

# THE RIGHT TO A FAIR TRIAL

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**ABSTRACT:** *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. The right to fair trial is seen as an essential right in all countries respecting the rule of law. A trial in these countries that is deemed unfair will typically be restarted, or its verdict quashed.*

*The right to a fair trial is explicitly proclaimed in Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention of Human Rights, as well as numerous other constitutions and declarations throughout the world.*

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**KEYWORDS:** *right to a fair trial, ECHR, art.6, rule of law, justice.*

**JEL CLASSIFICATION :** *K 00, K 10*

## 1. INTRODUCTION

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<sup>1</sup>.

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<sup>1</sup> E. Ruiz Fabri, Charlotte Girard, « Procès équitable et enchevêtrement des espaces normatifs (réflexions sur la problématique générale) », Société de législation comparée, Paris, 2003, pg 156-160.

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The right to a fair trial is an ancient one and is synonymous with the trial process itself. It would be nonsense to speak of the permissibility of an unfair trial. After centuries of implementation in practice, the right to a fair trial, which was finally codified in the international human rights instruments following World War II, is now universally recognized.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, entitles an accused to a fair and public hearing within a reasonable time period, to prompt information on the trial in a language which he understands, to confront witnesses testifying on behalf of the prosecution, to order the appearance of witnesses to testify on his behalf, and to legal assistance.

The Court, and previously the Commission, has interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy.

Although the article talks about the right to a fair trial the guarantees often apply long before an individual has been formally charged with a criminal offence, or, in civil cases, may apply to the administrative stages that precede the initiation of judicial proceedings<sup>2</sup>. The guarantees do not stop at the delivery of a judgment but apply also to the execution phase. Many of the guarantees enshrined in Article 6, in particular the concept of fairness; apply to both criminal and civil proceedings.

In both criminal and civil cases, where either civil rights or criminal charges are being determined the individuals concerned must have “access to court”. The dispute or charge must be decided by a duly constituted tribunal<sup>3</sup>.

Article 6 provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged with a criminal offence (adequate time and facilities to prepare their defense, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter).

The majority of Convention violations that the Court finds today are excessive delays, in violation of the “reasonable time” requirement, in civil and criminal proceedings before national courts, mostly in Italy and France<sup>4</sup>. Under the “independent tribunal” requirement,

<sup>2</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; « *Pour des procès équitables* », Les Editions francophones d’Amnesty International, Paris, 2001, pg 281-285.

<sup>3</sup> IDHAE, « *Le procès équitable et la protection juridictionnelle du citoyen* » Bruxelles, Bruylant, 2001, pg 230.

<sup>4</sup> E. Ruiz Fabri, Charlotte Girard, « *Procès équitable et enchevêtrement des espaces normatifs (réflexions sur la problématique générale)* », Société de législation comparée, Paris, 2003, pg 160-162.

the Court has ruled that military judges in Turkish state security courts are incompatible with Article 6. Turkey adopted a law abolishing these courts in compliance with Article 6.

Another significant set of violations concerns the “confrontation clause” of Article 6 (i.e. the right to examine witnesses or have them examined). In this respect, problems of compliance with Article 6 may arise when national laws allow the use in evidence of the testimonies of absent, anonymous and vulnerable witnesses.

However, the guarantees provided for in Article 6 apply not only to the court proceedings, but also to the stages which both precede and follow them.

It is important to define the concept of fairness. To be fair is to be just and equitable. What fairness does *not* require is perfection.

In the broader sense, trial monitoring consists not only of an observer’s physical presence in the courtroom during at least part of the proceedings but, just as importantly, of the duty promptly to prepare a report for the organization he or she represents, with conclusions on the fairness of the trial observed. The publicity which this report receives may serve in the short term to enhance a defendant’s chances of having his/her case fairly reviewed on appeal.

The lasting aim is to inform the government and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international human rights standards. The basic criteria according to which the fairness of a trial may be assessed is the first issue that will be dealt with in this review<sup>5</sup>. The second is how a trial observation mission is typically carried out.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights<sup>6</sup>:

- to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him;
- to have adequate time and facilities for the preparation of his defense;
- 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;
- 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;
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Certain standards apply in both criminal and civil proceedings. These rights include:

- The right to a trial within a reasonable time.
- The right to an independent and impartial judge or tribunal.
- The right to a public hearing (although there are circumstances when the public can be excluded)
- The right to a public judgment (although this may be restricted in certain types of cases, e.g. family cases.)

<sup>5</sup> Franklin Kutty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d’innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 156-158.

<sup>6</sup> IDHAE, « Le procès équitable et la protection juridictionnelle du citoyen » Bruxelles, Bruylant, 2001, pg 234-235

There are further rights in criminal proceedings. These include:

- The right to be presumed innocent until you have been proved to be guilty.
- The right to be informed at a very early stage what the accusation against you is.
- The right not to be forced to answer questions, although the court may be able to draw conclusions from your failure to answer questions.
- The right to adequate time to prepare your defense.
- The right to have legal aid for a lawyer if you cannot afford one and it is in the interests of justice for you to have one.
- The right to be present at your trial.
- The right to put your side of the case at your trial.
- The right to question the main witnesses against you and to call witnesses of your own
- The right to an interpreter if you need one.

Article 6 guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him. The Court, and previously the Commission, have interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy<sup>7</sup>. The Court stated that: *“In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.”*

The first paragraph of Article 6 applies to both civil and criminal proceedings, but the second and third paragraphs apply only to criminal proceedings<sup>8</sup>. Guarantees similar to those detailed in Article 6 (2) and 6 (3) may under certain circumstances apply also to civil proceedings.

The text of the article is, however, only the starting point as Article 6 has been extensively interpreted by the European Court of Human Rights in its case-law.

A word of warning must be given about the Article 6 case-law. Since no complaint will be held admissible by the Court unless all domestic remedies have been exhausted, almost all cases alleging violations of Article 6 will have proceeded to the highest national courts before reaching Strasbourg.

The Court will frequently find no violation of Article 6 because it considers that the proceedings “taken as a whole” were fair, as a higher court was able to rectify the errors of the lower court. It is therefore all too easy to fall into the trap of thinking that a particular procedural defect complies with Convention standards because it was not found to violate the Convention by the Strasbourg Court. But this will often be because it was rectified, at least in part, by a higher court<sup>9</sup>. Judges sitting in lower courts are responsible for ensuring compliance with Article 6 in the proceedings currently before them. They cannot rely on the possibility that a higher court may rectify their errors.

<sup>7</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; *« Pour des procès équitables »*, Les Editions francophones d'Amnesty International, Paris, 2001, pg 288-290. <sup>8</sup> E. Ruiz Fabri, Charlotte Girard, *« Procès équitable et enchevêtrement des espaces normatifs (réflexions sur la problématique générale) »*, Société de législation comparée, Paris, 2003, pg 165-168.

<sup>9</sup> Matadi Nenga Gamanda, *« Le droit à un procès équitable »*, Academia-Bruylant, 2010, pg 118.

## 2. THE RIGHT TO A FAIR TRIAL – THE RIGHT FUNDAMENTAL ON A HUMAN BEING

The text of the Article is merely a skeleton. It is the case-law of the Court, which is referred to extensively throughout this handbook, which provides the necessary detail to understand the nature of the rights<sup>10</sup>. Although the article talks about the right to a fair trial the guarantees often apply long before an individual has been formally charged with a criminal offence, or, in civil cases, may apply to the administrative stages that precede the initiation of judicial proceedings. The guarantees do not stop at the delivery of a judgment but apply also to the execution phase. Many of the guarantees enshrined in Article 6, in particular the concept of fairness; apply to both criminal and civil proceedings.

The terms “criminal” and “charge” as well as “civil rights and obligations” have an autonomous Convention meaning which is often different from the national definitions of those terms. Where civil rights or criminal charges, as defined by the Court’s case-law, are involved everyone must have access to court, that is to an independent and impartial tribunal established by law whose decisions cannot be subordinated to any non-judicial authority. Much of the Court’s case-law has examined what safeguards need to be in place to guarantee access to court. Once judicial proceedings are under way, they must normally be conducted in public and judgment must always be pronounced publicly.

They must also be concluded by the delivery of a reasoned judgment within a reasonable time and compensation must be paid for undue delays. This obligation continues until the judgment is executed<sup>11</sup>. There will have been no determination if the intended effect of the judgment can be altered by a non judicial authority to the detriment of one of the parties. If the judgment is against a public body it must be executed automatically.

If against a private individual, it is permissible for further steps to be required to be taken by the successful party to enforce the judgment, so long as the State assumes the ultimate responsibility for ensuring its execution. If no other officials of the justice system have been charged with this specific responsibility, it will remain with the judge who gave the judgment.

In the course of judicial proceedings, principles such as the presumption of innocence and of “equality of arms” must be observed<sup>12</sup>. Children and other vulnerable parties must be accorded special protection. Specific rights apply only to those accused of criminal charges (Article 6 (3) *a*) to *e*) but comparable guarantees where relevant have been found by the Court to be required in civil cases if the proceedings are to be adjudged “fair”.

The State is under a positive obligation to take all the steps necessary to ensure that these rights are guaranteed in practice as well as in theory. This includes putting sufficient financial resources at the disposal of their systems for the administration of justice.

What follows in this handbook is of particular importance to judges who are the primary guardians of Article 6 rights. It is their responsibility to ensure that proceedings

<sup>10</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; « *Pour des procès équitables* », Les Editions francophones d’Amnesty International, Paris, 2001, pg 291.

<sup>11</sup> Roland ADJOVI, Gabriele Della Morte, « Le procès équitable devant les tribunaux pénaux internationaux » pg 120-124.

<sup>12</sup> Franklin Kutty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d’innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 158-160.

in their court rooms, whether investigative, at trial or at the stage of the execution of judgments comply with the all specified standards. But they are not the only public officials with such responsibilities. The police and prosecutors are under a duty to the victims of crimes (or surviving family members) to ensure that they conduct an effective prosecution of the case. Public defenders, and legal aid lawyers in civil cases, who are charged with protecting the Article 6 rights of their clients, must carry out their professional responsibilities to a standard which makes the fair trial guarantees “practical and effective not theoretical and illusory”. All those involved in the administration of criminal justice have a duty to respect the dignity of the accused and protect the safety of victims and witnesses.

Lack of access to lawyers whilst in police custody or pretrial detention may also prejudice the fairness of the trial<sup>13</sup>. Ill-treatment in custody will raise issues under Article 3 (the prohibition on torture or inhuman and degrading treatment) or Article 8 (the right to “moral and physical integrity” protected under the private life rubric of that article). It may also prejudice the fairness of the trial.

An arguable allegation of ill-treatment requires an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible.

Without this practical safeguard, the fundamentally important prohibition of torture would be ineffective in practice and it would be possible for agents of the State to abuse the rights of those within their control with impunity<sup>14</sup>. Obligations under other international instruments, such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment form part of a state’s obligations by virtue of Article 53 of the European Convention on Human Rights.

Public officials are frequently entrusted with the administration of procedures which have a decisive outcome for civil rights and obligations, for example the taking of children into public care, the registration of land transactions or the granting of licenses. They too need to ensure that they act in accordance with the guarantees of Article 6.

Finally, the application of Article 6 is not limited to national judicial procedures. The Court has also held that a State’s obligations under Article 6 can be engaged by expelling or extraditing an individual to face a trial in another State if that trial is likely to lack the fundamental elements of due process<sup>15</sup>. This principle applies in reverse to giving effect to foreign judgments.

### 3. THE PROCEEDINGS REGULATED BY ARTICLE 6

In both criminal and civil cases, where either civil rights or criminal charges are being determined the individuals concerned must have “access to court”<sup>16</sup>. The dispute or

<sup>13</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; « *Pour des procès équitables* », Les Editions francophones d’Amnesty International, Paris, 2001, pg 295.

<sup>14</sup> Roland ADJOVI, Gabriele Della Morte, « Le procès équitable devant les tribunaux pénaux internationaux » pg 124-127.

<sup>15</sup> Matadi Nenga Gamanda, « Le droit à un procès équitable », Academia-Bruylant, 2010, pg 119.

<sup>16</sup> E. Ruiz Fabri, Charlotte Girard, « Procès équitable et enchevêtrement des espaces normatifs (réflexions sur la problématique générale) », Société de législation comparée, Paris, 2003, pg 168-170.

charge must be decided by a duly constituted tribunal. However, the guarantees provided for in Article 6 apply not only to the court proceedings, but also to the stages which both precede and follow them.

In criminal cases, the guarantees cover pre-trial investigations carried out by the police. The Court stated that the reasonable time guarantee starts running from when a charge comes into being, and that other requirements of Article 6 – especially of paragraph 3 – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.

The Court has also held that in cases concerning Article 8 of the Convention – the right to family life – Article 6 also applies to the administrative stages of the proceedings. Article 6 does not provide a right of appeal. This right is provided for criminal cases in Article 2 of Protocol No. 7 to the Convention.

Even if Article 6 does not provide for a right of appeal, the Court has stated that when a State does provide in its domestic law for a right of appeal, these proceedings are covered by the guarantees in Article 6. The way in which the guarantees apply must, however, depend on the special features of such proceedings<sup>17</sup>. Account must be taken of the entirety of the proceedings conducted in the domestic legal order, the functions in law and practice of the appellate body, and the powers and the manner in which the interests of the parties are presented and protected. Therefore, there is no right under Article 6 to any particular kind of appeal or manner of dealing with appeals.

The Court has also stated that Article 6 applies to proceedings before a constitutional court if the outcome of these proceedings is directly decisive for a civil right or obligation. The question of whether the fairness of the proceedings of the European Court of Justice (ECJ) can be reviewed by the European Court of Human Rights was raised, but not answered as the case was declared inadmissible on other grounds. The ECJ has however held itself that Article 6 applies in Community Law proceedings.

Article 6 also covers post-trial procedures such as the execution of a judgment.

The state must not interfere with the outcome of judicial proceedings.

The Court has stated that the intervention of the legislature to determine the outcome of the proceedings that are already before the courts by passing a law may violate the principle of equality of arms. A common feature of certain States' legal proceedings is the initiating of a "supervisory review" or a "protest" of a judgment that has been delivered by a court and which is not subject to any further right of appeal.

#### 4. THE CIVIL RIGHTS AND OBLIGATIONS

The guarantees of Article 6 apply only in the context of proceedings to determine civil rights and obligations or a criminal charge. The Court has an extensive body of case law on the meaning of the term civil rights and obligations for Convention purposes. The Convention meaning is often different from the Court has stated in some cases that the concept of civil rights and obligations is autonomous and cannot be interpreted solely by reference to the domestic law of the respondent state, it has also stated that for Article 6

<sup>17</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; « *Pour des procès équitables* », Les Editions francophones d'Amnesty International, Paris, 2001, pg 298-230

to apply there must be a right in national law which is capable of being classified by the European Court as civil.

Many Governments have sought to deny the applicability of Article 6 because they have claimed that the proceedings in question were administrative and did not determine a civil right<sup>18</sup>. There is a substantial body of case law by the Court and the Commission as to what is and what is not a civil right or obligation, and the interpretation of this phrase by the Convention has been progressive.

Matters which were once considered outside the scope of Article 6, such as social security, now generally fall within the civil rights and obligations column of Article 6<sup>19</sup>.

A number of points must be considered in order to decide whether the right at issue is a civil right for Convention purposes.

*Firstly*, what is relevant is *the character of the right* itself rather than the character of the legislation. The Court stated, “*The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence*”, meaning in national law of the term civil rights. Domestic law is not decisive.

This guideline is specifically important for cases involving relations between a person and the State<sup>20</sup>. In such a situation, the Court has stated that whether the public authority in question had acted as a private person or in its sovereign capacity is not conclusive.

The key point in determining whether Article 6 is applicable or not is whether the outcome of the proceedings is decisive for private law rights and obligations.

*Secondly*, any *uniform European notion* as to the nature of the right should be taken into consideration.

*Thirdly*, the Court has stated that even though the concept of civil rights and obligations is autonomous, the *legislation of the state concerned is not without importance*. The Court held that “*Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the state concerned.*”

As stated above, the Court has taken the approach of deciding each case on its own particular circumstances and it is perhaps easier to look at examples of situations where the Court has, or has not, found a civil right or obligation to be involved.

The Court has first and foremost held that the rights and obligations of private persons in their relations are in all cases civil rights and obligations. The rights of private persons, physical or legal, in their relations between themselves, in for instance contract law, commercial law, the law of tort, family law, employment law and the law of property are always civil.

<sup>18</sup> E. Ruiz Fabri, Charlotte Girard, « Procès équitable et enchevêtrement des espaces normatifs (réflexions sur la problématique générale) », Société de législation comparée, Paris, 2003, pg 170-172

<sup>19</sup> Matadi Nenga Gamanda, « Le droit à un procès équitable », Academia-Bruylant, 2010, pg 130.

<sup>20</sup> Franklin Kutuy, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d’innocence – Droits spécifiques du prévenu, Larcier, 2009, pg, 160-163.

Where a case involves the relationship between an individual and the State, the area is more problematic<sup>21</sup>. The Court has recognized a number of such rights and obligations as being civil. Property is one area where the Court has held Article 6 to be applicable. In those stages in expropriation, consolidation and planning proceedings, and procedures concerning building permits and other real-estate permits, which have direct consequences for the right of ownership with respect to the property involved, and also more general proceedings where the outcome has an impact of the use or the enjoyment of property, the fair hearing guarantee applies. Article 6 also covers the right to engage in commercial activity.

Cases in this area have involved the withdrawal of an alcoholic beverage license from a restaurant, the license to run a medical clinic and to grant permission to run a private school. Disputes determining the right to practice a profession such as medicine or law are also covered by Article 6.

The Court has further held that in proceedings involving the mutual enjoyment by parent and child of each other's company are at issue, Article 6 applies to public as well as private family law.

Examples in this area are decisions to place children in care, concerning parental access to children, placing children for adoption or fostering<sup>22</sup>.

As mentioned above, the Court held that proceedings concerning welfare benefits were not covered by Article 6<sup>23</sup>. However, the Court has now made clear that Article 6 covers proceedings in which a decision is taken on entitlement, under a social security scheme, to health insurance benefits, to welfare (disability) allowances, and to State pensions.

Article 6 further covers proceedings in which a decision is taken on the obligation to pay contributions under a social security scheme.

The guarantee in Article 6 applies to proceedings against the public administration concerning contracts, damages in administrative proceedings or in criminal proceedings. It applies to proceedings where a claim is made for compensation for unlawful detention under Article 5 (5) following acquittal in criminal proceedings<sup>24</sup>.

Although disputes over taxation are not regulated by Article 6, the right to recover monies paid in tax is covered. Further, an individual's right to respect for his reputation by a private person is considered to be a civil right. The Court has also held that where the outcome of constitutional or public law proceedings may be decisive for civil rights and obligations, these proceedings are covered by the fair trial guarantee in Article 6.

In a case from 2004, the Court stated that it wanted to end the uncertainty surrounding the applicability of Article 6 to the joining of a victim of crime as a civil party in criminal proceedings.

It held that a criminal complaint accompanied by an application to join the proceedings as a civil party did fall within the scope of Article 6. However there was no independent right under Article 6 to have particular third parties prosecuted or sentenced for a crime.

<sup>21</sup> I. Pingel, « Droit des immunités et exigences du procès équitable », Pedone, 2005, pg 45-47

<sup>22</sup> Roland ADJOVI, Gabriele Della Morte, « Le procès équitable devant les tribunaux pénaux internationaux » pg 130.

<sup>23</sup> Charles GUINCHARD, Jacques BUISSON, AMNESTY INTERNATIONAL; « Pour des procès équitables », Les Editions francophones d'Amnesty International, Paris, 2001, pg 231-233.

<sup>24</sup> I. Pingel, F. Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 70-74.

## 5. CIVIL RIGHTS AND OBLIGATIONS NOT INCLUDED

In accordance with the Commission's and the Court's approach which is to rule on each case on its particular circumstances, the Strasbourg Court has also declared certain areas of law as not falling within the remit of Article 6 (1). This means that even claims relating to disputes over a right which is guaranteed by the Convention will not automatically attract the protection of Article 6. However, Article 13 (the right to an effective remedy) will always apply, and this may require a remedy or procedural safeguards to those found in Article 6 (1).

The following are examples of issues that have not been regarded as involving the determination of civil rights and obligations. However some of these decisions are very old, and may need to be re-visited in the light of more recent developments in the wider case law of the Court<sup>25</sup>.

**A criminal charge:** The guarantees contained in this rubric of Article 6 apply only in the context of "criminal" proceedings and only to those who have been "charged". The Court has an extensive body of case law on the meaning of the terms "criminal" and "charge" for Convention purposes. The Convention meaning is often different from the meaning in national law.

**Meaning of "criminal":** Although states have a wide margin of appreciation in deciding what conduct will constitute a criminal offence, the normal exercise of Convention rights, for example freedom of speech or freedom of expression, cannot be a criminal offence<sup>26</sup>. However some conduct, such as serious sexual assault, must carry a criminal sanction if the victim's rights are to be protected.

As the Court stated, State Parties are free to designate matters in their domestic law as either criminal, disciplinary or administrative, as long as this distinction does not in itself contravene the Convention.<sup>27</sup>

These principles have been confirmed in later case-law. Four points are relevant here: The classification in domestic law, the nature of the offence, the purpose of the penalty and the nature and the severity of the penalty.

If the charge is classified as criminal in the domestic law of the respondent state, Article 6 will apply automatically to the proceedings and the considerations set out below do not apply.

However, if the charge is not classified as criminal, this will not automatically mean that the fair trial guarantees in Article 6 do not apply. If this was the case, the Contracting States could evade the application of the fair trial guarantee by decriminalizing or re-classifying criminal offences.

If the norm in question only applies to a restricted group of people, such as a profession, this would indicate that it is a disciplinary and not a criminal norm<sup>28</sup>. However,

<sup>25</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 74-78.

<sup>26</sup> Franklin Kuty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d'innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 165

<sup>27</sup> Matadi Nenga Gamanda, « Le droit à un procès équitable », Academia-Bruylant, 2010, pg 133-134.

<sup>28</sup> Frédéric SUDRE, « Droit européen et international des droits de l'homme », PUF, 6ème éd. refondue, septembre 2003, p. 379.

if the norm is of general effect it is likely to be criminal for the purposes of Article 6. In the case of *Weber v. Switzerland*, the applicant had filed a criminal complaint of defamation, and held a press conference to inform the public of his complaint. He was then fined for breaching the secrecy of the investigation. The applicant complained of a violation of Article 6 when his appeal against the conviction was dismissed without a public hearing. The Court therefore had to rule on whether this concerned a criminal matter, and stated: “Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. Furthermore, in the great majority of the Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions (...).”

Therefore, since the provision was not restricted to a group of persons in one or more specific capacities, it was not exclusively disciplinary in character<sup>29</sup>.

When the penalty in question is not imprisonment or threat of imprisonment but fines, the Court gives consideration to whether they are intended as pecuniary compensation for damage or essentially as a punishment to deter re-offending<sup>30</sup>. Only in case of the latter will they be considered as belonging to the criminal sphere.

### 5.1. The nature and severity of the penalty

This criterion is distinct from the purpose of the penalty. If the purpose of the penalty does not make Article 6 applicable, the Court will then have to look at its nature and severity which can render the fair trial guarantee applicable.

*Deprivation of liberty* as a penalty generally makes a norm criminal rather than disciplinary. The Court stated that “in a society subscribing to the rule of law, there belong to the “criminal” sphere deprivation of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.”

Meaning of “charge”: Article 6 guarantees a fair trial in the determination of a criminal charge against a person, and its guarantees apply from the moment a person is charged. What is then meant by “criminal charge”?

“Charge” is an autonomous concept under the Convention which applies irrespective of the definition of a “charge” in domestic law<sup>31</sup>. The Court stated that the word “charge” should be given a substantive rather than a formal meaning, and it felt compelled to look behind the appearances and investigate the realities of the procedure in question. Once it has been established that an individual is the object of a criminal charge, all the guarantees of Article 6 will apply.

Article 6 guarantees to everyone a public hearing in the determination of his civil rights and obligations or of any criminal charge against him. Article 6 further states that the press and public may be excluded from all or part of the trial in the interests of morals,

<sup>29</sup> Matadi Nenga Gamanda, « Le droit à un procès équitable », Academia-Bruylant, 2010, pg 135

<sup>30</sup> I. Pingel, « Droit des immunités et exigences du procès équitable », Pedone, 2005, pg 48-50.

<sup>31</sup> Gérard COHEN-JONATHAN, Christophe PETTITI « La Réforme de la Cour européenne des Droits de l’Homme », Bruylant 2003, pg 144.

the interests of juveniles or the protection of the private life of the parties require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This provision requires that in principle, there should be an oral hearing attended in criminal cases by the prosecutor and the accused, and in civil cases by the parties, and that this hearing should be open to the public.

A public hearing is an essential feature of the right to a fair trial.

A public hearing is generally needed to satisfy the requirements of Article 6 (1) before courts of first instance or only instance. However, in technical matters a public hearing may sometimes not be required.

If a public hearing is not held in first instance, this can be cured by the holding of a public hearing at a higher instance. However, if the appeal court does not consider the merits of the case or is not competent to deal with all aspects of the matter, there will still have been a violation of Article 6. It will require exceptional reasons to justify that no public hearing is held if there has not been one at the first instance.

The right to a public hearing generally includes a right to an oral hearing, if there are not any exceptional circumstances.

There is no general requirement for an oral hearing at the appeal court.

The first instance court gave judgment against the applicant in favor of the firm, and the Court of Appeal confirmed this decision<sup>32</sup>.

Article 6 states that judgment shall be pronounced publicly. This provision is not subject to any exceptions of the kind permitted under the rule that hearings should be held in public. It is however also intended to contribute to a fair trial through public scrutiny.

The Court has stated that “pronounced publicly” does not necessarily mean that the judgment has always to be read out in court.

A very large number of cases that are submitted to the Court concern the right guaranteed by Article 6 to a hearing within a reasonable time. This single issue accounts for more judgments of the Court than any other.

The Court also emphasized that States had a general obligation to solve the systemic problems underlying violations found by the Court of the reasonable time guarantee<sup>33</sup>.

The Court has stated that the purpose of the reasonable time guarantee is to protect “all parties to court proceedings ... against excessive procedural delays”. The guarantee further “underlines the importance of rendering justice without delays which might jeopardize its effectiveness and credibility”<sup>34</sup>. The purpose of the reasonable time requirement is therefore to guarantee that within a reasonable time and by means of a judicial decision, an end is put to the insecurity into which a person finds himself/herself as to his/her civil law position or on account of a criminal charge against him/her: this is in the interest of the person in question as well as of legal certainty.

The time to be taken into consideration starts running with the institution of proceedings (administrative or judicial depending on the kind of case) in civil cases, and in criminal cases with the charge<sup>35</sup>. Time ceases to run when the proceedings have been

<sup>32</sup> I. Pingel, « Droit des immunités et exigences du procès équitable », Pedone, 2005, pg 50-54

<sup>33</sup> Franklin Kuty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d’innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 167-170.

<sup>34</sup> Frédéric SUDRE, « *Droit européen et international des droits de l’homme* », PUF, 6ème éd. refondue, septembre 2003, p. 383.

<sup>35</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 78-81.

concluded at the highest possible instance, when the determination becomes final and the judgment has been executed. The Court will examine the length of proceedings from the date on which a Contracting State ratified the Convention but will take into account the state and progress of the case at that date.

The Court has established in its case-law that when assessing whether a length of time can be considered reasonable, the following factors should be taken into account: the complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant<sup>36</sup>.

The Court has regard to the particular circumstances of the case, and has not established an absolute time-limit. In some cases the Court makes an overall assessment rather than referring directly to the above-mentioned criteria.

All aspects of the case are relevant in assessing whether it is complex<sup>37</sup>.

The complexity may concern questions of fact as well as legal issues. The Court has attached importance to the nature of the facts that are to be established, the number of accused persons and witnesses, international elements, the joinder of the case to other cases, and the intervention of other persons in the procedure.

A case that is very complex may sometimes justify long proceedings.<sup>38</sup>

After the breakup of the former Yugoslavia, the Slovenian Government took over the responsibility for payment of military pensions. The Court considered that the subject-matter of the litigation was of considerable complexity. The case was the first of a large number of constitutional appeals concerning the pensions of former Yugoslav military personnel, and as such, the domestic court had to examine its merits in detail. As the Constitutional Court had not acted unreasonably, no violation of Article 6 was found<sup>39</sup>.

Article 6 states that everyone is entitled to a hearing by an independent and impartial tribunal established by law. The two requirements of independence and impartiality are interlocked, and the Court often considers them together.

## 5.2. The matter of judicial independence

Courts will normally be considered to be independent and the independence of judicial bodies is rarely challenged except in situations where they are being asked to consider the decisions of non-judicial bodies. Bodies which are not courts may exercise functions which are determinative of civil rights or criminal charges. This is acceptable so long as they comply with the requirements of independence and impartiality<sup>40</sup>.

When deciding whether a tribunal is independent, the European Court considers:

- the manner of appointment of its members,
- the duration of their office,
- the existence of guarantees against outside pressures and
- the question whether the body presents an appearance of independence.

<sup>36</sup> N. Mole, c. Harby, "The right to a fair trial", Human rights handbooks N.3, 2009, pg 50.

<sup>37</sup> Franklin Kutty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d'innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 174.

<sup>38</sup> I. Pingel, F. Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 81-85

<sup>39</sup> Frédéric SUDRE, « Droit européen et international des droits de l'homme », PUF, 6ème éd. refondue, septembre 2003, pg 384

<sup>40</sup> I. Pingel, « Droit des immunités et exigences du procès équitable », Pedone, 2005, pg 57.

The Court has held that the tribunal must be independent of both the executive and the parties.

### 5.3. Composition and appointment

The Court has held that the presence of judicial or legally qualified members in a tribunal is a strong indication of its independence.

Although there is no reason in principle why Article 6 guarantees cannot be observed in courts martial the Court has found a number of violations in respect of military tribunals. Where civilians are on trial for offences against national security the presence of military judges on State Security Courts has been held to violate Article 6 because, *inter alia*, the judges remained subject to military discipline. Several cases have been decided concerning courts martial which try military personnel for offences which the Convention classifies as criminal.

### 5.4. Subordination to other authorities

The tribunal must have the power to give a binding decision which cannot be altered by a non-judicial authority<sup>41</sup>. Courts martial and other military disciplinary bodies have been found to violate Article 6 in this context. The executive may issue guidelines to members about the general performance of their functions, as long as any such guidelines are not in reality instructions as to how specific cases are to be decided.

### 5.5. Impartiality

The Court held that<sup>42</sup> *whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 (1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*

For *subjective* impartiality to be made out, the Court requires proof of actual bias. Personal impartiality of a duly appointed judge is presumed until there is evidence to the contrary. This is a very strong presumption and in practice it is very difficult to prove personal bias<sup>43</sup>.

As to the *objective* test, the Court stated that *under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of certain 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. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge*

<sup>41</sup> Louis-Edmond PETTITI, Emmanuel DECAUX, Pierre-Henri IMBERT, « La Convention européenne des droits de l'homme », Economica, 2ème éd., 1999, pg 287.

<sup>42</sup> Franklin Kutty, « Justice pénale et procès équitable », Tome 2 : Exigence de délai raisonnable – Présomption d'innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 176

<sup>43</sup> I. Pingel, « Droit des immunités et exigences du procès équitable », Pedone, 2005, 59-60

*lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.*

The Court has made clear that any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw.

The European Court also noted a Resolution adopted by the Ukrainian Council of Judges in 2000, finding that the decisions of the Cabinet of Ministers to lower judicial salaries were contrary to the principle of the independence of the judiciary.<sup>44</sup> Taking these into account, together with the organizational structure of the courts (in particular the relationship between the Presidium of the Regional Court and the District Court), the Court held that the applicant's doubts as to the impartiality of the judge could be said to have objectively justified.

The existence of national procedures for ensuring impartiality are also relevant here<sup>45</sup>. Whilst the Convention does not expressly stipulate that there must be mechanisms whereby parties to proceedings are able to challenge impartiality, violations of Article 6 are more likely to occur if they are absent. If a defendant raises the issue of impartiality, it must be investigated unless it is "manifestly devoid of merit"<sup>46</sup>. The issue has been raised most often in the Strasbourg courts in the context of racism. Both the principles set out in the cases below apply equally to other kinds of prejudice or impartiality.

## 6. ACCESS TO COURT

There is no express guarantee of the right of access to a court in the text of Article 6, but the European Court has held that this provision secures to everyone the right to have any claim relating to his/her civil rights and obligations brought before a court or tribunal.

Article 6 embodies the right to a court, of which the right to access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.<sup>47</sup>

The Court held that *were Article 6 (1) understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent of the Government... It would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.*

However, the right of access to court is not an absolute right.

<sup>44</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 85-86

<sup>45</sup> Frédéric SUDRE, « Droit européen et international des droits de l'homme », PUF, 6ème éd. refondue, septembre 2003, pg. 385-387

<sup>46</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 87-90

<sup>47</sup> Gérard COHEN-JONATHAN, Christophe PETTITI « La Réforme de la Cour européenne des Droits de l'Homme », Bruylant 2003, pg 150

In some jurisdictions of the Council of Europe, e.g. Cyprus, there is no legal aid scheme for civil cases but *ex-gratia* payment can be made by the state in suitable cases<sup>48</sup>. Whether or not the lack of a legal aid scheme leads to a violation of the Convention will depend on the facts of the case.

The Court has held that the accused in criminal proceedings must be present at the trial hearing. The object and purpose of Article 6 (1) and 6 (3) *c-e* presuppose the presence of the accused.

As regards civil cases, the requirement that the parties be present at the proceedings only extends to certain kinds of cases, such as cases which involve an assessment of a party's personal conduct.

A criminal trial in the absence of the accused or a party may be allowed in certain exceptional circumstances, if the authorities have acted diligently but not been able to notify the relevant person of the hearing and may be permitted in the interests of the administration of justice in some cases of illness<sup>49</sup>.

A party may waive the right to be present at an oral hearing, but only if the waiver is unequivocal and "attended by minimum safeguards commensurate to its importance". However, if the accused in criminal cases waive their right, they must still be permitted legal representation.

The right of a person to be present at the appeal will depend on the nature and scope of the hearing. The Court considers that a hearing in the presence of the accused is not as crucial at an appeal hearing as it is at the trial. If the appeal court will only consider points of law, a hearing in the presence of the accused will not be necessary. The situation is different, however, if the appeal court will also consider the facts of the case. In determining whether the accused has a right to be present, the Court will take into consideration what is at stake for him/her and the appeal court's need for the presence of the accused to determine the facts<sup>50</sup>.

The Court has held that the right to a fair trial in criminal cases includes "the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself".

### **6.1. Equality of arms and the right to adversarial proceedings**

The right to a fair hearing incorporates the principle of equality of arms. This means that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent. A fair balance must be struck between the parties.

The right to a fair hearing also incorporates the right to adversarial proceedings, which means in principle the opportunity for parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed. In this context particular importance is to be attached to the appearance of the fair administration of justice.

<sup>48</sup> Frédéric SUDRE, « *Droit européen et international des droits de l'homme* », PUF, 6ème éd. refondue, septembre 2003, pg. 338.

<sup>49</sup> Julie Meunier, « Le procès équitable devant la Cour européenne des droits de l'homme », article dans la *Rivue de Droit* nr. 16, 2005, pg 51-54.

<sup>50</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 93-95

These principles apply to both criminal and civil proceedings. In criminal cases, they overlap with some of the specific guarantees of Article 6 (3), but are not confined to those aspects of the proceedings.

### **6.2. Right to a reasoned judgment**

Article 6 requires that the domestic courts give reasons for its judgment in both civil and criminal proceedings.<sup>51</sup> Courts are not obliged to give detailed answers to every question, but if a submission is fundamental to the outcome of the case the court must then specifically deal with it in its judgment.

### **6.3. Special rights applying to juvenile cases**

The Court has long recognized that the fair trial rights enshrined in the Convention attach to children as well as adults:

“The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.”

Where *children* claim to have been *victims of violations* of Convention rights which are also civil rights they must have access to court to determine the liability of the authorities for those violations.

The Court has held that lawyers who acted in previous proceedings or parents who have been deprived of parental responsibility can bring cases to Strasbourg on behalf of their children if it would otherwise mean that the children’s cases could not be heard.<sup>52</sup> There seems no reason why this principle should not also apply to cases in national courts.

All Convention rights must be read in conjunction with the relevant provisions of the Convention on the Rights of the Child.

### **6.4. The admissibility of evidence**

The European Court has frequently held that<sup>53</sup> it is not its place to substitute its own view as to the admissibility of evidence for that of national courts, although it has examined the way in which the evidence was treated as an important matter in deciding whether or not a trial was fair. The rules of evidence are thus principally the matter for the domestic courts in each Contracting State. However the Convention has established some important guidelines.

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<sup>51</sup> Frédéric SUDRE, « *Droit européen et international des droits de l’homme* », PUF, 6ème éd. refondue, septembre 2003, pg. 342

<sup>52</sup> Gérard COHEN-JONATHAN, Christophe PETTITI « *La Réforme de la Cour européenne des Droits de l’Homme* », Bruylant 2003, pg 155

<sup>53</sup> Franklin Kuty, « *Justice pénale et procès équitable* », Tome 2 : Exigence de délai raisonnable – Présomption d’innocence – Droits spécifiques du prévenu, Larcier, 2009, pg 180.

### 6.5. The actions that might contravene to the presumption of innocence

Article 6 (2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. However, it also applies to the kinds of civil cases which the Convention regards as “criminal”, such as professional disciplinary proceedings. The presumption of innocence must equally be upheld *after acquittal* as before trial.

### 6.6. The meaning of the right to prompt intelligible notification of charges as covered in Article 6 (3) A

The list of minimum guarantees set out in Article 6 (3) *a-e* is not exhaustive. The guarantees identify key specific aspects of the right to a fair trial. The Court has held that the relationship between Article 6 (1) and Article 6 (3) “is that of the general to the particular”.<sup>54</sup> A criminal trial could therefore fail to fulfill the requirements of a fair trial, even if the minimum guarantees in Article 6 (3) are upheld. Article 6 (3) *a* states that everyone charged with a criminal offence has the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/ her. As with Article 6 (2) it also applies to the cases which the Convention regards as “criminal”, such as professional disciplinary proceedings.

This provision is aimed at the information that is required to be given to the accused at the time of the charge or the commencement of the proceedings. As regards the relationship between this provision and Article 5 (2), the latter generally requires less detail and is not as rigorous.

It is essential that the offence of which a person is convicted is the one with which he was charged. The information about the charge must be in a language that the accused understands.

Article 6 (3) *b* states that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his/her defense. This also applies in some civil cases as part of the general fairness requirement.

The judge’s key role in relation to this provision is to achieve the proper balance between this requirement and the obligation to ensure that trials are concluded within a reasonable time. The provision is also closely related to Article 6 (3) *c*, the right to legal assistance and legal aid<sup>55</sup>.

Complaints on this point in relation to convictions have been declared inadmissible when they have been made by a person who has subsequently been acquitted on appeal in criminal proceedings or by a person who declares that he/she will not take any further part in the proceedings. The judge’s role is nevertheless to ensure that this safeguard is respected in the proceedings before him/her and not to rely on the possibility of the defect being made good on appeal.

<sup>54</sup> Frédéric SUDRE, « *Droit européen et international des droits de l’homme* », PUF, 6ème éd. refondue, septembre 2003, pg. 345

<sup>55</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 95

The adequacy of the time will depend on all the circumstances of the case, including the complexity and the stage the proceedings have reached<sup>56</sup>.

A fundamental element is that the defense lawyer must have sufficient time to allow proper preparation to take place.<sup>57</sup>

This principle implies a presumption that the defense lawyer has unrestricted and confidential access to any client held in pre-trial detention in order to discuss all elements of the case. A system which routinely requires the prior authorization of the judge or prosecutor for legal visits will violate this provision. Judges should make it clear to all parties when authorizing or prolonging pretrial detention that their permission is NOT required for legal visits to take place. If the prosecutor seeks to assert the right to authorize or withhold legal visits not only will this provision be violated but the whole fairness of the trial may be questionable. It follows that the authorities in charge of the pre-trial detention institution cannot require any authority from the judge in order to facilitate legal visits. Furthermore they must ensure that adequate facilities are provided to enable legal visits to take place in confidence and out of hearing of the prison authorities.

Where the accused, or his lawyers, allege that adequate facilities have not been provided the judge has the responsibility to decide whether or not the trial can go ahead without violating Article 6 (3) *b*.

In doing so the judge will bear in mind that the right of the accused to communicate freely with his lawyer in the preparation of his defense is regarded as absolutely central to the concept of a fair trial. Certain restrictions may however be justified in exceptional circumstances.

The right to communicate with a lawyer also includes the right to correspond via letters. Most of these cases have been examined under Article 8 of the Convention (the right to respect for correspondence) as well as under Article 6 (3) *b*.

Article 6 (3) *c* provides for the accused the right to defend himself/ herself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The rights set out in this provision are closely linked to those in Article 6 (3) *b*, see above.

The Court has held that the right to represent oneself in person is not an absolute right.

The right to legal aid for an accused depends on two circumstances.

Firstly, that the accused lacks sufficient means to pay for legal assistance. Not many issues regarding this condition have arisen before the Convention's representants, but it seems that the level of proof required for a defendant that he/she lacks resources should not be set too high. The second condition is that the interests of justice require legal aid to be granted. A number of factors are relevant here. The Court will have regard to the complexity of the case and the ability of the defendant to present the case adequately without assistance.

Finally, the seriousness of any possible sanction is also relevant to the question whether legal aid should be granted.<sup>58</sup>

<sup>56</sup> Julie Meunier, « Le procès équitable devant la Cour européenne des droits de l'homme », article dans la revue de Droit nr. 16, 2005, pg 55-57.

<sup>57</sup> I.Pingel, F.Sudre, « Le ministère public et les exigences du procès équitable », Bruylant, 2003, pg 97-100

<sup>58</sup> Gérard COHEN-JONATHAN, Christophe PETTITI « La Réforme de la Cour européenne des Droits de l'Homme », Bruylant 2003, pg 157

Article 6 (3) d provides that the accused has the right to examine or have examined witnesses against him/her, and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.

The general principle is therefore that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case, and must be able to examine any witness who is called, or whose evidence is relied on, by the prosecutor.

This provision does not provide for the accused an *absolute* right to call witnesses or a right to force the domestic courts to hear a particular witness. Domestic law can lay down conditions for the admission of witnesses and the competent authorities can refuse to allow a witness to be called if it appears that the evidence will not be relevant. The applicant must therefore establish that the failure to hear a particular witness prejudiced his/her case. However, the procedure for hearing of witnesses must be the same for the prosecution as the defense and equality of arms is required.

In principle, all evidence relied on by the prosecution should be produced in the presence of the accused at a public hearing with a view to adversarial argument. Problems will therefore arise if the prosecution introduces written statements by a person who does not appear as a witness, for example because he/she fears acts of vengeance from the accused or his/her associates.

Only *exceptional circumstances* will permit the prosecution to rely on evidence from a witness that the accused has been unable to cross-examine. The determination by the judge of a criminal charge in reliance on the prosecutor's file, but without the prosecutor being present to answer any challenge by the accused, is likely to give rise to the risk of violations of this provision. The judge of course, cannot defend the prosecutor's case in his absence without compromising his impartiality. Many Convention states have rules which excuse some witnesses, e.g. family members, from giving evidence.

#### **6.7. The right to an interpreter, covered and guaranteed by Article 6 (3) E**

Article 6 (3) *e* provides that the accused is entitled to *free assistance* of an interpreter if he/she cannot understand or speak the language used in court.

The right to an interpreter is understood to extend to deaf people where the normal method of communication is for instance by sign language. It should be noted that, in contrast to the right to free legal assistance under Article 6 (3) *c* which is subject to a means test, the right to free interpretation applies to everyone charged with a criminal offence.

The competent authorities' obligation is not limited to the mere appointment of an interpreter but may also extend to exercising a degree of control over the adequacy of the interpretation, if they are put on notice of the need to do so.

### **7. CONCLUSION**

Article 34 of the Convention enables any persons (physical or legal), non-governmental organizations or groups of individuals claiming to be victims of a violation of their Convention rights to take their complaints to the European Court of Human Rights.

Before embarking on such a course after reading this handbook, lawyers should be aware of the limited nature of the Court's powers.

The Court will decide if the complaint meets the detailed admissibility criteria set out in Article 35 and, if it finds a violation, will deliver a binding judgment. States have undertaken in Article 46 to abide by the Court's judgments. Many thousands of complaints are taken each year alleging violations of Article 6. Only a tiny handful are declared admissible. Of those, the majority are so called "clone" cases – such as the Italian undue length of proceedings cases.

Under Protocol No. 14, which has yet to come into force, a Committee of the Court will be able to declare a case admissible and at the same time issue a judgment on the merits and award just satisfaction, if the underlying question in the case is already the subject of well established case-law.

The Court's role is primarily a declaratory one. It merely states whether or not it considers that the Convention has been violated and awards any compensation it considers appropriate. Pecuniary awards must be paid within three months of the date of the judgment.

The sums it awards are modest and frequently, particularly in Article 6 cases, it makes no monetary award at all, holding that the finding of a violation constitutes sufficient just satisfaction. It has stated that the purpose of awarding sums by way of just satisfaction is "to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied".

The European Court cannot quash a verdict of a national court, order a re-trial, or order the payment of a judgment debt, although in response to Resolution Res (2004) 3 it has taken to indicating to states the need for remedies for perceived systemic wrongs.

Compliance, if not prompt compliance, with the judgments of the Court is the norm. Protocol No. 14 will nevertheless introduce a new provision which will allow the Committee of Ministers to refer a case back to the Court for a ruling as to whether the state has discharged its obligation under Article 46 to comply with the judgment.

In conclusion, we can see that the right to a fair trial is something to which every person is entitled. The history of this right and the practice of courts show that the right to a fair trial has acquired universal recognition and acceptance. Not only has it been integrated into the legal systems of most countries, but it has been codified in treaties and conventions. It is today a well-established rule of customary international law, and in the view of many, has the status of a pre-emptory norm of general international law.

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