention system, regardless of classifications under national law (*Damir Sibgatullin v. Russia*, § 45; *S.N. v. Sweden*, § 45). Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (*Kaste and Mathisen v. Norway*, § 53; *Lucà v. Italy*, § 41).

299. The term includes a co-accused (*Trofimov v. Russia*, § 37), victims (*Vladimir Romanov v. Russia*, § 97) and expert witnesses (*Doorson v. the Netherlands*, §§ 81-82).

300. Article 6 § 3 (d) may also be applied to documentary evidence (*Mirilashvili v. Russia*, §§ 158-159).

b. Right to examine or have examined witnesses

i. General principles

301. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a

later stage of proceedings (*Hümmer v. Germany*, § 38; *Lucà v. Italy*, § 39; *Solakov v. the former Yugoslav Republic of Macedonia*, § 57).

302. There are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”) (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 119).

303. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied (*Van Mechelen and Others v. the Netherlands*, § 58).

304. The possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial (*Tarău v. Romania*, § 74; *Graviano v. Italy*, § 38).

ii. Duty to make a reasonable effort in securing attendance of a witness

305. The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 120; *Gabrielyan v. Armenia*, §§ 78, 81-84).

306. Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (*Trofimov v. Russia*, § 33; *Sadak and Others v. Turkey (no. 1)*, § 67).

307. In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (*Karpenko v. Russia*, § 62; *Damir Sibgatullin v. Russia*, § 51; *Pello v. Estonia*, § 35; *Bonev v. Bulgaria*, § 43).

308. However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses’ unavailability as such does not make it necessary to discontinue the prosecution (*Gossa v. Poland*, § 55; *Haas v. Germany* (dec.); *Calabrò v. Italy and Germany* (dec.); *Ubach Mertes v. Andorra* (dec.)).

iii. Duty to give reasons for refusal to hear a witness

309. Although it is not the Court’s function to express an opinion on the relevance of the evidence produced, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial (*Popov v. Russia*, § 188; *Bocos-Cuesta v. the Netherlands*, § 72; *Wierzbicki v. Poland*, § 45; *Vidal v. Belgium*, § 34).

iv. Reliance on witness testimony not adduced in court

310. It may prove necessary in certain circumstances to refer to depositions made during the investigative stage (*Lucà v. Italy*, § 40), for example, when a witness has died (*Mika v. Sweden* (dec.), § 37; *Ferrantelli and Santangelo v. Italy*, § 52) or has exercised the right to remain silent (*Vidgen v. the Netherlands*, § 47; *Sofri and Others v. Italy* (dec.); *Craxi v. Italy (no. 1)*, § 86), or when

reasonable efforts by the authorities to secure the attendance of a witness have failed (*Mirilashvili v. Russia*, § 217).

311. Given the extent to which the absence of a witness adversely affects the rights of the defence, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 125).

312. Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care (*S.N. v. Sweden*, § 53; *Doorson v. the Netherlands*, § 76).

313. If a witness was unavailable for adversarial examination for good reason, it is open to a domestic court to have regard to the statements made by the witness at the pre-trial stage, if these statements are corroborated by other evidence (*Mirilashvili v. Russia*, § 217; *Scheper v. the Netherlands* (dec.); *Calabrò v. Italy and Germany* (dec.); *Ferrantelli and Santangelo v. Italy*, § 52).

314. Article 6 § 3 (d) only requires the possibility of cross-examining witnesses whose testimony was not adduced before the trial court in situations where this testimony played a main or decisive role in securing the conviction (*Kok v. the Netherlands* (dec.); *Krasniki v. the Czech Republic*, § 79).

315. Even where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. However, the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness would constitute a very important factor to weigh in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 147).

v. Anonymous witnesses

316. While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 127).

317. The use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention (*Doorson v. the Netherlands*, § 69; *Van Mechelen and Others v. the Netherlands*, § 52; *Krasniki v. the Czech Republic*, § 76).

318. While Article 6 does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. The principles of a fair trial therefore require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (*Doorson v. the Netherlands*, § 70; *Van Mechelen and Others v. the Netherlands*, § 53).

319. The national authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses (*Doorson v. the Netherlands*, § 71; *Visser v. the Netherlands*, § 47; *Sapunarescu v. Germany* (dec.); *Dzelili v. Germany* (dec.)).

320. If the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases, the handicaps

under which the defence labours must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Doorson v. the Netherlands*, § 72; *Van Mechelen and Others v. the Netherlands*, § 54; *Haas v. Germany* (dec.)).

321. In particular, an applicant should not be prevented from testing the anonymous witness's reliability (*Birutis and Others v. Lithuania*, § 29; *Van Mechelen and Others v. the Netherlands*, §§ 59 and 62; *Kostovski v. the Netherlands*, § 42).

322. In addition, when assessing whether the procedures followed in the questioning of an anonymous witness was sufficient to counterbalance the difficulties caused to the defence, due weight has to be given to the extent to which the anonymous testimony was decisive in convicting the applicant. If this testimony was not in any respect decisive, the defence was handicapped to a much lesser degree (*Kok v. the Netherlands* (dec.); *Krasniki v. the Czech Republic*, § 79).

vi. Witnesses in sexual abuse cases

323. Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account. Therefore, in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (*Aigner v. Austria*, § 37; *D. v. Finland*, § 43; *F and M v. Finland*, § 58; *Accardi and Others v. Italy* (dec.); *S.N. v. Sweden*, § 47; *Vronchenko v. Estonia*, § 56).

324. Having regard to the special features of criminal proceedings concerning sexual offences, Article 6 § 3 (d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means (*S.N. v. Sweden*, § 52; *W.S. v. Poland*, § 55).

325. The accused must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility (*Bocos-Cuesta v. the Netherlands*, § 71; *P.S. v. Germany*, § 26; *Accardi and Others v. Italy* (dec.); *S.N. v. Sweden*, § 52).

326. The viewing of a video recording of a witness account cannot be regarded alone as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities (*D. v. Finland*, § 50; *A.L. v. Finland*, § 41).

vii. Advantages offered to witnesses in exchange for their statements

327. The use of statements made by witnesses in exchange for immunity or other advantages forms an important tool in the domestic authorities' fight against serious crime. However, the use of such statements may put in question the fairness of the proceedings against the accused and is capable of raising delicate issues as, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge. The sometimes ambiguous nature of such statements and the risk that a person might be accused and tried on the basis of unverified allegations that are not necessarily disinterested must not, therefore, be underestimated. However, the use of these kinds of statements does not in itself suffice to render the proceedings unfair (*Cornelis v. the Netherlands* (dec.), with further references).

viii. Hearsay

328. Article 6 §§ 1 and 3 (d) of the Convention contain a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence (*Thomas v. the United Kingdom* (dec.)).

ix. Right to call witnesses for the defence

329. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter (*Perna v. Italy* [GC], § 29; *Solakov v. the former Yugoslav Republic of Macedonia*, § 57).

330. It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence (*Perna v. Italy* [GC], § 29; *Băcanu and SC « R » S.A. v. Romania*, § 75).

331. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his acquittal, the domestic authorities must provide relevant reasons for dismissing such a request (*Topić v. Croatia*, § 42; *Polyakov v. Russia*, §§ 34-35).

332. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to examine a witness (*S.N. v. Sweden*, § 44; *Accardi and Others v. Italy* (dec.)).

333. There might be exceptional circumstances which could prompt the Court to conclude that the failure to examine a person as a witness was incompatible with Article 6 (*Dorokhov v. Russia*, § 65; *Popov v. Russia*, § 188; *Bricmont v. Belgium*, § 89).

5. Interpretation (Article 6 § 3 (e))

Article 6 § 3 (e) of the Convention

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

...

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

a. If the accused "cannot understand or speak the language used in court"

334. The right to free assistance of an interpreter applies exclusively in situations where the accused cannot understand or speak the language used in court (*K. v. France* (dec.)). An accused who understands that language cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member (*K. v. France*, Commission decision; *Bideault v. France*, Commission decision; *Lagerblom v. Sweden*, § 62).

335. Where the accused is represented by a lawyer, it will generally not be sufficient that the accused's lawyer, but not the accused, knows the language used in court. Interpretation of the

proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence (*Kamasinski v. Austria*, § 74; *Cuscani v. the United Kingdom*, § 38).

336. Article 6 § 3 (e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge (*X. v. Austria*, Commission decision).

337. The right to an interpreter may be waived, but this must be a decision of the accused, not of his lawyer (*Kamasinski v. Austria*, § 80).

b. Protected elements of the criminal proceedings

338. Article 6 § 3 (e) guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial (*Luedicke, Belkacem and Koç v. Germany*, § 48; *Ucak v. the United Kingdom* (dec.); *Hermi v. Italy* [GC], § 69; *Lagerblom v. Sweden*, § 61).

339. Article 6 § 3 (e) applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings (*Kamasinski v. Austria*, § 74; *Hermi v. Italy* [GC], § 70).

340. However, it does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings (*Kamasinski v. Austria*, § 74). For example, the absence of a written translation of a judgment does not in itself entail a violation of Article 6 § 3 (e) (*ibid.*, § 85). The text of Article 6 § 3 (e) refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention (*Husain v. Italy* (dec.); *Hermi v. Italy* [GC], § 70).

341. In sum, 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 or her version of the events (*ibid.*; *Kamasinski v. Austria*, § 74; *Güngör v. Germany* (dec.); *Protopapa v. Turkey*, § 80).

c. "Free" assistance

342. The obligation to provide "free" assistance is not dependent upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice. However, an accused may be charged for an interpreter provided for him at a hearing that he fails to attend (*Fedele v. Germany* (dec.)).

343. The costs of interpretation cannot be subsequently claimed back from the accused (*Luedicke, Belkacem and Koç v. Germany*, § 46). To read Article 6 § 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article (*ibid.*, § 42; *Işyar v. Bulgaria*, § 45; *Öztürk v. Germany*, § 58).

d. Conditions of interpretation

344. It is not appropriate to lay down any detailed conditions under Article 6 § 3 (e) concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings (*Ucak v. the United Kingdom* (dec.)).

e. Positive obligations

345. The verification of the applicant's need for interpretation facilities is a matter for the judge to determine in consultation with the applicant, especially if he has been alerted to counsel's difficulties in communicating with the applicant. The judge has to reassure himself that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance for him (*Cuscani v. the United Kingdom*, § 38).

346. While it is true that the conduct of the defence is essentially a matter between the defendant and his counsel (*Kamasinski v. Austria*, § 65; *Stanford v. the United Kingdom*, § 28), the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (*Cuscani v. the United Kingdom*, § 39; *Hermi v. Italy* [GC], § 72; *Katritsch v. France*, § 44).

347. The defendant's linguistic knowledge is vital and the court must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (*Hermi v. Italy* [GC], § 71; *Katritsch v. France*, § 41; *Saman v. Turkey*, § 30; *Güngör v. Germany* (dec)).

348. In view of the need for the right guaranteed by Article 6 § 3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (*Kamasinski v. Austria*, § 74; *Hermi v. Italy* [GC], § 70; *Protopapa v. Turkey*, § 80).

VI. Extra-territorial effect of Article 6

349. The Convention does not require the Contracting Parties to impose its standards on third States or territories (*Drozd and Janousek v. France and Spain*, § 110). The Contracting Parties are not obliged to verify whether a trial to be held in a third State following extradition, for example, would be compatible with all the requirements of Article 6.

A. Flagrant denial of justice

350. According to the Court's case-law, however, an issue might exceptionally arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial, i.e. a flagrant denial of justice, in the requesting country. This principle was first set out in *Soering v. the United Kingdom* (§ 113) and has subsequently been confirmed by the Court in a number of cases (*Mamatkulov and Askarov v. Turkey* [GC], §§ 90-91; *Al-Saadoon and Mufdhi v. the United Kingdom*, § 149; *Ahorugeze v. Sweden*, § 115; *Othman (Abu Qatada) v. the United Kingdom*, § 258).

351. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (*Sejdovic v. Italy* [GC], § 84; *Stoichkov v. Bulgaria*, § 56; *Drozd and Janousek v. France and Spain*, § 110). Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

- conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge (*Einhorn v. France* (dec.), § 33; *Sejdovic v. Italy* [GC], § 84; *Stoichkov v. Bulgaria*, § 56);

- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (*Bader and Kanbor v. Sweden*, § 47);
- detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed (*Al-Moayad v. Germany* (dec.), § 101);
- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (*ibid.*);
- use in criminal proceedings of statements obtained as a result of a suspect's or another person's treatment in breach of Article 3 (*Othman (Abu Qatada) v. the United Kingdom*, § 267; *El Haski v. Belgium*, § 85).

352. It took over twenty years from the *Soering v. the United Kingdom* judgment – that is, until the Court's 2012 ruling in the case of *Othman (Abu Qatada) v. the United Kingdom* – for the Court to find for the first time that an extradition or expulsion would in fact violate Article 6. This indicates, as is also demonstrated by the examples given in the preceding paragraph, that the “flagrant denial of justice” test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial proceedings such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (*Ahorugeze v. Sweden*, § 115; *Othman (Abu Qatada) v. the United Kingdom*, § 260).

B. The “real risk”: standard and burden of proof

353. When examining whether an extradition or expulsion would amount to a flagrant denial of justice, the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (*Ahorugeze v. Sweden*, § 116; *Othman (Abu Qatada) v. the United Kingdom*, §§ 272-280; *El Haski v. Belgium*, § 86; *Saadi v. Italy* [GC], § 129).

354. In order to determine whether there is a risk of a flagrant denial of justice, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 125; *Saadi v. Italy* [GC], § 130). The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 125; *Saadi v. Italy* [GC], § 133). Where the expulsion or transfer has already taken place by the date on which it examines the case, however, the Court is not precluded from having regard to information which comes to light subsequently (*Al-Saadoon and Mufdhi v. the United Kingdom*, § 149; *Mamatkulov and Askarov v. Turkey* [GC], § 69).

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A. v. Austria, 16266/90, Commission decision of 7 May 1990, Decisions and Reports (DR) 65
A. Menarini Diagnostics S.R.L. v. Italy, 43509/08, 27 September 2011
A.L. v. Finland, 23220/04, 27 January 2009
A.L. v. Germany, 72758/01, 28 April 2005
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—G—

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—H—

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Hamer v. Belgium, 21861/03, ECHR 2007-V (extracts)
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Hauschildt v. Denmark, 24 May 1989, Series A no. 154
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Henryk Urban and Ryszard Urban v. Poland, 23614/08, 30 November 2010
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Holm v. Sweden, 25 November 1993, Series A no. 279-A
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