RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 6)

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Using this Manual

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1. INTRODUCTION

Article 6 of the European Convention for Human Rights (the Convention) provides:

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.

1.1. Specifics and structure of Article 6

Article 6 guarantees the right to a fair trial which is of fundamental importance in a democratic society, occupying a central place in the Convention system. Their object and purpose enshrines the principle of the rule of law, upon which such a society is based and built, as well as reflects part of the common heritage of the States parties to the Convention, according to the Preamble of the Convention. Article 6 is the provision of the Convention most frequently invoked by applicants to the European Court of Human Rights (the Court). It is therefore hardly surprising that there is substantial case-law on the provision's application. In addition, consistent with the premise that the Convention is a living instrument, the Court's Article 6 jurisprudence has developed progressively over the years to encompass an ever increasing variety of legal proceedings.

1.1.1. Autonomous nature

As with other provisions of the Convention, many of the terms used in Article 6(1) bear "autonomous" meaning and require interpretation which may differ from that given by the domestic law or the national authorities. Hence, the right to a fair hearing contained in Article 6 does not apply to all court proceedings at the domestic level. Both concepts used by the Convention, 'determination of criminal charge' and 'determination civil rights and obligations' are autonomous; thus their content may differ from the qualifications given by the national laws. In other words, the nomenclature attached by domestic law is not determinative of the issue; the Court will decide according its own established criteria, whether particular proceedings are to be considered "criminal" or such concerning 'civil rights and obligations' from the point of view of the above provision.

1.1.2. Difference in procedural protection

While Article 6(2) and (3) contain specific provisions setting out additional procedural standards applicable only in respect of those charged with a "criminal" offence, Article 6(1) applies both to "civil" and "criminal" proceedings. It is also important to note that the majority of issues brought to the Court's attention under the "criminal" limb of Article 6 have concerned fairness of procedural acts by various State officials - at the investigation, trial or appeal stage - leading to a person's conviction. However, the issues brought to the Court's attention under the "civil" heading of Article 6 have touched upon three distinct set of problems: a) lack of access to a court to have a "civil" dispute determined, b) fairness of judicial proceedings where access to a court was not restricted, c) the right to obtain timely execution of a court judgment in case of a favourable outcome of a "civil" dispute. These three types of problems may be the result of a statutory bar (to bring a court action or appeal, for instance) as well as the consequence of specific acts by the authorities. As a result, different types of domestic remedies may or may not exist in regard to each of these separate problems, with the result that Article 35(1) of the Convention – the exhaustion of domestic remedies and six months' rules - will be applied by the Court differently depending on the nature of the issue claimed by the applicant to be in breach of Article 6(1) in connection with a "civil" dispute.

1.1.3. Fourth instance doctrine

The Court's task with regard to a complaint under Article 6 is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by this provision (see, among other authorities, **Bernard v France (1998)**). It is important to bear in mind that the Court has no jurisdiction under Article 6 to re-open domestic legal proceedings or to substitute its own findings of fact or national law for the findings of domestic courts. For instance, where a complaint has been brought about unfairness of criminal proceedings, the Court will essentially concentrate on the circumstances disclosing whether or not an applicant was afforded ample opportunities, on an equal footing with the accusation, to state his case and contest the evidence that he considered false. Unlike a national trial court or a court of appeal, the Court under Article 6 is not concerned, in principle, with the questions whether the domestic courts' factual findings were based on an adequate interpretation of the witnesses' evidence, whether the admission of certain evidence was lawful from the point of view of the domestic criminal procedure, whether the legal findings of the domestic courts were compatible with the provisions of the substantive criminal law of the Contracting State, or whether the sentence was appropriate. The Court calls this principle the "fourth instance" doctrine, because it does not intend to be seen simply as a higher instance in the ordinary appeal procedure.

2. SCOPE OF PROTECTION

2.1. Applicability of Article 6

There is a threshold question for the applicability of Article 6; that is, whether particular legal proceedings qualify as the "determination of civil rights and obligations or a criminal charge". Where the proceedings fall into one of these two categories, Article 6(1) will apply. Further, if the proceedings qualify as the "determination of any criminal charge" then Article 6(2) and (3) also apply.

2.2. "Civil rights and obligations"

For Article 6 to apply under its "civil" heading, there must first be a dispute ("contestation") over a "right" or "obligation". Secondly, that "right" must have a basis in national law. Furthermore, the dispute in question must determine that "right" in a direct and decisive manner. Finally, that right or obligation must be "civil" in nature. Only having passed all the above tests, the Court will embark on examining an applicant's claim that the impugned domestic proceedings were in breach of the requirements of Article 6 of the Convention.

It is obvious that the concept of "civil right and obligations" covers ordinary civil litigation having the predominant features of private law, such as disputes between private individuals relating, for example, to actions in tort, contract, and family law. It is more difficult, however, to determine whether Article 6(1) should apply also to disputes between individuals and the State concerning rights which, under some systems of law, fall under the public rather than the private law domain. From the start, the Court took the view that the question whether a dispute relates to "civil rights and obligations" could not be answered solely by reference to the way in which it is viewed under the domestic law of the respondent State; the concept has an "autonomous" meaning under the Convention. Any other approach would have allowed the Contracting States to circumvent fair trial guarantees under Article 6(1) simply by classifying various areas of the law as "public" or "administrative" and would have risked creating substantive disparity in the protection of the right to a fair trial throughout Europe.

On the other hand, in view of this refusal by the Court to take account of the national-law definitions in order to determine whether there has been a "civil" dispute, it becomes more difficult to ascertain whether a particular type of dispute is included in the domain protected by Article 6. The Court has based itself on various elements such as the economic nature of the right concerned, its definition under national law, allowing for a gradual expansion of the dispute covered by Article 6 and seeming to struggle on some issues, like the applicability of Article 6 with respect to disputes over the employment of civil servants. The general guidance that could be extracted from the case law is that the domestic law position is not decisive, and the substantive content, character, and effects of the right concerned would all be taken into consideration.

2.2.1. Dispute ("contestation") over a "right"

There should exist a dispute or "contestation" (the term derived from the French version of the text of Article 6) over rights and obligations recognised, at least on arguable grounds, in the domestic law. The label attached to the issue subject to the dispute in domestic law is not conclusive of the matter; as will be seen, what is important, is the nature of this issue. Questions over the existence of a dispute have often arisen in cases relating to the admission or re-admission to professional bodies, such as the Bar and medical councils, membership of which is essential to the lawful prac-

tice of such professions. They have also arisen in a variety of other contexts. Disputes attracting Article 6 protection may arise not only between private persons, but also between a private person and a public authority.

- In **Benthem v Netherlands (1985)**, the applicant was granted but subsequently withdrawn a licence to run a garage. The applicant claimed that the hearings leading to the withdrawal of the licence did not accord with Article 6(1). The Court formulated certain important principles as to the interpretation of the term dispute ("contestation") in that case. First, conformity with the spirit of the Convention requires that the word 'contestation' (dispute) should not be construed too technically and should be given a substantive rather than a formal meaning. Second, the dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised. Third, a dispute may concern both "questions of fact" and "questions of law". Furthermore, it must be genuine and of a serious nature. Finally, while the term dispute covers all proceedings the result of which is decisive for a person's civil rights and obligations, the dispute in question must not have a tenuous connection or remote consequences to those rights or obligations. Hence, civil rights and obligations must be the object, or one of the objects of the dispute, and the result of the proceedings must be directly decisive for such a right. On the facts of the **Benthem** case, the Court held that a dispute could be said to have arisen between the applicant and the Netherlands authorities as to the actual existence of the right to a licence claimed by the applicant. This was especially since the applicant was able to use the garage, by virtue of the grant of the licence, without violating the law, and that the legal proceedings were decisive for his right. Article 6(1) therefore applied.

- In **H. v Belgium (1987)**, the applicant had been struck off the roll of the Bar and had twice applied to be reinstated. The domestic law provided that a person could seek readmission to the roll of the Bar within ten years, or later if there were "exceptional circumstances". The applicant was refused re-admission in that he had applied after the ten years' time-limit had expired. The Court held that Article 6(1) applied only to disputes ("contestations") over civil rights and obligations that could be said, at least on arguable grounds, to be recognised under domestic law; Article 6(1) does not in itself guarantee any particular content for civil rights and obligations in domestic laws. The Court noted that the condition of "exceptional circumstances" was open to interpretation, and that thus the applicant could claim, at least on arguable grounds, that he had a "right" recognised under Belgian law to apply to the Bar again. The Court also held that, despite the fact that admission to the Bar had features of public law, the practice of a barrister also involved many functions of the private-law nature; accordingly Article 6(1) was applicable.

- In **Chevrol v France (2003)**, the applicant, a French national, was refused admission to the Medical Council on the ground that she held an Algerian diploma in medicine. The French legislation laid down two conditions for registration as a practising medic, namely, first, the need to have the necessary qualifications and, second, French nationality. As there was no dispute as to the applicant having in principle complied with the condition of the necessary qualifications, the Court pointed out that the applicant could at least arguably claim to have a "right" under the French law for admission to the medical profession. Article 6(1) was therefore applicable to the domestic proceedings to determine that right.

- In **Van Marle and Others v Netherlands (1986)**, the applicants were refused renewal of certification to practise as accountants, in view of the entry into force of new special legislation. The task of the authorities implementing the law was to evaluate knowledge and experience of existing accountants for carrying on the profession of a certified accountant. The Court held that the assessment at issue was akin to a school or university examination and was so far removed from the exercise of the normal judicial function that the safeguards in Article 6 did not cover resultant disagreements.

- In **Georgiadis v Greece (1997)**, the applicant was detained after having refused to undergo military service on religious grounds. His refusal was subsequently found by the Supreme Administrative Court as having basis in domestic law. At the same time, no right to claim compensation was afforded to the applicant. The Court held that the outcome of the proceedings was decisive for establishing the applicant's right to compensation for unjustified detention, which in principle existed under the Greek law. There was thus a dispute over a "right" for the purposes of Article 6(1).

- In **Mustafa v France (2003)**, the applicant complained about the length of proceedings concerning his request to change his family name. The French law permitted a person to request the change where he has demonstrated a "legitimate interest", that interest to be determined on discretion of the administrative authorities. The Court concluded that the dispute in the case concerned a "right" which could be said, at least on arguable grounds, to be recognised under the domestic law. Further, the Court held that the right to a name was "civil" in nature for the purposes of Article 6(1) (also see chapter 2.2.3 below).

The Court has recognized that the applicability of Article 6 is not restricted to the question of the existence of a personal right or obligation under the domestic statutes, but also includes the questions of the scope and manner of the exercise of the right, as emphasised in the **Benthem** criteria. In **Le Compte, Van Leuven and De Meyere v Belgium (1981)**, the applicants, doctors, were suspended from the medical register for a short period on the grounds of professional misconduct. The Government claimed, *inter alia*, that the suspension did not impair a "right"; rather it consisted no more than a temporary limitation of its exercise. The Court held that the suspension did constitute a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right. Article 6(1) was therefore applicable to the domestic proceedings concerning the lawfulness of that suspension.

For a dispute to attract the protection of Article 6(1), it must in addition be "genuine and serious". In the above-mentioned **Benthem v Netherlands (1985)**, where the Court first formulated this principle, it was established that there was a "genuine and serious" dispute as to the "actual existence" of the right to a licence claimed by the applicant. This was borne out by the facts that the applicant had operated the garage for three years, pending the outcome of the impugned proceedings, and that the result of the proceedings was directly decisive for the right at issue.

- In **Sporrong and Lonnroth v Sweden (1982)**, the applicants' properties were subject to expropriation and prohibition of construction for a number of years. They complained that their complaints in this respect could not be heard by the Swedish courts. The Court noted that the applicants regarded as unlawful the adoption of the administrative measures which seriously affected their right of property, with the result that they were entitled to have the lawfulness of those measures determined by a tribunal within the meaning of Article 6(1).

However, where there is no actionable claim in domestic law, because of substantive national law, individuals cannot claim that Article 6 should apply.

- In **M.S. v Sweden (1997)**, the applicant complained that she had no right to challenge in court the disclosure of her medical records, sent to an insurance institution in order to process her claim of compensation in regard to an injury. The Court noted that while the Swedish law guaranteed confidentiality of medical records, it also imposed a statutory duty of disclosure in certain circumstances, such as those pertaining to the applicant's. Accordingly, it could not be said on arguable grounds that there was a "right" to prevent communication of her medical data to the insurance. The applicant could not claim that there was a dispute over any of her "rights" for the purposes of Article 6(1).

- In **Powell and Rayner v United Kingdom (1990)**, the applicants claimed that they were prevented by statute from bringing an action in nuisance against the authorities in connection with the increased air traffic noise at Heathrow airport. The Court held that the national law effectively excluded liability of the authorities in such circumstances. The result was that the applicants could not claim to have a substantive "right" under the English law to obtain relief. Accordingly, there was no "right" recognised under domestic law to attract the application of Article 6(1). Similarly, the Court held that Article 6(1) was not applicable for lack of a right recognized under domestic law.

- **Skorobogatykh v Russia (2006)**. There, the applicant complained of the refusal of the domestic prison authorities to transport him to the court house for the hearing in a case, in which he was seeking damages from the prison authorities. His claim was based on the fact that several HIV positive prisoners were detained in for some time in his prison. The Court held, that under domestic law, damages could only be claimed for proved prejudice, and throughout the domestic proceedings the applicant made no specific allegations of personal prejudice or interference with his individual rights, leading eventually the domestic court to dismiss his action as unsubstantiated.

- In **Tinnelly & Sons LTD and Others and McElduff and Others v United Kingdom (1998)** the applicants were prevented, by way a governmental decision ("certificate") invoking national security grounds, from submitting to a tribunal their claims about the rejection of their tender for construction. The Court held that the law allowing the administration to issue the "certificate" did not amount to an automatic ousting of the jurisdiction of the United Kingdom courts, with the result that there was no "substantive" bar on the applicants' access to a tribunal. Article 6(1) was applicable as the applicants could challenge that procedural bar ("certificate") under the domestic law on the grounds of bad faith, for instance.

- In **Gutfreund v France (2003)**, the applicant was charged with a minor offence, in respect of which he was refused legal aid. In examining whether the civil aspect of Article 6(1) was at issue here, the Court observed that the national law provided only for the possibility, and not for a right, to legal aid for the sort of offence with which the applicant was charged. Therefore, there was no dispute over a "right" and Article 6 did not apply.

The Court has drawn a distinction between substantive national law preventing legal claims, and procedural bars preventing legal claims. The Court has noted that it would not be consistent with the rule of law in a democratic society if, for example, a State could, without restraint or control by the Court, remove from the jurisdiction of the domestic courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons. Such a bar would, by inference, be deemed to be a procedural bar. However, the main problem is how to determine what amounts to a substantive bar, where Article 6(1) does not apply, and a procedural bar, where Article 6(1) may apply.

- In **Markovic v Italy (2006)**, the Court had to review a complaint by the relatives of persons killed during the NATO air strike on Radio Televizije Srbije (RTS) in Belgrade in April 1999. They complained, that the Italian courts have refused to consider their claims for damages. In holding that Article 6 was not applicable, the Court reasoned that the bar on the lawsuit under Italian law was not immunity from lawsuit, but rather a rule of substantive law, excluding any possibility of the State being held liable for acts of foreign policy, such as war.

- In **Roche v United Kingdom (2005)**, the Grand Chamber of the Court stated: "in assessing if there is a "right" and in determining the substantive or procedural characterisation to be given to the impugned domestic restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts. Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, the Court would need strong reasons to differ from the conclusion reached

by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law and by finding, contrary to their view, that there was "arguably" a right recognised by domestic law".

Questions:

1. Is there a dispute over a "right or obligation" which has a basis in domestic law?
2. Is the domestic legal practice consistent with the Convention meaning of the notions "dispute" and "right"?

2.2.2. Determination of the right

In accordance with the **Benthem v Netherlands (1985)** criteria (see chapter 2.2.1 above), in order to constitute a "determination" of civil rights and obligations, the outcome of a dispute must be directly decisive for those rights or obligations. The rights at issue must be central to the proceedings, and may not be merely incidental or have a remote or tenuous connection to the outcome of the domestic proceedings in question. Where the effect on the right asserted is too remote from an impugned decision, Article 6 will not apply. The Court has also determined that the character of the authority invested with jurisdiction in the matter is of little consequence; it may be a court, a tribunal, a local authority, a professional body, etc. So long as the body concerned has the power to determine a person's civil rights and obligations, Article 6 will apply.

- **Ringeisen v Austria (1971)** was the first case in which the Court examined the applicability of Article 6 under the "civil" heading. In that case, the applicant had entered into an agreement with a married couple for the sale of land. However, the administrative authorities refused approval of the sale of the land. The Court ruled that for Article 6(1), to be applicable to a dispute it is not necessary that both parties to the proceedings should be private persons. The wording of Article 6(1) is far wider; covering all proceedings the result of which is decisive for private rights and obligations. 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. The Court established that, when the applicant purchased property from the married couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although the relevant authorities applied administrative law in deciding whether or not to approve the sale, their decision was decisive for the relations in civil law between the applicant and the couple. Article 6(1) was therefore applicable.

- In **Fayed v United Kingdom (1994)**, the Court held that an investigation by inspectors appointed by the Department of Trade and Industry into the applicants' takeover of Harrods did not attract the protection of Article 6(1), despite the applicants' argument that their reputation (a civil right) had been at stake. The Court found that the purpose of the inquiry, the public report of which discussed many facts such as the applicants' family background and wealth, had been to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative. The Court was satisfied that the functions performed by the inspectors were essentially investigative and that they had not been empowered to make any legal determination as to criminal or civil liability concerning the Fayed brothers. Accordingly, Article 6(1) did not apply.

- In **Balmer-Schafroth and Others v Switzerland (1997)**, the applicants were refused the possibility to have access to a court to challenge the operation of a nuclear power station located

close to their home, on the ground that it had allegedly had serious and irremediable construction defects. The Court noted that the applicants' argument was based on the right to have their physical integrity adequately protected, a right recognised in Swiss law. The main question was whether the outcome of the proceedings was directly decisive for the right asserted by the applicants. The Court noted that the applicants failed to establish a direct link between the operating conditions of the power station and their right to protection of their physical integrity. The possible dangers were thus not established with a degree of probability necessary to make the outcome of the proceedings directly decisive for the rights relied on by the applicants. Article 6(1) did not therefore apply.

- In **S.a.r.l. du Parc d'Activites de Blotzheim and SCI Haselaecker v France (2003)**, the applicant companies challenged before the Conseil d'Etat a presidential decree publishing a bilateral agreement between France and Switzerland to permit eventual enlargement of the Basel-Mulhouse airport. The Court recognised that the dispute at issue was serious and concerned certain pecuniary interest of the applicant companies, given that their property and activities in the vicinity of the airport area would have been affected by the possible enlargement of the airport. At the same time, the Court noted that the dispute at issue concerned no specific planning or expropriation decision, but only the domestic legality of publication of the inter-State agreement making the necessary legal foundations for such enlargement to occur. The Court considered that the dispute was thus not directly decisive to the applicant companies' "civil" rights and obligations, and Article 6 did not apply to the proceedings before the Conseil d'Etat.

Question:

1. To what extent is the domestic law consistent with the Court's notion of the "determination" of civil rights and obligations?

2.2.3. A "civil" right

Normally the question of whether a dispute relates to "civil" rights and obligations is a straightforward matter. The legal relations between private persons will be considered as "civil" – for example, claims for damages for personal injury or defamation, alleged breaches of contractual obligations, or disputes over financial arrangements following a divorce. Sometimes, a statute will confer a "civil right" on individuals who fulfil certain criteria (see **Tinnelly & Sons LTD and Others and McElduff and Others v United Kingdom (1998)**). As observed above, the question of the applicability of Article 6(1) is less obvious when, for example, the domestic law stipulates that the relevant proceedings are of a public law nature, or where one of the parties to the proceedings is a public body, given that the phrase "civil rights and obligations" within the meaning of Article 6 is not to be interpreted solely by reference to the respondent State's domestic law. The domestic classification of a dispute may be helpful, but it certainly is not decisive for the Court to rule whether or not Article 6 should apply. Hence, some judicial proceedings subject to jurisdiction of ordinary civil courts and civil procedure may nevertheless fall outside the scope of Article 6. And *vice versa*, some proceedings classified by the domestic statute as administrative or disciplinary may be considered by the Court to fall within the ambit of Article 6 under its "civil" or "criminal" heading.

Difficult questions have arisen as to applicability of Article 6 in disputes relating to the domain of public law, for instance in cases where an administrative or disciplinary body has been empowered by law to take action impinging on the rights or interests of the individual, or in relation to court proceedings where a State authority is one of the parties. Following its judgment in the **Ringeisen** case, the Court adopted an increasingly liberal interpretation of the concept of "civil" rights and obligations. The case-law of the Court under Article 6 has evolved to a large degree in cases involv-

ing some such public law element. The Court has stated that Article 6 (1) applies irrespective of the status of the parties, or of the character of the legislation which governs how the dispute is to be determined. What matters is the character of the right at issue, and the fact whether the outcome of the proceedings will be "decisive for private rights and obligations" (See, for example, **Baraona v Portugal (1987)**).

A right to compensation arising from unlawful detention is a "civil" right for the purposes of Article 6(1) (See the **Georgiadis** case cited above, also see, **Goc v Turkey (2002)**), as well as the right to claim compensation for alleged torture even where that torture was allegedly committed by private persons or authorities of another country (See, e.g., **Al-Adsani v United Kingdom (2001)**), or the right to complain about conditions of detention (**Ganci v Italy (2003)**) or the right to claim release from detention in a psychiatric ward (**Aerts v Belgium (1998)**). In the social field, Article 6 has been held to apply to the decisions of public authorities on such matters as the taking of children into public care and parental access (**Olsson v Sweden (1988)**), all these issues being ruled to be sufficiently 'civil' in nature to fall within the scope of Article 6(1).

- In **König v Germany (1978)**, the Court held that proceedings which involved the withdrawal of an authority to run a medical clinic and an authorization to practise medicine were within the scope of Article 6(1). This was so even though the function of the body which had taken the decision was to act in the interests of public health and to exercise responsibilities borne by the medical profession towards society at large. The Court has also held that the Article 6 was applicable with respect to a dispute over the right to continue medical education begun in a different country (See for example, **Kok v Turkey (2006)**).

- Similarly in **Pudas v Sweden (1987),** where the applicant's licence to operate a taxi on specified routes was revoked as part of a programme of rationalisation which would have involved the replacement of one of his routes by a bus service, the Court rejected the Swedish Government's argument that, since the revocation of the licence depended essentially on an assessment of policy issues not capable of, or suited to, judicial control, the matter did not involve the determination of civil rights and obligations. Instead the Court held, unanimously, that the public law features of the case did not exclude the matter from the scope of Article 6(1), which applied since the revocation of the licence affected the applicant's business activities.

Following these principles, the Court has held Article 6 to be applicable in various cases when the right to conduct a profession or other economic activity has been denied or otherwise affected. The Court has held it applicable to disputes arising in or from the following: medical disciplinary proceedings (See the **König** case cited above); decisions of a board controlling admission to the accountants' profession (See the **Van Marle** case cited above), a decision by a professional body refusing to restore to the roll an advocate who had been struck off (See the **H. v Belgium (1987)** judgment cited above), decisions on an appeal against the grant of a licence to operate a gas supply installation (See the **Benthem** case cited above), the revocation of a licence to serve liquor () or work a gravel pit (**Fredin v Sweden (1991)**). The Court has held that Article 6 is applicable under its civil head also with respect to the registration by the authorities of ownership of property, as this was decisive for the effective exercise of ownership rights (see **Buj v Croatia (2006)**).

Where money or property claims have been at the centre of a dispute, the Court has usually classified such disputes as "civil", even if the resultant disagreements came about as a result of the decisions taken in the sphere of public law.

- In **Stran Greek Refineries and Stratis Andreadis v Greece (1994)**, the applicants successfully claimed damages before the arbitration courts for termination by the new governmental authorities of a tender to build a power station. However, the State subsequently brought another set of proceedings before the ordinary courts to set aside the award of damages. The Court noted that the arbitration courts had allowed the applicants' claims in part, attesting that

they had a basis under the Greek law. The Court further observed that the applicants' claim to be paid the award for damages was "pecuniary" in nature, and was thus "civil" within the meaning of Article 6(1). The outcome of the proceedings brought in the ordinary courts by the State to have the arbitration award quashed was decisive for those "civil rights". Article 6(1) therefore applied.

In a similar context, the Court has held Article 6(1) to be applicable to various disputes concerning administrative decisions affecting property, including: proceedings concerning administrative approval of a land sale contract (See the **Ringeisen** case cited above), the making of detention orders in the mental health (**Winterwerp v Netherlands (1979)**) or criminal law (See the **Baraona** case cited above) spheres affecting the applicants' capacity to administer their property, proceedings concerning the right to occupy a house (**Gillow v United Kingdom (1986)**), agricultural land consolidation proceedings (**Erkner and Hofauer v Austria (1987)**), proceedings concerning the expropriation of land (See the **Sporrong and Lonnroth** case cited above) and permission to build on land (**Mats Jacobsson v Sweden (1990)**), proceedings concerning permission to retain agricultural land acquired at auction (**Hakansson and Sturesson v Sweden (1990)**), and various types of compensation proceedings (See **Lithgow and Others v United Kingdom (1986)** and **Jasiuniene and Others v Lithuania (2003)**).

It must however be noted that proceedings do not become "civil" merely because they have economic implications. The action itself must be at least "pecuniary" in nature and be founded on an alleged infringement of rights which are likewise pecuniary rights (**Procola v Luxembourg (1995)**); and the outcome of the proceedings should be directly decisive for the pecuniary rights at issue (See the **S.a.r.l. du Parc d'Activites de Blotzheim and SCI Haselaecker** decision cited above).

One question that has gradually evolved in the case law of the Court is the issue of applicability of Article 6(1) to disputes arising from social security entitlements such as pensions and benefits.

- **Feldbrugge v Netherlands (1986)**, concerned a claim for sickness benefits. Although the character of the legislation, the compulsory nature of insurance against certain risks, and the assumption by public bodies of responsibility for ensuring social protection were public law characteristics, the Court considered that the above elements were outweighed by the personal and economic nature of the asserted right by Mrs Feldbrugge, the connection with a contract of employment, and the similarities with insurance under ordinary law. The Court concluded that Article 6(1) applied to the domestic proceedings in determination of the benefits claim. In **Deumeland v Germany (1986)**, the Court reached the same conclusion as regards the right to a widow's supplementary pension following the death of her husband in an industrial accident.

- In **Salesi v Italy (1993)**, which concerned a dispute over entitlement to a disability allowance financed entirely from public funds and not dependent on the payment of contributions, the Court found that Article 6(1) applied. It appeared to rely on two factors: first, the fact that entitlement to the allowance was a right under national law, derived from statute, which the applicant could assert in an ordinary civil court and which was not dependent on an exercise of State discretion; secondly, the fact that, as a result of being denied the allowance, the applicant had suffered an interference with her means of subsistence. This second factor was sufficient to make the right "civil" for the purposes of the Convention.

Until the **Salesi** judgment, it was not clear whether this interpretation of "civil" disputes would extend to cases concerning non-contributory types of social assistance, such as claims for income support, which are not based on any "contract" between the State and the individual and are harder to compare to the private-law insurance schemes. Since **Salesi** the Court has gradually taken the view that, where assessment of an amount of money is the object of the dispute, regardless of whether the alleged entitlement to that claim is based on the private or public-law schemes, Article 6(1) applies.

The applicability of Article 6 in disputes over civil service employment has created particular difficulties for the Court. Until 1999, the Court had followed its standard approach in deciding over the applicability of Article 6, considering whether the pecuniary features were more central for the particular dispute, for Article 6 to apply. Where the pecuniary claim connected to the civil service was not central, but rather the access to or dismissal from civil service was, then Article 6 would not apply. In 1999, the Court decided to introduce a new test in the case of **Pellegrin v France (1999)** the Court had excluded from the scope of Article 6(1) the claims " that were raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities". Under this approach, the Court went to ascertain, in each case, whether an applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State.

- In **Vilko Eskelinen v Finland (2007)** however, the Court acknowledged that the **Pellegrin** functional criteria could also lead to anomalous results, and overturned it. It laid down a different standard, according to which, a State could argue that Article 6 is not applicable with respect to a dispute over the employment of a civil servant, only if two conditions were fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. This was a significant change in the Court's approach, as until then, available access to court under domestic law, was of no relevance for the analysis of the applicability of Article 6. Secondly, the exclusion of judicial review under domestic law must be justified on objective grounds in the State's interest. To justify such exclusion, the State would have to establish not only that the civil servant in question participated in the exercise of public power, but that the dispute was precisely about this exercise of power and the "special bond of trust and loyalty" between the civil servant exercising such powers and the State. Under this new approach there could be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes of civil servants, such as those relating to salaries, allowances or similar entitlements.

- Following this new approach, the Court decided that Article 6 is not applicable in **Sukut v Turkey (2007)**, where a soldier complained of the inability to challenge a decision by the military to discharge him from service on disciplinary grounds. In holding that Article 6 was not applicable, the Court held that both requirements set under **Vilko Eskelinen** were satisfied. First, domestic law clearly excluded judicial review and second, the soldier was dismissed as being incompatible with his position in the military, because of his religious affiliations. This in the Court's view was precisely a dispute about the existence of a "special bond of trust and loyalty" between the civil servant and the State, and the principle of secularism was deemed sufficient to exclude judicial review.

It follows that Article 6 may apply under its "civil" head even in the context of proceedings between a public official on one hand, and the State authorities on the other hand, given that the nature of the dispute is pecuniary, and the "obligations" or "rights" claimed to be violated are private-law obligations. Thus in the case of **Richard-Dubarry v France (dec.)(2003)**, the Court ruled that Article 6 was applicable in the proceedings brought by the State against the applicant in relation to the alleged mismanagement of public funds in her former capacity as a mayor. The Court noted that the applicant was in fact in financial litigation with the State and could be regarded as having committed a tort causing the Treasury to sustain a loss which she had to make good.

- In **Loiseau v France (dec.)(2003)** the Court found Article 6 applicable to administrative court proceedings concerning the administrative authorities' refusal to communicate to the applicant certain documents relating to the circumstances of his recruitment as teacher by a State secondary school. While the Court noted that, as a rule, it is difficult to derive from the Convention a general right of access to administrative data and documents, proceedings concerning dis-

closure of information can be considered as "civil" where the documents and data relate only to the applicant's personal situation, and where, as in that case, the disclosure can influence significantly the applicant's private career prospects.

At the same time, Article 6(1) is not applicable to disputes pertaining purely to the domain of public-law, for instance, concerning the existence of political rights such as those to sit in the legislature (See for example **Zdanoka v Latvia (dec.)(2003)**) or on a local authority (**Cherepkov v Russia (dec.)(2000)**), or disputes concerning the lawfulness of immigration authorities' decisions to refuse asylum or deport an alien (**Maaouia v France (2000)**). A dispute over the right to an exemption from military service of a conscript was also ruled by the Court to fall outside Article 6, as the right to be exempted from military service, is clearly of a public-law nature (**Kunkov and Kunkova v Russia (dec.)(2006)**). Article 6(1) also does not apply to proceedings concerning the assessment of tax (**Lasmane v Latvia (dec.)(2002)**); it may, however, apply under the "criminal" heading where penalties are imposed for fiscal offences (see **Janosevic v Sweden (2002)** and **Jussila v Finland (2006)**).

- In **Schreiber and Boetsch v France (dec.)(2003)** the Court ruled Article 6 to be inapplicable in connection with the applicants' procedural challenge of a judge, on the basis of his alleged bias, in the context of a criminal investigation of an airplane accident in which the applicants had been recognised as civil parties (it is of course understood that Article 6 applies under its "civil" head in connection with criminal investigations where an applicant is the alleged victim of a crime and where his civil rights are directly affected by the outcome of those criminal proceedings.). The Court stated that the right to obtain a judicial decision on the composition of a court or replacement of a judge is not a "civil" right. At most, it was a procedural right which did not entail the determination of the applicants' civil rights, even if the possible replacement of the judge may have influenced the outcome of the ancillary proceedings (the criminal investigation) to which Article 6(1) clearly applied, and regardless of the fact that the applicants had been imposed a fine for abuse of process as a result of the unsuccessful procedural challenge. Similarly, the Court has held that no civil right was at stake in the attachment of assets in the context of criminal investigation aimed at safeguarding claims of aggrieved parties. This was so, as the attachement did not include any determination of such claims, the existence of which would have to be settled in separate proceedings (see for example **Dogmoch v Germany (dec.)(2006)**)

Hence, an applicant cannot claim the guarantees of Article 6 to be applicable autonomously to procedures determining a challenge of a judge or other procedural decisions taken in the context of a civil or criminal case. There is no separate right of "access to a court" under Article 6(1) to complain about procedural decisions – there is only right of access with a view to obtaining judicial decisions which determine the merits of that civil or criminal case.

To sum up, it can be said that Article 6 applies under the "civil" rights head not only to private-law litigation but to a wide variety of public proceedings whose outcome directly affects the private-law rights of individuals. Its applicability is not, however, unlimited. Thus it is inapplicable in certain areas of public law where, in general, it can be seen that the rights of the individual are of the predominantly public-law character (taxation, immigration, resolution of procedural matters, etc.) and where there is no real analogy to the private-law rights. Furthermore, even in fields such as planning and licensing law, where Article 6(1) has been held applicable, there are certain aspects of the decisions of public authorities to which its applicability does not extend, and which need not therefore be subject to the requirements of a "fair" trial. Since the Court's case-law is in a state of rapid development, the precise scope of applicability of Article 6 in particular areas may yet be open to debate.

Questions:

1. How does the domestic law define "civil" rights and obligations?
2. How much does that definition differ from the Court's interpretation of "civil" rights? For instance, does domestic law regard as "civil" disputes concerning entitlement to social benefits or employment disputes of public servants who exercise functions exercised by the private sector?

2.3. "Criminal charge"

The notion of a "criminal charge" in Article 6, like the concept of "civil rights and obligations", is regarded by the Court as possessing an autonomous meaning. Cases have frequently arisen where the impugned behaviour is characterised by national authorities as a disciplinary offence rather than a criminal offence.

- In **Engel and Others v Netherlands (1976)** which concerned action taken against members of the armed forces in respect of offences such as insubordination (classified under the Netherlands law as disciplinary in nature), the Court adopted a three-stage approach to determine whether an offence amounts to a criminal charge for the purposes of Article 6. First, it will examine the categorisation made by the national law and authorities. Second, the Court will examine the nature of the offence, and, thirdly, it will assess the nature and degree of severity of a penalty that may be imposed in the event of a finding against the person concerned. The second and third **Engel** criteria are alternative, and not necessarily cumulative. In other words, the Court may find that an offence is "criminal" by reference either to its nature, or to the penalty available (**Lutz v Germany (1987)**). A cumulative approach may be necessary where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal" charge (**Ezeh and Connors v United Kingdom (2003)**).

The approach developed by the Court in **Engel** prevents the Contracting States from using the defence of domestic classification to lift the guarantees of Article 6 with regard to various types of proceedings concerning administrative or disciplinary offences. While the States have the right to distinguish between criminal and disciplinary law, the Court must be satisfied that the line drawn between these does not prejudice the object and purpose of Article 6 (**Weber v Switzerland (1990)**).

2.3.1. Characterisation by the national authorities

The Court's approach is first to examine the question of whether the provisions defining the offence in issue belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently (**Demicoli v Malta (1991),** at para 32). The Court has stated that this serves as a starting point (See the **Engel** case cited above at para 82); indeed, sometimes, even the domestic law is not clear on this issue (See the **Engel** case cited above at para 82). At the same time, the domestic classification is important, since if a matter is classed as criminal under national law this will be enough to bring it within the scope of Article 6, even if it is relatively minor.

- In **Demicoli v Malta (1991)** the applicant was a journalist who published an article critical of the behaviour of Members of Parliament. He was summoned by the House of Representatives to appear before it for proceedings for breach of privilege, and found guilty. The applicant claimed that the offence was criminal in nature, while the respondent State argued that it was merely disciplinary. The Court held that the fact that the domestic law did not categorise the offence as criminal in nature was not decisive. Of greater importance was the nature of the offence (see chapter 2.3.2 below) within the meaning of Article 6 of the Convention.

- **Ravnsborg v Sweden (1994)** concerned a fine for improper statements made in court by a party to civil proceedings. The Court, in examining the characterisation by the national authorities, found that there was evidence to suggest that the offences were regarded as criminal, but that there was also evidence that they could also be characterised as disciplinary from the point of view of the domestic law. It thus became necessary to look at the nature of the offence within an autonomous meaning of Article 6 (see chapter 2.3.2 below).

2.3.2. Nature of the offence

The nature of the offence requires an examination of the law at issue, its application, and whether there is some similarity with other criminal offences. The Court has drawn a distinction between offences that are relevant to the disciplining of a particular group of persons, such as MPs, journalists, and other professional bodies, and those that apply to the population as a whole. Where the offence is aimed at a particular group only, there is a greater likelihood of the Court regarding it as a disciplinary offence not covered by Article 6(1).

In the above-mentioned **Demicoli** case, the Court noted that the offence at issue potentially affected the whole population since it applied whether or not the alleged offender was a Member of Parliament and irrespective of where in Malta the publication of the defamatory libel takes place. Further, the Court took note of the fact that the offence provided for the imposition of a penal sanction and not a civil claim for damages. Accordingly, the offence was akin to a "criminal" offence within the meaning of Article 6.

In the aforementioned **Ravnsborg** judgment, the Court noted that the relevant law applied exclusively to improper statements made orally or in writing to a court by a person attending or taking part in judicial proceedings. The Court considered that measures ordered by the Swedish courts in regard to the applicant were typical to most European legal systems, their purpose being to ensure the good administration of justice rather than impose a punishment for commission of a "criminal" offence. The Court therefore concluded that the offences in issue were not "criminal" in nature, and that Article 6 did not apply.

- In **Weber v Switzerland (1990)**, which concerned a fine imposed on the applicant for disclosure to the press of certain procedural documents regarding the proceedings in defamation against a third person, the Court held that such sanctions were generally designed to ensure that the members of particular groups comply with the specific procedural rules. Judges, lawyers and all those closely associated with the functioning of the courts would have been liable to disciplinary measures on account of their profession for the same conduct as that of the applicant. By contrast, the parties only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system. The Court held that the relevant law applied to the applicant potentially affected the whole population; accordingly the offence it defined, and to which it attached a punitive sanction, was "criminal" in nature.

- In **Ziliberberg v Moldova (2005)** the applicant was taken into a brief custody and subsequently fined under the Code of Administrative Offences for having participated in an unauthorised demonstration. The court held that both the nature of the offence committed by the applicant, which was applicable to the whole of the population for a breach of the public order, as well as the punitive and deterrent nature of the penalty imposed, attested that the proceedings were "criminal" for the purposes of Article 6.

- From the case of **Kyprianou v Cyprus (2005)** it follows that the measures imposed by the courts for the purpose of good administration of justice, such as fines or warnings or other types of disciplinary reprimand on lawyers, prosecutors or parties to the proceedings would not be considered as

"criminal" in nature as long as those measures are attributed on the basis of statutory regulations applying exclusively to that particular group of individuals appearing in court. In some cases of this nature, however, a severe penalty (such as imprisonment) can invoke application of Article 6, as confirmed by the Court in cases concerning the contempt of court, an offence typical to the common-law legal systems.

The fact that an offence may relate only to a particular sector of the population is just one of the relevant indicators in assessing the nature of the offence (See the **Ezeh and Connors** case cited above). While the extreme gravity of an offence will usually indicate that it is "criminal" in nature, the mere fact that an offence may be relatively minor will not necessarily mean that it is purely disciplinary. Where however, an offence may be treated as both disciplinary (e.g. in the context of prison discipline) and criminal, this is a factor that is relevant for the purposes of assessing the nature of the offence.

2.3.3. The nature and degree of severity of the penalty

Some offences such as minor traffic offences may be regarded in domestic law as administrative or regulatory rather than belonging to the criminal sphere. Indeed, the Court has recognised the advantages in the fact that some national authorities have taken the step to "decriminalise" certain conduct; this can both serve the interests of the individual, in that he does not acquire a criminal record, and the administration of justice, by relieving the judicial authorities of a certain case-load. However, the Court has also commented that it is important that in so doing, the national authorities are not unfairly excluding the operation of Article 6. Where the penalty is intended to be punitive and deterrent, the proceedings at issue are likely to be regarded as "criminal". Where the penalty is sufficiently severe (provides for a longer period of imprisonment), Article 6 will also apply under its "criminal" heading.

- In the **Engel and Others** case cited above, the Court held that military disciplinary proceedings in which the accused risked committal to a disciplinary unit (involving deprivation of liberty) for three to four months fell within the criminal sphere under the third criterion. Proceedings where the accused risked only light arrest (not involving deprivation of liberty) or a two day period of strict arrest did not fall within the criminal sphere. In its later case law, the Court has been willing to accept that where the punishment was deprivation of liberty, even if for short time periods, Article 6 should apply. Thus, in **Zaicevs v Latvia (2007)**, the punishment of a lawyer with three days of imprisonment for contempt of court, was considered sufficient to bring the proceedings within Article 6, even though domestic law did not classify the proceedings as criminal and the nature of the offence was not general.

- In **Campbell and Fell v United Kingdom (1984)** the proceedings for serious disciplinary offences in prison (mutiny and gross personal violence to an officer), in which the accused risked the loss of a substantial period of remission of sentence, were held to be "criminal". The Court did not regard the nature of the offences as of itself bringing the case within the criminal sphere, but considered that the severity of the penalty did so. Article 6 therefore applied.

- In **Ezeh and Connors v United Kingdom (2003)**, the same conclusion was reached by the Court in regard to the prison disciplinary proceedings where the prisoners had been sentenced to additional days of custody (of 40 and 7 days respectively). The nature and severity of the punishment were decisive in leading the Court to hold that the offences were "criminal" for the purposes of Article 6. What was important in deciding whether the applicants faced a "criminal charge" was the penalty that was "liable to be imposed" under the statute. The Court did not give a fixed lower limit at which a sentence of imprisonment would be too short to bring a disciplinary charge into the "criminal" sphere from the point of view of Article 6, although it

did refer to the decision in the **Engel** case that two days of imprisonment was not enough in this respect.

- In **Janosevic v Sweden (2002)**, where the applicant was subjected to tax surcharges, the Court held that generally, the question of tax falls outside the scope of "civil rights and obligations" in Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer. However, the Court noted that tax surcharges were directed towards all persons liable to pay tax in Sweden and not towards a given group with a special status. The tax surcharges were not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. Rather, the main purpose of the surcharges was to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties were thus both deterrent and punitive. Accordingly, they should be regarded as "criminal" in nature, and Article 6 accordingly applied (See also **Jussila v Finland (2006)**).

- In **Ozturk v Germany (1984)**, the German authorities had decided as a matter of policy to bring certain less serious motoring offences, punishable by fine, out of the criminal sphere. The Court found, applying the **Engel** criteria, that the purpose of the penalty imposed on the applicant for causing a road-accident was both deterrent and punitive and this sufficed to show the "criminal" nature of the matter for Convention purposes. The process of decriminalisation of certain minor offences in the national law did not affect the classification of those offences as "criminal" under Article 6.

Even where the punishment is not imprisonment and not even a fine, Article 6 might still apply on the basis of a combination of factors.

- In **Matyjek v Poland (dec.)(2006)** at issue was a case under Polish lustration law. The Court considered that a punishment consisting of a ban to take certain government positions was significantly serious, to be considered as having at least partly punitive and deterrent character. A further argument for the applicability of Article 6 according to the Court, was the fact that the punishment was imposed for signing an untrue declaration, which was similar to the crime of perjury and the procedure, though not classified as criminal under domestic law, had certain features, that made it close to a criminal procedure.

There have been a number of cases where proceedings of one sort or another have been held not to involve the determination of a "criminal" charge even though some question of alleged or suspected criminal conduct may have been involved. The common feature of these cases appears to be the absence of the penal or punitive element which the Court has described as "the customary distinguishing feature of criminal penalties" (See the **Ozturk** case mentioned above). By way of example proceedings leading to an order for the compulsory residence in a particular locality of a person alleged to present a danger to public security or morality have been held not to come within the "criminal" sphere from the point of view of Article 6(See, for example, **Guzzardi v Italy (1980)**). Deportation on security grounds (even if based on suspicion of criminal activity or on grounds of illegal entry to the country (itself an offence) (**Zamir v United Kingdom (dec.)(1982)**, **Chahal v United Kingdom (1996)**), have similarly been held not to involve determination of a "criminal" charge. Proceedings under the Convention on the Transfer of Sentenced Persons, have also been held to fall outside Article 6 (**Szabo v Sweden (dec.)(2006)**). The same conclusion was reached in relation to the imposition of restrictions on an insurance business on the ground that the controller was not a fit and proper person, even though the allegations against him at least arguably included allegations of criminal conduct (**Kaplan v United Kingdom (dec.)(1978)**).

- Similarly, in **R. v United Kingdom (1987)**, the Court considered the applicable of Article 6 with respect to a warning issued by the police against a schoolboy in connection with an incident of indecent assault. The police had decided not to prosecute the applicant for the indecent assault,

but rather impose a warning, whereby the applicant was required to sign a register and was referred to the youth offending team in order to determine whether or not an intervention programme should be provided. In holding that Article 6 was not applicable, the Court relied on its analysis of the nature of these measures, which it found to be preventive, not punitive.

Examples of various disciplinary proceedings which have been held not to fall within the "criminal" sphere within the meaning of Article 6 include: military disciplinary proceedings involving compulsory transfer of an officer to the reserve list (**Saraiva de Carvalho v Portugal (dec.)(1981)**), disciplinary proceedings leading to the dismissal of a police officer for misappropriating official property (**X. v United Kingdom (dec.)(1980)**), dismissal of State officials on the basis of special legislation adopted in the field of national security (See the **Sidabras and Dziautas v Lithuania (dec.)(2003)** decision), minor disciplinary proceedings against a lawyer resulting in a warning (**X. v Belgium (dec.)(1980)**), disciplinary proceedings against a teacher resulting in a fine for having gone on strike (**S. v Germany (dec.)(1984)**), proceedings against a pharmacist leading to a fine for unethical behaviour involving a breach of regulations as to the pricing of drugs (**M. v Germany (dec.)(1985)**).

Questions:

1. How does the domestic law distinguish between criminal offences and disciplinary or regulatory offences?
2. What criteria are used by the domestic authorities in order to define whether a certain offence is subject to a criminal or disciplinary (administrative) procedure?
3. Are the guarantees of a fair trial available, for example, to convicted prisoners tried for serious disciplinary offences committed in prison?

2.4. Applicability of Article 6 to pre-trial investigation, appeal, constitutional and related review procedures

In cases concerning a "criminal" charge within the meaning of Article 6, the protection of this provision starts from the time when a person is charged with a criminal offence. This is not, however, necessarily the moment when formal charges are first made against a person suspected of having committed an offence. Moreover, as the object of Article 6 is to protect a person throughout the criminal process, and since formal charges may not be brought until a fairly advanced stage of an investigation, it is necessary to find a criterion for the opening of criminal proceedings which is independent of the actual development of the procedure in a specific case. In this respect, the Court has defined a "charge" for the purposes of Article 6(1) as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" (**Eckle v Germany (1982)**). It may, however, "in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect" (**Foti and Others v Italy (1982)**).

Article 6(1) covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence.

- In **Delcourt v Belgium (1970)**, Article 6(1) was found to be applicable to proceedings before the Belgian Court of Cassation. The Government had argued that the Court of Cassation did not deal with the merits of cases submitted to it, but the Court found that although the judgment of the Court of Cassation could only confirm or quash a decision, and not reverse or replace it, it was still 'determining' a criminal charge.

- In **T. and V. v United Kingdom (1999)**, the Court examined the question of applicability of Article 6(1) to a sentencing procedure. The applicants had been convicted at the age of 11 of murdering a toddler the year before. As with all children convicted in England and Wales of murder, they were sentenced to be detained "during Her Majesty's pleasure". This is an indeterminate sentence: a period of detention, "the tariff", is served to satisfy the requirements of retribution and deterrence, and thereafter it is legitimate to continue to detain the offender only if this appears to be necessary for the protection of the public. At the time of the applicants' conviction, the tariff was set by the Home Secretary. The Court held that the tariff fixing procedure amounted to the fixing of a sentence and that there had been a violation of Article 6(1) since the Home Secretary was not "an independent and impartial tribunal".

At the same time, the determination of a "criminal" charge has been held not to be involved in various proceedings preliminary to or incidental to criminal proceedings. Hence, proceedings which take place after conviction and sentence have become final fall outside Article 6 (**Delcourt v Belgium (1970)**). This provision is not applicable to proceedings concerning an application by a convicted prisoner for release on probation or parole (**X. v Austria (dec.)(1961)**), or for a new trial (**Franz Fischer v Austria (dec.)(2003)**), or for review of his sentence after the decision has become *res judicata* (**X. v Austria (dec.)(1962)**). Nor does Article 6(1) apply to proceedings following a decision that an applicant is unfit to plead to a criminal charge (**Antoine v United Kingdom (dec.)(2003)**), various decisions concerning the execution of penalties involving matters such as the type of institution in which a sentence is to be served (**X. v Austria (dec.)(1977)**, the security classification of a prisoner (**X. v United Kingdom (dec.)(1979)**), the recall of a prisoner conditionally released (**Ganusauskas v Lithuania (dec.)(1999)**), or the prolongation of a period of detention of a recidivist at the disposal of the Government (**Koendjbiharie v Netherlands (1990)**).

While Article 6 does not itself guarantee a right of appeal, it is settled in the case law that in both criminal and civil proceedings where such a right is given to a person under the domestic law, Article 6 applies to proceedings both at first instance and on subsequent appeals. The manner in which it is to be applied depends on the special factors of the proceedings concerned. In considering whether Article 6 has been complied with at any particular stage, account has to be taken of the entirety of proceedings in the domestic legal order. Therefore, deficiencies at one stage may be compensated for at another stage (**Fejde v Sweden (1991)**). Thus in administrative or disciplinary proceedings, or in proceedings concerning petty offences, it may be that proceedings before a body of first instance do not comply with Article 6, but that the availability of a court hearing thereafter will sufficiently compensate for this. Equally, it may be unnecessary in all circumstances for an appellate jurisdiction to afford a full hearing if there has already been one at first instance (**Ekbatani v Sweden (1988)**).

Article 6 will not apply to proceedings before constitutional courts where they cannot rule on the merits of a specific case, and are concerned only with constitutional rights and decide on the compatibility with the national constitution of particular domestic law (**Valasinas v Lithuania (dec.)(2000)**). However, Article 6 applies to constitutional proceedings where the decision of the Constitutional Court is capable of affecting the outcome of a dispute to which Article 6 applies (**Deumeland v Germany (1986)**).

Further, Article 6 does not apply to unsuccessful actions to re-open the proceedings, including the requests for extraordinary or special review procedures, which are not accessible to the individual personally and the execution whereof depends on the discretionary power of a certain public authority (**Tumilovich v Russia (dec.)(1999)**). However, once a case has been re-opened or the extraordinary review granted, the guarantees of Article 6 will apply to the ensuing court proceedings (**Vanyan v Russia (2005)**). Likewise, Article 6 will not apply to refusals of the authorities to re- open a case domestically after the Court's judgment finding a violation of the Convention in connection with the impugned domestic proceedings (See the **Franz Fischer v Austria** decision cited above).

3. SUBSTANTIVE RIGHTS GUARANTEED UNDER ARTICLE 6(1)

3.1. The right to a court

This is one of the rights that does not flow directly from the text of Article 6(1), and which was developed by the Court. It means that an individual must be able to have a matter brought before a court for determination without any improper legal or practical obstacles being placed in his or her way. As will be seen, this right is not unqualified and takes rather different forms in the civil and criminal spheres. The right to a court also includes the right to finality of legal proceedings, and the right to claim timely execution of a civil judgment.

3.1.1. Access to a court

According to the Court's interpretation, the right to a court is inherent in Article 6(1), the right of access being one aspect. The lack of access to a court may be relied upon by anyone who complains that he or she has not had the possibility to submit a claim to a tribunal having the jurisdiction to examine all questions of fact and law relevant to the dispute before it and to adopt a binding decision (see the **Le Compte and Others** case cited above). This right applies equally to persons seeking determination of "civil" rights, or those charged with a "criminal" offence (**Deweer v Belgium (1980)**).

The Court first recognized this right in **Golder v United Kingdom (1975)**, where it held that the detailed fair trial guarantees under Article 6 would be useless if it were impossible to commence court proceedings in the first place. The applicant was detained in an English prison where serious disturbances broke out. He was accused of assault by a prison officer and wished to bring proceedings for defamation in order to have his record cleared, but this was precluded by the Prison Rules. Though not without limitation, the Court concluded that Article 6(1) contained an inherent right of access to a court, alongside the principle of international law which forbids the denial of justice.

In the **Chevrol** case cited above, the Court considered that the involvement of the executive authorities in producing a decisive opinion in the applicant's case, as a result of which the Conseil d'Etat (the Supreme Administrative Court) rejected his claim for admission to the Medical Council without even examining the applicant's arguments, disclosed a violation of the applicant's rights under Article 6(1) to the extent that he obtained no examination by a tribunal of factual and legal issues relevant to the determination of the dispute.

Article 6(1) requires that the tribunal with jurisdiction over the matter possesses judicial functions, and is capable of issuing binding decisions (See the **Benthem** case cited above). The right of access to court thus also includes the right to obtain a decision from a court (See the **Ganci** case cited above). The Court found a violation of the right to access where the domestic courts have apparently lost the case file and thus failed to deliver a judgment (**Dubinskaya v Russia (2006)**). A body that has the power to make recommendations would therefore not be regarded as a "tribunal" for the purposes of Article 6(1). However, clearly, it is not possible for all decisions affecting a person to be taken by courts; indeed, the administration of justice would be severely hampered if such was the case. Accordingly, in many jurisdictions, decisions affecting civil rights and obligations, are made by administrative bodies. The Court has held that where the administrative body does not afford the guarantees of Article 6(1), there must be a right of appeal to a judicial body that does possess these qualities (**Albert and Le Compte v Belgium (1983)**).

While Article 6(1) does not itself guarantee a right of appeal, it must be recalled that Article 6 applies to proceedings both at first instance and on subsequent appeals – in civil as well as crimi-

nal matters – where such a right is given to a person under the domestic law. Hence, a refusal to entertain a civil claim or a refusal to examine a cassation appeal in a criminal case both constitute a restriction on the applicant's "access to a court" within the meaning of Article 6(1). The Court found restrictions of access to appeal proceedings to be in violation of Article 6, where the restriction was based on the fact that the appeal did not clearly state the facts, on which the lower court based its judgment (**Liakopoulou v Greece (2006)**), where the time limit for appeal was cut short by legislation, and the new time limit applied to the applicant's case (**Melnyk v Ukraine (2006)**), where appeal based directly on Article 6 (1) was found inadmissible under domestic law (**Perlala v Greece (2007)**) and where the applicant was not allowed to submit a detailed brief in support of their appeal (**Dunayev v Russia (2007)**).

Most of the issues that have come to the Court's attention under this heading have concerned inability of a prospective claimant to submit a civil action for damages because of a statutory bar or the domestic legal practice.

- In **Ashingdane v United Kingdom (1985)**, the Court expressly stated that the right of access to court is not absolute: it is open to States to impose restrictions on would be litigants, as long as these restrictions pursue a legitimate aim and are not so wide ranging as to destroy the very essence of the right. In that case, it was held that it is legitimate to impose restrictions on the access to court of mental patients to protect those responsible for them from being unfairly harassed by litigation. Thus a limitation of the liability of authorities responsible for patients for acts done negligently or in bad faith, coupled with a requirement that substantial grounds for contending that there was negligence or bad faith had to be demonstrated to the court before proceedings could go ahead, has been held compatible with Article 6(1).

In civil matters, the Court has subsequently examined a number of cases concerning the proportionality of statutory bars on a certain group of claimants, such as prisoners, to bring a legal action. Thus the Court found a violation of Article 6(1) in relation to a refusal to allow a prisoner to institute proceedings for libel (See the **Golder** case cited above) and substantial delay in allowing prisoners access to legal advice with a view to instituting proceedings for personal injury (See the **Campbell and Fell** case cited above). In **Lupas and Others v Romania (2006)** the Court found a violation due to a rule of domestic law, which prevented some of the joint owners of land from filing an action for recovery of property, without the consent of the other joint owners. While accepting that this rule pursued the legitimate aim of protecting the rights of all joint owners of the property, the Court held that it should have been interpreted with some flexibility, as it prevented the applicants from having their actions for recovery of land determined on thei merits, imposing a disproportionate burden on the applicants and depriving them of any possibility of obtaining a decision from the courts. And in **Arma v France (2007)**, the court found a violation of Article 6, as domestic law prohibited the managing director and sole shareholder of a company to challenge an order for the company's liquidation.

The Court has also ruled however that it is legitimate to impose restrictions on the access to a court of mental patients to protect those responsible for them from being unfairly harassed by litigation (See the **Ashingdane** case cited above). Where a person is of unsound mind and for that reason is unable to bring an action himself, there is not an unlimited right to have a guardian or other person appointed to conduct the action and a refusal to appoint such a person on the ground that the action lacks sufficient prospect of success is legitimate (**X. and Y. v Netherlands (1985)**).

Restrictions on access designed to prevent abuse of legal proceedings also have a legitimate aim (**Monnell and Morris v United Kingdom (1987)**). Thus an order under which a vexatious litigant was prohibited from instituting proceedings without the leave of a judge has been held legitimate (**H. v United Kingdom (dec.)(1985)**). The need to avoid a multiplicity of claims in nationalisation compensation proceedings was held to justify a system under which individual shareholders had no direct access to the compensation tribunal and claims had to be presented by a representative

acting on behalf of shareholders collectively (See the **Lithgow** case cited above). By contrast, a system under which only a professional organisation was empowered to bring an action for recovery of an engineer's fees, was held to involve injury to the substance of the individual engineer's right of access to a court (**Philis v Greece (1991)**).

In examining restrictions based on national security grounds on the applicants' rights to have a determination by a court of their civil claims that they were victims of unlawful discrimination, the Court accepted that the protection of national security is a legitimate aim which may entail limitations on the right of access to a court, including for the purposes of ensuring the confidentiality of the security screening data. The right guaranteed to an applicant under Article 6 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive (See the **Tinnelly** case cited above).

In the criminal sphere, the rule under French law that a convicted person may bring an appeal in cassation only if he surrenders to custody was considered by the Court as a disproportionate restriction on access to court in **Papon v France (2002)**. The Court also found a violation of this right in **Marpa Zeeland B.V and Metal Welding B.V v Netherlands (2004),** where the applicant company had been persuaded to withdraw its appeal against sentence on the basis of assurances from the Advocate General that the penalty would, in any event, be reduced. By the time the company discovered that these assurances would not be followed through, the withdrawal of the appeal had become irrevocable.

It is of course understood that, in civil as well as criminal spheres, the interests of the proper administration of justice will justify the imposition of reasonable time-limits and procedural conditions for the bringing of claims, such as the need to lodge an appeal with a proper court (**MPP Golub v Ukraine (dec.)(2005)**). As a result, a time-limit missed by an applicant in order to lodge his court action or submit an appeal will not, in principle, violate Article 6(1) (**Stubbings and Others v United Kingdom (1996)**), unless the authorities fail to take into account objective reasons justifying the fact of the applicant being out of time. Such reasons were found for example where an applicant could not lodge a fully motivated appeal since he had not been duly served with a written version of the full first-instance judgment, regardless of his diligent attempts to discover the reasons of the decision he intended to appeal (**Hadjianastassiou v Greece (1992)**). At the same time, it cannot be said that Article 6 expressly requires a party in civil or criminal case, or his lawyer, to be furnished with a written version of a specific decision. The question in each case is whether the requirements of the right of access to a court have been met overall, in view of the specific features of the domestic criminal procedure, as well as the degree of diligence of the applicant's actions to comply with the procedural requirements to attain the judicial examination of his complaints (**Jodko v Lithuania (dec.)(1999)**).

As to financial obstacles to access, in **Airey v Ireland (1979),** the Court found a violation of Article 6(1) where an applicant wished to bring separation proceedings against her husband. It was not practicable for her effectively to conduct such proceedings in person and she had insufficient means to pay for a lawyer. The Court held that in the circumstances she had not had effective access to a court. However, the Court said that this did not mean that legal aid had to be provided for every dispute. Effective access might be secured in other ways such as a simplification of procedures. A state operating a legal aid system as the means of providing access may properly establish machinery to select which cases should be legally aided. Refusals of legal aid on such grounds as lack of sufficient prospects of success, or the frivolous or vexatious nature of the claim, are legitimate in principle (**Webb v United Kingdom (dec.)(1997)**). It may also be legitimate for the state to determine that legal aid should be available for some types of proceedings and not for others (**Granger v United Kingdom (1990)**). In **Staroszczyk v Poland (2007)** and in **Sialkowska v Poland (2007)**, however, the Court held that the applicants' access to appeal from a judgment of the lower courts has been limited in violation of Article 6. The applicants were granted legal aid, but their

lawyers refused to appeal to the Supreme Court for lack of prospect, representation before that court being mandatory. While noting that such a system in principle is not contrary to Article 6, the Court found a violation as the domestic regulations did not require the legal-aid lawyer to prepare a written legal opinion on the prospects of the appeal, which made an objective assessment of whether this refusal was arbitrary impossible. Further, in one of the cases the opinion was given only three days before the time limit for appeal was due to expire, which gave no realistic opportunity for bringing an appeal before the cassation court.

- In **Steel and Morris v United Kingdom (2005)**, the Court held that the question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* on the importance of what was at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicants' capacity to represent themselves effectively. It found violation in that case, on the grounds that the financial consequences of the domestic proceedings had been potentially severe; the proceedings were factually and legally complex (the trial at first instance had lasted 313 court days, preceded by 28 interlocutory applications; the appeal hearing had lasted 23 days. The factual case which the applicants had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue). It accepted that in an action of this complexity neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.

The obligation of the State to guarantee effective access to a court under Article 6(1) may not end even where a formal decision to grant free legal aid has been taken. It is important in such cases that legal assistance be actually provided.

- Thus in **Bertuzzi v France (2003)**, the applicant was granted legal aid in the context of civil proceedings involving a lawyer as a defendant. However, that decision remained a dead letter because the three lawyers successively assigned to the applicant's case sought permission to withdraw because of personal links with the lawyer the applicant wished to sue. In spite of his efforts, the applicant failed to get the president of the legal-aid office to assign a new lawyer to his case and was therefore unable to issue the proceedings. The Court concluded that in order to satisfy the requirements of access to a court, the relevant authorities, the president of the bar council or his or her representative, were obliged to arrange for a replacement who would provide the applicant with actual legal assistance.

The requirement to pay fees, such as a stamp duty, to civil courts in connection with claims they are asked to determine is also compatible with Article 6(1) unless it impairs the very essence of the right of access to a court. In **Kreuz v Poland (2001)**, the Court found a violation of Article 6(1) where an excessive amount of a court fee placed a disproportionate burden on the applicant and prevented him from filing a civil claim alleging unlawfulness of an official act. The Court found also violations of the right of access to a court, where the domestic courts refused to exempt impecunious applicants from court fees in two Turkish cases. The domestic courts refused exemption on grounds of the fact that the action was ill-founded, and that the applicants could not claim to be unable to pay costs as they were refused legal aid and were represented by a lawyer. The representation by the lawyer, however, was under a contingency-fee arrangement (**Bakan v Turkey (2007) and Mehmet and Suna Yepet v Turkey (2007)**). In **Weissman and Others v Romania (2006)**, the Court found a stamp duty of more than EUR 320 000 on a claim of lost income from property excessive and not justified by the particular circumstances of the case. And in a case of a prisoner complaining of inhuman treatment, even a stamp duty of EUR 3 lead to a violation of Article 6, as he could not pay it (**Ciorap v Moldova (2007)**).

Even if an applicant is ordered to pay excessive court fees at the end of the court proceedings, rather than at the begining, this could lead to a violation of the right of access to court. In **Stankov v Bulgaria (2007)**, the applicant sued the prosecution office for damages resulting from his unlawful detention. The domestic courts allowed part of the claim, ordering the applicant to pay a court fee on the part that was rejected. The court fee he had thus to pay, was almost equal to the compensation awarded.

However, where a defendant is a private person, the domestic procedure may provide for large amounts of a court fee to allow the claimant's action, especially as far as the claim for pecuniary damages is concerned. Hence, where an applicant was prevented from bringing an action for defamation as a result of his inability to pay a court fee representing a portion of 5% of the amount claimed in pecuniary damages, the Court found that restriction compatible with the right of access to a court under Article 6(1), given in particular that the applicant was not required to pay a significant fee in regard to the other part of his defamation claim concerning the alleged amount of non-pecuniary damages (**Jankauskas v Lithuania (dec.)(2003)**).

The Court has however faced a considerable difficulty in establishing a clear test in regard to both the question of applicability of Article 6 (Also see chapter 2.2.1 below) as well as the issue of a violation of the right of access to a court in cases where a certain category of defendants – mainly public authorities – was excluded, by way of the statutory or case-law based domestic immunity, from answering an action for damages. Thus in **Osman v United Kingdom (1998)**, the Court found a violation of Article 6 in regard to the inability to bring an action in negligence against the police for their alleged failure to protect the life of a child eventually wounded by an obsessive teacher, while in a very similar case, **Z. and Others v United Kingdom (2001)**, the Court found no violation of the right of access to a court in view of the immunity enjoyed by the local authority from an action in negligence with respect to its failure to take a positive action to remove certain children from the care of abusive parents. In the **Markovic** and **Roche** cases cited above the Court went even further by finding Article 6 inapplicable. In **Roche** this finding was in connection with the immunity of the State from liability for damages claimed by former conscripts for the allegedly adverse effects of medical tests carried out in the 1950s.However, the Court made it clear that it is the domestic authorities, not the Court, who are empowered in the first place to answer the question whether or not a disputed "right" exists in domestic law (also see chapter 2.2.1 above), and that, before lodging a complaint about the alleged absence of access to a court, an applicant must clearly show that he seeks such access in relation to a dispute over such a "right".

As the matters stand, even where it is clear that Article 6 should apply, that is where there is an established dispute over a "right" recognised in domestic law, the Court has not given much guidance to explain in which case a statutory immunity of a defendant – be it just a mere immunity from suit in certain circumstances (depending on the nature of the damage claimed), or a more general immunity from legal liability (such as that enjoyed by foreign diplomats) – is compatible with the right of access to a court within the meaning of Article 6. On the whole, it appears that the immunity from a civil suit acceptable from the point of Article 6(1) should be functional rather than structural, that is it must not create a "carte-blanche" freedom from liability for any group of individuals or authorities, but must be applied after having taken into account a causal relationship between the acts claimed by a victim to be in violation of the domestic law on one hand, and the need to protect a certain group of defendants on the other hand. Hence the Court has found that an immunity attaching to statements made in the course of parliamentary debates in the legislative chambers and designed to protect the interests of Parliament as a whole, as opposed to those of individual parliamentarians, was compatible with the Convention (**A. v United Kingdom (2002)**). Similarly, the Court found no violation of the right to access on account of the immunity from lawsuit of members of the Italian Judicial Council, for allegedly defamatory statements made in the course of deliberations of the Council (**Esposito v Italy (2007)**). However, it has found a violation in regard to a blanket immunity

from suit enjoyed by a parliamentarian in connection with his statements lacking any substantial connection with parliamentary activities (**Cordova v Italy (2003)**).

The same functional approach should also appear to be valid in respect of claims against diplomatic representations or even organs of another state. Hence, in **Fogarty v United Kingdom (2001)**, the Court recognised no breach of Article 6(1) in relation to the immunity enjoyed by a foreign embassy in view of its allegedly discriminatory recruitment practices, while noting that the State immunity may not have been sufficient as a basis to deprive that applicant of access to a court if her claim had concerned established contractual relations between her and the embassy. In **Al-Adsani v United Kingdom (2001)**, the Court found no violation of Article 6(1) in view of the refusal of the United Kingdom courts to examine that applicant's action for damages against the Kuwait authorities for alleged torture that had occurred in Kuwait. In that case, the Court even took into account certain practical considerations, such as the lack of possibility to eventually obtain execution of a court judgment and payment of damages, in order to justify from the point of view of Article 6(1) the foreign state's immunity from such a suit in the United Kingdom.

It can therefore be concluded that the right of access to a court under Article 6(1) of the Convention does not automatically guarantee the right to bring a civil action for damages against the authorities concerning any allegedly improper execution of their official duties. For instance, there is no separate right of access to a court to contest a procedural decision of a judge – there is only one right of access to a court with a view to determining the merits of a civil or criminal case. All in all, the more distant the link between the official actions or inactivity allegedly breaching the domestic law on one hand, and the private-law based rights and obligations of an applicant on the other, the less likely that the Court will find a breach of the right of access to a court, if it finds Article 6(1) applicable at all (See the **Schreiber and Boetch** decision cited above, also see chapter 2.2.3 above).

Since Article 6 applies only to the determination of a criminal charge "against" a person, this right does not include access to a court for the purpose of bringing a private criminal prosecution against another person. Nor can the principle of access to a court under Article 6(1) be interpreted as giving an unlimited right to institute criminal or disciplinary proceedings against third persons or State officials. At the same time, there is an increasing trend in the Court's current case-law, where it can find no violation of Article 6(1) in regard to a bar to bring a court action against the State authorities or an official, to examine separately whether the State complied with its "positive obligation" under certain other Convention provisions to act or to provide an adequate – albeit not necessarily judicial – remedy with regard to various situations touching upon personal rights of an individual, for example, concerning alleged violations of Article 2 (the inadequate investigation of circumstances surrounding the death of a relative (**Paul and Audrey Edwards v United Kingdom (2002)**), Article 3 (the allegedly inefficient investigation of disciplinary penalties in prison (**Valasinas v Lithuania (2001)**), Article 8 (the lack of implementation of the statutory schemes for re-settling of residents of the environmentally-dangerous area (**Fadeyeva v Russia (2005)**), or Article 13 (the limited scope of judicial review of the statutory schemes allowing the increase in air traffic (**Hatton and Others v United Kingdom (2003)**).

3.1.2. The right to legal certainty and effectiveness of court decisions

The right to a court within the meaning of Article 6(1) entails that once a civil judgment or a criminal acquittal has become final and binding, there should be no risk of its being overturned. Many countries have retained in their procedural codes a power enabling a State official, such as a prosecutor, to bring an extraordinary appeal at any time, regarding any factual or legal aspects of the final court decision. In **Brumarescu v Romania (1999)**, where final court decisions in the applicants favour in a civil case were subsequently quashed after an intervention of the Prosecutor General, the Court found a violation of Article 6(1) of the Convention as well as Article 1 of Protocol No. 1, which guarantees the right to respect for one's property. The same principle holds true also

in criminal proceedings.

- In **Bujnita v Moldova (2007)**, the Court found a violation of the right to a fair trial where an acquittal that has been appealed and became final, was later quashed upon a request by the prosecutor, without any new evidence being presented.

- In **Ryabykh v Russia (2003)**, the Court also found a violation of Article 6(1) in a similar situation, explaining: "one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question ... Legal certainty presupposes respect for the principle of *res judicata* ..., that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character."(paras. 51–52)

Linked to these principles is another fundamental aspect of the rule of law: that a final court judgment should be executed.

- In **Burdov v Russia (2002)**, the applicant was awarded compensation by the social security service. Six years after the award of the compensation had been made, the applicant lodged proceedings against the social security service, which was accepted by a court. The applicant was then informed that despite the enforcement order, the social services would not be able to make the payments, since they were under-funded. The Court stated in that case that the right of access to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Further, the Court held that a State may not cite lack of funds as an excuse for not honouring a judgment debt. While a delay in so honouring may be acceptable for a time, the delay must not be such as to impair the essence of the rights in Article 6(1).

- In **Kyrtatos v Greece (2003)**, the applicants successfully challenged local planning decisions affecting their property. The Court found that the national authorities had refrained for more than 7 years from taking the necessary measures to comply with the final, enforceable judicial decisions, thereby depriving the provisions of Article 6(1) of the Convention of all useful effect.

The assessment of compatibility of any delay in the execution of a court judgment with the requirements of Article 6(1) has not been defined by the Court in such detail as the criteria "within a reasonable time", which do not apply to the execution procedures but only to the examination of a civil or criminal case before the courts up to the moment of the adoption of the final judicial decision (see chapter 3.5 below). The Court will examine any complaint about the lack of or delays in the execution of a court judgment separately under the heading of "right to a court", not in the context of a complaint about "fairness" (including length) of judicial proceedings (see chapter 1.1 above). These peculiarities notwithstanding, the criteria such as the complexity of the case and the behaviour of the parties (see chapter 3.5 below) also seem to be relevant while establishing whether a delay in the execution of a court decision has impaired the essence of the "right to a court".

- Thus, in the case of **Jasiuniene and Others v Lithuania** judgment above, he Court found a violation of Article 6(1) where the executive authorities had failed to execute a domestic court judgment obliging them to make a compensation in land to the applicant under the special domestic legislation for restitution of property rights after more than 8 years from the date of the impugned court decision.

- However, in **Uzkureliene and Others v Lithuania (2005)**, the Court considered that the period of more than 4 years which had taken the executive authorities to enforce a final court decision taken

under the same piece of domestic legislation was not long enough to show a violation of Article 6(1). In this respect the Court took account of the fact that the execution of a judgment in the field of restitution of property involved much more than a clear one-off act such as payment of money (as in the **Burdov** case above), and that it necessitated analysis of various historical, legal and technical documents, as well as required the participation by the applicants themselves, in order to carry out all the necessary formalities to register the land in their name. In view of the lack of activity by the applicants and the absence of evidence implying a sufficient degree of negligence on the part of the executive authorities, the Court found the four-year delay in the execution of the judgment to be compatible with the requirements of Article 6(1).

In cases regarding property non-enforcement of final judgements can also give raise to violation of Article 1 of Protocol 1 (see for example **Burdov** and **Timofeyev v Russia (2003)**).

The Court has found a violation of Article 6(1) not only in view of non-enforcement of judgments awarding pecuniary claims to the applicants. Thus in **Okyay and Others v Turkey (2005)**, a violation was found as a result of the authorities' refusal to execute court judgments ordering the halt of thermal power plants.

The enforcement principle is also true in criminal cases. The Grand Chamber found a violation of Article 6 in **Assanidze v Georgia (2004)**, where the applicant, a former mayor, was convicted of a number of criminal offences but was subsequently acquitted of all charges. The Court found a violation of Article 6(1) in that he was not immediately released following the acquittal.

At the same time, Article 6(1) does not permit an applicant to complain about the failure of his private debtors to comply with a court judgment in his favour. The right to a timely execution of a court judgment does not go as far as to require from the State to substitute itself for a private defendant in case of his insolvency (**Shestakov v Russia (dec.)(2002)**). The guarantees of the "right to a court" under Article 6(1) are satisfied where the applicant has been permitted to apply to bailiffs for the judgment to be executed, and where the continuing failure to obtain the execution is not the result of negligence or inaction by the State authorities.

Questions:

1. Is access to a court guaranteed by the domestic law and practice?
2. What kind of bars (substantive or procedural, practical or financial) was imposed on bringing a specific case for examination before the courts?
3. Did these restrictions pursue a legitimate aim, and did a relationship of proportionality exist between the bar employed in a specific case and the aims sought to be achieved by the restriction on access to a court?
4. What domestic remedies exist to obtain a timely execution of a court judgment?

3.2. Independent and impartial tribunal established by law

Although independence and impartiality are quite distinct from one another, the Court tends to examine these attributes together in many cases. However, in order to clarify the distinction between them, they will be treated separately in this paper, to the extent that this is possible. It should be noted that where a professional, disciplinary or executive body does not conform with the requirements of an "independent and impartial tribunal established by law", Article 6 will still be complied with, provided that an applicant subsequently has access to full judicial review of the impugned decision taken by that body (**Buzescu v Romania (2005)**).

3.2.1. Tribunal established by law

The body envisaged by this phrase is a body whose function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner (**Belilos v Switzerland (1988)**). The body must have power to make binding decisions (**Sramek v Austria (1984)**). A body which can merely tender advice will not therefore be a "tribunal" even if there is a practice that the advice in question is followed (See the **Benthem** case cited above). The body need not be part of the ordinary judicial machinery of the country but must have certain fundamental features including independence from the executive and the parties to the case, an appropriate duration of the members' term of office and a judicial procedure offering guarantees that are adequate in the particular kind of case (**De Wilde, Ooms and Versyp v Belgium (1971)**). The fact that a body has other functions besides a judicial function does not necessarily mean that it is not a "tribunal" (See the **H. v Belgium** case cited above).

Numerous different administrative or specialised bodies have thus been held to be "tribunals" for the purposes of Article 6(1), including professional disciplinary bodies (as in the case of **H. v Belgium**), military and prison disciplinary tribunals (See the **Engel** case cited above), bodies dealing with the approval of land sale contracts (See the **Ringeisen** case cited above), bodies dealing with land reform questions (**Ettl and Others v Austria (1987)**) and arbitration bodies dealing with compensation for nationalisation and the compulsory purchase of shares (See the **Lithgow** case cited above). A Minister, or the Government itself, cannot on the other hand be regarded as a tribunal even where empowered to give a binding decision on a disputed matter (See the **Benthem** case cited above).

- In **Van de Hurk v Netherlands (1994)**, the applicant complained that an industrial tribunal was unable to issue binding decisions; the law permitted decisions of the tribunal to be subject to a ruling by the Crown or a Minister that they should not be implemented, or their execution should be suspended. The Court held that the power to give a binding decision that may not be altered by a non-judicial authority to the detriment of an individual party, is inherent in the very notion of a "tribunal". The Court also noted that this power could also be regarded as a component part of "independence" required by Article 6(1) (also see chapter 3.3.2. below). Even where it can be shown that the State authorities did not avail themselves of this power, the mere existence of such a power deprived the tribunal of the characteristics required by Article 6(1). A defect of this nature could be remedied, only if there was an appeal available to a tribunal that did accord with the requirements of a "tribunal" established by law (also see, in the context of the right of access to a court, chapter 3.2.1 above).

The object of the requirement that the tribunal be "established by law" is that judicial organisation should be regulated by law and not by executive discretion (**Lavents v Latvia (2002)**). The scope of the tribunal's jurisdiction should be specified by law. It is not necessary, however, that every detail of judicial organisation should be regulated by primary legislation. Thus an Austrian system was ruled compatible with Article 6(1), under which primary legislation provided for the establishment of labour courts and specified the subject matter of their jurisdiction, whilst it was left to a Minister, by means of delegated legislation, to make provision as to where courts should be established and what their territorial jurisdiction should be (**Zand v Austria (dec.)(1977)**).

- In **Posokhov v Russia (2003)**, the Court held that the phrase "established by law" covers not only the existence of the tribunal, but also the composition of the bench in each case. In that case, the applicant claimed that two lay judges in civil proceedings had not been appointed by the drawing of lots, as required by the law, and that they had acted in their capacity for a period exceeding the statutory time-limit. All in all, the national authorities had no legal grounds justifying the appointment of the two lay judges in question to sit in the applicant's case. The court comprising these judges could not therefore be regarded as a tribunal "established by law".

A body may have more than one function, but this does not necessarily mean that it loses its character as a "tribunal established by law" for the purposes of Article 6(1). Accordingly, the members of the tribunal do not necessarily have to be qualified judges.(See the **Ettl v Austria** case cited above) In the aforementioned **H. v Belgium**, the applicant claimed that the Council of the Bar was not a "tribunal established by law" since it had a variety of functions, including administrative, regulatory, adjudicative, advisory and disciplinary. The Court held that his kind of plurality of functions did not, of itself, deprive a body such as this of its status as a "tribunal established by law". It held that the Council of the Bar did exercise a judicial function when it considered re-admissions of the applicant to the Bar, and that there was no reason on the facts to dispute its independence and impartiality.

- More recently, in **Zlinsat Spol. S.R.O. v Bulgaria (2006)**, the Court considered whether a prosecutor, enjoying under national law identical guarantees for independence as a judge, could be considered an independent tribunal for the purposes of Article 6. In that case, the applicant, a Czech company, had bought a hotel, privatised by the municipality. The Prosecutor's Office ordered the suspension of the privatisation contract, and later the eviction of the applicant, on the basis of domestic legislation allowing it to challenge contracts, which damage State interests. Under domestic law there was no judicial review of this decision of the prosecution office. In finding a violation of Article 6, the Court held that full independence from the executive was not dispositive, as an independent and impartial tribunal within the meaning of Article 6(1) exhibits other essential characteristics. The fact that the prosecution office could act on its own motion, had considerable freedom as to its course of action, was not bound by clear proceedings, rules of evidence and there were no guarantees for the participation of the parties, was not compatible with the notions of the rule of law and legal certainty inherent in judicial proceedings.

3.2.2. Independence

An "independent" tribunal is one that is independent of the parties, and of the executive. However, the fact that judges of an ordinary court are appointed by an executive authority, such as the Lord Chancellor in the United Kingdom or Minister of Justice in most European countries, does not itself mean that those judges will lack independence or impartiality in a particular set of domestic proceedings involving that State official as a respondent (**Clarke v United Kingdom (dec.)(2005)**). In considering whether a body can be regarded as "independent", regard must be had *inter alia* to the manner of appointment of its members, their terms of office, the existence of guarantees against outside pressures and the question whether there is the appearance of independence. The Court has held that it is acceptable for members of a prison disciplinary body to be appointed by the Minister responsible for prisons, where they were not subject to any instructions from the Minister in their adjudicatory role (See the **Campbell and Fell** case cited above). The appointment of two members of a tribunal responsible for determining nationalisation compensation by the Minister who was a party to the proceedings was also held to be compatible with Article 6(1) in circumstances where the Minister had to consult the representative of other parties before making an appointment and where there was no disagreement as to the appointments made (See the **Lithgow** case cited above).

The appointment of civil servants to sit on specialised tribunals dealing with agricultural land matters has been held not to infringe Article 6(1) where they were under a legal obligation to act independently (See the **Ringeisen** case cited above). A tribunal consisting of a judge and two civil servants, one representative of the employer and one of the employee, both with a fixed term, was also found to be in compliance with Article 6 (**Stojakovic v Austria (2006)**). On the other hand, where a civil service member of such a tribunal was in a subordinate position to an officer who was a party to the proceedings, the tribunal was held to lack the requisite appearance of independence (See the **Belilos** case cited above). A similar conclusion was reached where two lay assessors sitting

on a tribunal dealing with a claim for revision of a lease had been appointed by associations which had an interest in the continuation of the existing terms of the lease (**Langborger v Sweden (1989)**).

Security against removal

Security against removal of members of the tribunal by the executive during their term of office is a necessary corollary of their independence. Their irremovability need not be formally recognised in law, provided it is recognised in fact. No particular term of office has been specified by the Court as a necessary minimum. Terms of office that the Court has considered to comply with Article 6(1) have varied considerably; the longer the term, the more likely it is that the tribunal will comply with Article 6(1). But the appointment of members of a prison disciplinary body for terms of three years was described by the Court as "relatively short" but was found acceptable in view of the difficulty of finding members to serve for longer periods (See the **Campbell and Fell** case cited above).

Military tribunals

Courts with jurisdiction over civilians, but which are composed of military judges will usually fail this test; the reason is that military judges are members of the army that takes its instructions from the executive (**Incal v Turkey (1998)**). However, military tribunals that are established to try military personnel will comply with Article 6 so long as they have sufficient safeguards in place to guarantee their independence and impartiality. In **Cooper v United Kingdom (2003)**, the applicant claimed lack of independence of a court martial, consisting of a permanent president, two military officers and a civilian judge. The Court accepted that the safeguards of independence of that tribunal existed, including the terms of the appointment of members of the courts martial, the right of the accused to object to any of them, the confidentiality of the proceedings, and the fact that the most junior member of that body required to vote first on the verdict and sentence. There was therefore no violation of Article 6(1).

Appearance of independence

In the above mentioned **Belilos** case, the applicant claimed that she was tried by a police board consisting of a single police officer. Regardless of a number of procedural safeguards attesting a certain degree of independence of that one-man board, the Court noted that appearances were also important in establishing whether a tribunal is "independent". It pointed out that the ordinary citizen would see an officer in the police board as a member of the police force, subordinate to his superiors and loyal to his colleagues. There was therefore a violation of Article 6(1).

3.2.3. Impartiality

The requirement that the tribunal should be "impartial" to some extent overlaps with the requirement that it be independent, in particular of the parties but also of other authorities. It applies equally in civil as well as criminal cases. The Court has adopted a double approach to the question by considering: a) whether the tribunal is subjectively impartial in the sense that its members are free from personal bias, and b) whether, from an objective point of view, there is a sufficient appearance of impartiality and whether the guarantees of impartiality in a given situation are such as to exclude any legitimate doubt on the matter.

Subjective test

The subjective test of bias involves endeavouring to ascertain the personal conviction of a given judge in a given case. Personal impartiality must be assumed unless there is proof to the contrary. Indeed, it is generally very difficult for an individual to prove personal impartiality of a judge. However, in the above-mentioned **Lavents** case, public statements by a judge in the course of criminal proceedings assessing the quality and the nature of the defence severely compromised her impartiality from the subjective standpoint. In that statement the judge had also made an assessment of the likely outcome of the case, expressed astonishment at the applicant's insistence on

pleading not guilty, and suggested that that should have proven his innocence. The Court held that these statements amounted to the adoption of a definite position on the outcome of the case with a clear preference to fining the applicant guilty. The Court concluded that the applicant had very strong reasons to fear that the judge lacked impartiality. In another case, **Kyprianou v Cyprus,** cited above, judges who tried an applicant for the contempt of court expressed statements *inter alia* that they were "deeply insulted as persons" by the applicant's behaviour in court, which was ruled to amount to the offence of contempt. The wording of the judges' statements in the applicant's conviction, coupled with the speed with which the proceedings were carried out, showed lack of impartiality under the subjective test.

Recently, the Court found violations of the right to an impartial tribunal in several cases. In **Belukha v Ukraine (2006)**, it held that the president of the domestic court could justifiably be considered biased in a case involving a construction company, which has previously renovated the court house free of charge. The Court also found justified the fears of the representatives of a school, that the judge hearing their case was biased. This was so, as that judge's son had been previously expelled from that same school and the judge had threatened the school with retaliation (**Tocono and Profesorii Prometeisti v Moldova (2007)**). The appointment of a judge to a key position in a Ministry, which appointment the judge had known prior to deciding a case involving the Ministry, was also found to sufficiently justify fears of bias (**Sacilor-Lormines v France (2006)**). And in **Farhi v France (2007)**, the Court found that the applicant was denied an impartial tribunal in violation of Article 6, where the prosecutor had communicated informally with one of the jurors and the judge refused to investigate and identify the juror and put the incident on record.

Objective test

The Court has had many more occasions to deal with the so-called objective test of impartiality. In this respect, the Court's attitude has been based to a large extent on the consideration that "justice must not only be done, it must also be seen to be done". In **Piersack v Belgium (1982),** the Court stated that domestic courts must inspire confidence in the public and in particular in the accused in criminal proceedings, and any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must therefore withdraw. Applying these principles, the Court held that there was insufficient objective impartiality where a judge sitting in a criminal case had been head of the section of the public prosecutor's department which had been responsible for the prosecution of the accused.

Hence, any legitimate doubt of an applicant as to impartiality of a tribunal is itself sufficient to find a violation of that provision. Following this principle, the Court has come across a number of other cases concerning judges who previously held posts as prosecutors or investigating officials. It emphasised that it is perfectly normal in many of the contracting States for judges to have previously served as prosecutors. This fact alone cannot call into question the impartiality of the judge concerned. However, if, when serving as a prosecutor, the person had the possibility of intervening in a case in which he subsequently served as a judge, objective impartiality may be compromised. Hence in **De Cubber v Belgium (1984),** the Court found a violation of Article 6(1) where a judge hearing the merits of a criminal case had previously acted as investigating judge in the case.

- In **Hauschildt v Denmark (1989),** the Court found a violation of Article 6(1) where a judge had previously taken decisions concerning the detention on remand of an accused in circumstances where he had to be convinced that there was a "particularly confirmed suspicion" that the accused had committed the crime. The Court emphasised that the mere fact that a judge had made pre-trial decisions in a case, including those concerning detention on remand, would not of itself justify fears as to his impartiality. However, in view of the high degree of suspicion which was required in the particular case to justify detention on remand, the difference between the issue before the judge at the pre-trial stage and that at the trial was tenuous and his impartiality was

therefore capable of appearing open to doubt. Following these principles, the Court would typically refuse to find a violation of Article 6 (1), on the mere fact that the trial judge had ruled before that on the pre-trial detention, holding that a previous ruling on whether there was reasonable suspicion for the purposes of pre-trial detention does not in itself call into question the judge's impartiality (**Jasinski v Poland (2005)**). The Court, however, would examine the specific facts in every case and the extent to which, statements of a judge in preliminary proceedings might have entailed a finding on the guilt. Thus, where a judge has been involved not only in the prior remand decision, but has also been involve in the investigation via a preliminary decision to prosecute, involving a statement approving the strength of the evidence of guilt of the accused, the fact of that judge later sat at trial would be in breach of Article 6(1) (**Perote Pellon v Spain (2002)**).

At the same time, situations where the same judge intervenes at different stages of proceedings – which may raise problems of impartiality from the point of view of Article 6(1) – should be distinguished from situations where the same judge examines the case at first instance two or more times in view of the referral of the case back to the same court following the annulment of the first instance decision – the latter situation does not, as such, show a lack of impartiality under Article 6(1) (**Stow and Gai v Portugal (dec.)(2005)**). A review of the merits of an appeal and the admissibility of a cassation appeal by the same appellate judge, following which the appellant could appeal to the Supreme Court directly would also not violate Article 6 (**Warsicka v Poland (2007)**).

The mixture of prosecutorial and judicial functions was also underlined by the Court in finding bias on the part of judges who tried an applicant for an offence of contempt of court, those judges additionally being the victims of the crime (See the **Kyprianou** case cited above). The lack of impartiality of a court may be objectively open to doubt in view of an interference of other judges – who are not formally appointed to sit in a specific case – which has to be determined on the merits by their colleagues. In **Daktaras v Lithuania (2000)**, the President of the Criminal Division of the Supreme Court lodged a "petition" with the judges of that division to quash the Court of Appeal's judgment following the request by the first-instance judge, who was dissatisfied with the appeal judgment. The President proposed the quashing of the Court of Appeal's decision and the reinstatement of the first-instance judgment. The same President then appointed the judge rapporteur and constituted the Chamber which was to examine the case. The President's petition was endorsed by the prosecution at the hearing and eventually upheld by the Supreme Court. This mixture of interferences from different judicial officials in the case was considered sufficient to objectively justify the applicant's doubts as to impartiality of the Chamber of the Supreme Court. Those doubts, since objectively justified, were sufficient to find a violation of Article 6(1).

- Similarly, in **Salov v Ukraine (2005)**, a violation of Article 6(1) was found in relation to the lack of independence and impartiality of a district court judge hearing a case in view of the lack of sufficient guarantees against pressure from the regional courts.

Where members of a court adjudicating on a law have previously ruled on the same law in advisory capacity, their objective impartiality may be compromised. In the **Procola v Luxembourg** case mentioned above, the judicial panel of the Conseil d'Etat (Supreme Administrative Court) ruled on the applicant's case concerning a regulation incorporating certain EU rules into domestic law. Four of the five members of this panel had previously sat on the advisory panel of the Conseil d'Etat, and had given an opinion on the draft regulation concerned, and had drafted a bill making the bill retrospective. The Court held that the mere fact that a person successively performed two different types of function in a case casts doubts on the structural independence and impartiality of the tribunal. Accordingly, the applicant had legitimate grounds for fearing that the members of the judicial panel had felt bound by the opinion previously given in their advisory capacity. There was therefore a violation of Article 6(1).

However, the Court later made it clear, that where a court, such as the Conseil d'Etat, has advisory

and judicial roles, impartiality will not be called into question where an advisory opinion and subsequent legal proceedings cannot be regarded as the "same case" or "same decision". Thus in **Kleyn and Others v Netherlands (2003)**, the plenary of the Conseil d'Etat gave an advisory opinion on the Transport and Infrastructure Bill, as a result of which a number of changes were made before it became law. The applicants brought an action challenging a decision concerning the routing of a particular railway, taken on the basis of the new law. The applicants claimed that the Conseil d'Etat, which dismissed the applicant's action, lacked impartiality. The Court held however that there was nothing contained in the advice on the Transport and Infrastructure Bill that could reasonably be interpreted as expressing any views on, or amounting to a preliminary determination of, any issues subsequently decided by the routing decision contested by the applicants. Although the advice did make suggestions as to where the railway should begin and end, it did not give any advice on the detailed routing thereof. Accordingly, the applicants' fears regarding the impartiality of the Conseil d'Etat vis-à-vis its prior advisory opinion could not be objectively justified.

The participation in a medical disciplinary tribunal of medical practitioners who were members of a professional body which the defendants objected to joining was held not to infringe the impartiality requirement (See the **Le Compte and Others** case cited above).

While, as observed above, a judge will lack "impartiality" within the meaning of Article 6(1) where he has performed different functions (prosecutorial and judicial, or advisory and judicial) or has taken part in different stages of proceedings (as a first instance, and then as appeal judge) in the same case, the Court has not found a breach of the principle of impartiality because of the mere fact that the same court has dealt in succession with similar or related cases (See the **Gillow** case cited above).

Objective impartiality may also be open to doubt where a judge has a family, financial or other link to the opposing party in the proceedings. Thus for example, a violation of the principle of impartiality was found where a judge at the constitutional appeal level had previously acted as a legal counsel for the applicants' opponents in the lower set of the same proceedings (**Meznaric v Croatia (2005)**). However, that link between a judge and another party must be sufficiently strong to raise problems under Article 6(1). Thus in **Petur Thor Sigurdsson v Iceland (2003)**, the applicant's claim against the National Bank of Iceland was examined before the Supreme Court. One of the judges on the Supreme Court and her husband had a financial relationship with the same bank, and her husband had at the time been experiencing serious financial problems. The Court concluded that the judge's involvement in her husband's debt settlement, the favours received by her husband and his links to the bank ere of such a nature and amplitude and were so close in time to the Supreme Court's examination of the case, that the applicant could entertain reasonable fears that the Supreme Court lacked the requisite impartiality. There was therefore a breach of Article 6(1).

- In **Holm v Sweden (1993)**, five of the nine jurors who served in the trial of a defamation action brought by way of private prosecution were members of the political party which was the principal target of the allegedly defamatory material. The jury selection procedures complied with the requirements of Swedish law; attempts by the applicant to have those jurors disqualified who were members of the political party failed. The Court found that the links between the defendants and the five jurors could give rise to misgivings as to their objective independence and impartiality; this in turn rendered the independence and impartiality of the court questionable and there was a violation of Article 6(1).

- By contrast, in **Salaman v United Kingdom (dec.)(2000)**, the Court was called upon to consider the effect of a judge's membership of the Freemasons. The applicant had brought proceedings to challenge a will made by a Freemason, which revoked an earlier will in favour of the applicant and left the property instead to a man claimed by the applicant also to be a Freemason. The applicant referred before the Court to popularly held suspicions about the secretive, pervasive, and corrupting nature of Freemasonry. The Court, however, did not con-

sider that membership of a judge in the Freemasons in the United Kingdom could in itself raise doubts as to his impartiality where a witness or party in a case was also a Freemason; in particular, there was no reason to fear that a judge would not regard his oath on taking judicial office as taking precedence over any other social commitments or obligations. The applicant's doubts as to the lack of impartiality of the judge were not objectively justified.

The same applies whenever a member of a tribunal knows one of the parties to or witnesses at a trial.

- In **Pullar v United Kingdom (1996)**, by sheer coincidence one of the jurors selected to try a case of corruption had previously been employed by the leading prosecution witness. The Court did not consider that this gave rise to a problem under Article 6(1), because a detailed examination of the juror's relationship with the witness – who had dismissed him from his job – did not demonstrate that the juror would be predisposed to believe his testimony.

Hence, wider applications, such as complaints about trial by a jury whose composition does not correspond to the ethnic origin of the defendant, are unlikely to succeed unless the particular facts of the case show that the defendant's concerns about racism in the tribunal are objectively justified.

- In **Sander v United Kingdom (2000)**, the defendant was Asian. In the course of his trial in the Crown Court the trial was adjourned in that a member of the jury sent a note to the judge alleging that two fellow jurors had been making openly racist remarks and jokes and expressing the fear that the defendant would be convicted, not on the evidence, but because he was Asian. The following morning the judge received two letters from the jury. The first, signed by all the jurors including the one who had sent the complaint, refuted the allegation of racism. The second letter was written by a single juror who explained that he might have been the one responsible for making the racist jokes. He apologised for causing offence and declared that, in truth, he was not in the slightest racially biased. The judge decided not to dismiss the jury but instead redirected them on the importance of their judicial task and the trial continued, culminating in the applicant's conviction. The Court, in finding a violation of Article 6(1), held that, viewed objectively, the collective letter from the jury could not have been sufficient to dispel the applicant's fears, because the jurors would have been unlikely openly to admit to racism. Nor could his fears have been allayed by the judge's redirection, however trenchant, because racist views could not be changed overnight.

Question:

1. Are there in place effective and sufficient guarantees for the independence and impartiality of tribunals?

3.3. Fairness of proceedings

The right to a "fair" hearing is a fundamental element of Article 6. The requirement of "fairness" covers the proceedings as a whole, and not only those in an oral hearing or first instance (See the **Monnell and Morris** case cited above). The question whether a person has had a "fair" trial is thus approached by looking at the whole proceedings, although a particular incident may have a decisive effect. Defects at one stage of the proceedings may be put right or compensated for at a later stage.

The question whether proceedings have been "fair" is of course quite separate from the question whether the tribunal's decision is "correct" or "wrong". As the Court has frequently pointed out under in the so-called "fourth instance" cases, it has no general jurisdiction to consider whether domestic courts have committed errors of law or fact, its function being to consider the fairness of the proceedings (also see chapter 1 above).

3.3.1. Adversarial process

The notion of a "fair hearing" requires adversarial proceedings, in which the parties to civil proceedings have the opportunity to know and comment on the observations filed or evidence adduced by the other party. In criminal trials, the requirement of adversarial proceedings requires 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 (**Brandstetter v Austria (1991)**). It is primarily for national law to lay down rules on the admissibility of evidence and for the national courts to assess the evidence (**Schenk v Switzerland (1988)**). However, in considering whether the proceedings as a whole were fair, the nature of the evidence admitted and the way in which it was taken are relevant. In a criminal case in particular, respect for the rights of the defence requires that in principle all evidence must be produced in the presence of the accused at a public hearing where it can be challenged by way of adversarial procedure (**Barbera, Messegue and Jabardo v Spain (1988)**). This also involves an opportunity to question witnesses and to comment on their evidence in argument (**Bricmont v Belgium (1989)**).

In order for the adversarial process to work effectively, it is important, in civil and criminal proceedings, that relevant material is available to both parties.

- In **Ruiz-Mateos v Spain (1993)**, in the context of constitutional proceedings to which Article 6 applied under its "civil" head", the applicants' request to make submissions before the Constitutional Court was denied. The Court held that the right to adversarial proceedings requires that the parties are given the opportunity to know and comment on the observations filed or evidence adduced by the other party. The Court recognised that a party to a case must, as a rule, be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations.

- In **McMichael v United Kingdom (1995)**, the applicants did not have access to certain social reports relevant in the context of child-care proceedings. The Court held that the failure to disclose such vital documents was capable of affecting the ability of participating parents not only to influence the outcome of the hearing, but also to assess their prospects of appealing against the eventual decision. At appeal, the same documents were lodged with the court, but were not supplied to the applicants. Accordingly, the appeal did not remedy the shortcomings of the first-instance proceedings, in breach of Article 6(1).

In the context of criminal cases, the Court also explained in the same vein that the right to an adversarial trial means 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, and that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (**Rowe and Davis v United Kingdom (2000)**).

At the same time, the right to disclosure of all evidence is not absolute. In **Edwards v United Kingdom (1992),** the Court held that in certain cases non-disclosure could be protected by public interest immunity (e.g., non-disclosure of the name of an agent or sensitive investigative technique), which could be served *inter alia* by the considerations of national security. In **Chahal v United Kingdom (1996),** the Court further stated that the use of confidential material may be unavoidable where national security is at stake, but national authorities are not free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. Therefore, in each case, in considering whether evidence report could be withheld from the defendant, given that the prosecution objects to the disclosure of this material on the grounds of national security, the trial court must balance the public interest in non-disclosure against the importance of the materials in question to the defence. At the same time, only such measures restricting the rights of the defence which are "strictly necessary" are permissible under Article 6(1) (See the **Rowe and Davis** case cited above). In **Botmeh**

and Alami v United Kingdom (2007), the Court found no violation of Article 6 on account of the fact that police information was withheld from the applicants at trial. The applicants were tried for terrorist bombings in London. The request for disclosure of the documents was reviewed by the appeal court, which granted partial disclosure, as the material was protected on national security grounds.

In accordance with the "fourth instance" doctrine, the Court will not itself review whether or not an order permitting non disclosure was justified in any particular case under the applicable domestic procedure. Instead, it examines the quality of that procedure itself to ensure that it complied, as far as possible, with the autonomous requirements of adversarial proceedings. In the above mentioned **Rowe and Davis** case, for example, the Court found fault with the domestic procedure in that the appeal judges had no opportunity to examine the withheld evidence and make the decision on disclosure. Instead, they were dependent for their understanding of the possible relevance of the undisclosed material on the judgment of the trail court, the transcripts of the first-instance hearings, and on the account of the issues given to them by the prosecution. There was thus a violation of Article 6(1) as a result of this defect in the appeal proceedings.

- In **Dowsett v United Kingdom (2003)**, the applicant also complained about the failure of the police to disclose certain evidence to him prior to his trial. The Court emphasised in that case that the material relevant to the defence, including secret evidence, must be placed before the trial judge for his or her ruling on questions of disclosure. The Court has therefore made it clear that any decision to withhold information must be placed before a court; the prosecution may not unilaterally decide to withhold information. Further, an assessment of relevance of such material must be made by the trial judge; the defect cannot be remedied where only a subsequent level of jurisdiction (i.e. the appellate court) is able to make such an assessment. These cases show that the relevant assessment of the secret evidence must be done at both first instance and appeal stages.

- In **Edwards and Lewis v United Kingdom (2004)**, it was the trial judge who reviewed all the evidence which the prosecution sought not to disclose. In the particular circumstances of the case, however, this created a problem of lack of adversarial proceedings and equality of arms. Each applicant had applied to have the prosecution case against him struck out for abuse of process on the ground that he had been entrapped into committing the offence by undercover police officers (also see chapter 3.3.5 below). The trial judge first determined, as a question of fact and taking into account such matters as the accused's past criminal record and any evidence concerning his dealings with the police, whether or not it was established on the balance of probabilities that the police improperly incited the offence. The problem arose under Article 6 because the same trial judge had already examined, in the absence of any representative of the defence, the prosecution's undisclosed evidence, which had to be disclosed only if it was likely to be of assistance to the defence case. Because of the secret nature of this procedure the defence were unable to know whether or not the undisclosed evidence was in fact harmful to the accused's allegations of entrapment, and, if so, whether the evidence was accurate or could have been rebutted. In the case of one of the applicants, for example, it was subsequently revealed that the undisclosed evidence suggested that he had for some time before the police operation been involved in drug trafficking: an allegation which was of material relevance to the judge's decision on entrapment and one which the defendant strongly denied. There was thus a violation of Article 6(1).

- In **Georgios Papageorgiou v Greece (2003)**, the applicant, a bank employee, was convicted of cashing in on fraudulent cheques. The applicant's complaints under Article 6 concerned not a concealment of evidence, but the refusal by the domestic courts to order production of the originals of documents used as the main piece of evidence against him. In particular, at no stage of the proceedings were the courts dealing with the case able to examine the cheques at issue, or to check whether the copies submitted to them corresponded to the "originals". Furthermore, the first-instance court ordered the destruction of the cheques presumed to have been forged, the crucial piece of evidence in the applicant's trial. The applicant's conviction for

fraud was, moreover, based to a large extent on the photocopies of the cheques in question. In those circumstances, the Court considered that production of the "original" cheques was vital to the applicant's defence. Having regard to the fact that, in spite of his repeated requests, this essential piece of evidence was not adequately adduced and discussed at the trial, the Court concluded that the proceedings in question did not satisfy the requirements of a fair trial.

Closely related to the principle of adversarial proceedings are also the rights to attend trial and the principle of equality of arms, which will be reviewed in the chapters below.

3.3.2. The principle of equality of arms

The principle of equality of arms, in the sense of a fair balance between the parties, is a central feature of the right to a fair trial and is an inherent aspect of the right to adversarial proceedings. In essence it requires that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In other words, the principle of equality of arms essentially means procedural equality between the parties (**Neumeister v Austria (1968)**).

This principle applies to both civil and criminal cases. A minor inequality which does not affect the fairness of the proceedings as a whole will not, however, infringe Article 6(1). This principle does not have an exhaustive definition of procedural rules. Precisely what is required will depend to some extent on the nature of the case, including the nature and importance of what is at issue between the parties. There must be adequate procedural safeguards appropriate to the nature of the case. These include, where appropriate, adequate opportunity to adduce evidence, to challenge hostile evidence, and to present argument on the matters at issue (See the **H. v Belgium** case cited above).

In the context of civil cases between private parties, "equality of arms" does not have to be absolute. There is no duty on the State, for example, to provide legal aid to an impecunious litigant to such a level as to bring him or her into total parity with a wealthy opponent (**Steel and Morris v United Kingdom**, cited above).

What matters is that each party is afforded a reasonable opportunity to present their case—including their evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis the other side. The principle of equality of arms also generally means that the opposing party must not be given additional opportunities to promote their view, in the absence of the accused, or the litigant. Thus, in criminal proceedings, if the prosecution enjoys a significant procedural advantage – such as the right for high State official to make submissions to the Court of Cassation in the absence of representatives of the defence – there will not be a reasonable equality of arms between the parties (**Borgers v Belgium (1991)**).

At the same time, it must be noted that the sole fact that a very senior prosecuting official, such as a Deputy Prosecutor General, presents the accusation case at trial, does not itself mean that the equality of arms has been breached or that the trial court has been subjected to undue pressure (**Daktaras v Lithuania (dec.)(2000)**).

- In **Wynen v Belgium (2002)**, the applicants were not allowed by the cassation court to fill certain supplementary pleadings because of their being out of time. However, the Court noted that other party in the proceedings was not subject to any specific time limit to present its case. The applicants were thus placed at a clear disadvantage with regard to another party, in violation of Article 6(1).

The principle of equality of arms can be breached in circumstances where a litigant is faced with opponents who have advantages in respect of access to relevant information.

- In **Yvon v France (2003)**, in the context concerning the amount of compensation in land expropriation proceedings, the applicant was denied by the opposing party, a government authority, of a copy of the documents it had relied on in its written submissions before the court. The Court held that the authorities had significant advantages in access to information relevant for the determination of the case, including the land registry index. Further, in this case, the government authority was both an expert and a party, and was therefore in a dominant position in the proceedings and had a considerable influence on the findings of the judge. The Court concluded that all these factors together gave rise to an imbalance that was incompatible with the principle of equality of arms. There was a violation of Article 6(1).

The principle of equality of arms requires equal treatment between witnesses for the defence and witnesses for the prosecution in criminal proceedings.

- In **Bönisch v Austria (1985)**, an expert's report was commissioned by the police about the operation of the applicant's business. As a result of this report, a criminal prosecution against the applicant was brought and he was eventually convicted. The same police expert was appointed by the trial court as the court expert, and his evidence thus carried more weight than that of an expert called by the defence. By contrast to the court expert, the defence expert was not entitled to attend the whole hearing, but had to wait to be called to give evidence. When called, he was examined by both the judge and the court expert. He was thereafter allowed only to sit in the public gallery. The substantive role played by the court expert – that expert clearly lacking elements of neutrality – was ruled by the Court to have violated Article 6(1). It must be noted though that the Convention does not require, as such, that experts always be neutral – that neutrality is prerequisite for compliance with Article 6 only in cases where the expert plays a more important procedural role than a mere witness, as in the **Bönisch** case (also see chapter 5.4. below).

- In the aforementioned **Brandsetter v Austri**a case, following an inspection at the applicant's wine business, an agricultural institute expert drew up a report which resulted in criminal proceedings being brought against the applicant for adulterating wine. The trial court appointed an official court expert, an employee of the same institute. The Court held that while the appointment of the court expert could give rise to doubts as to independence, these doubts had to be objectively justified. It concluded that they were not. The mere fact that the court expert worked for the same institute could not in itself justify the fears that he would not have been able to act with neutrality. The Court concluded that there was no violation of the principle of equality of arms on the basis that the court refused to appoint another official expert. It further stated that the right to a fair trial does not require that a national court should appoint another expert simply because the opinion of the court-appointed expert supports the prosecution case. There was thus no breach of Article 6.

- However, in **Sara Lind Eggertsdottir v Iceland (2007)**, the Court held that there was a violation of the principle of equality of arms, due to the appointment of experts, who were employees of the defendant. The applicant in the case was suing a hospital for medical negligence, with the domestic court refusing her claim for damages on the basis of an expert opinion, given by doctors employed by the hospital. The domestic court refused to disqualify them, as none of them was a member of the management of the hospital and they were all members of a State Medico-Legal Board. The Court reasoned that even if those doctors had not had any prior involvement in the case, their hierarchical superiors had taken a clear stance against the claim and the applicant could legitimately fear that the experts had not acted with proper neutrality in the proceedings.

- In **Augusto v France (2007)**, the applicant was denied recognition of her incapacity to work and as result a retirement pension. Her appeal against that decision was heard and confirmed by the competent national tribunal, which partly based its findings on the observations of its accredited doctor, whose opinion, however, was never made available to the applicant. In finding a violation of Article 6, the Court held that the opinion of the accredited doctor had

been a crucial factor in the decision reached by the domestic court, and the communication of that opinion was all the more important as the doctor could not be regarded as impartial, in so far as he had been chosen from a list drawn by the other party in the proceedings at issue.

The principle of equality of arms can also be breached where the person holding relevant information prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in legal proceedings (**McGinley and Egan v United Kingdom (1998)**). However, the person arguing that the other party withheld such information, must be able to substantiate their assertion that such evidence existed and was in the hands of that party at the time. Article 6 could also be violated where the applicant could read the documents, in the specific case his file with the former security services, but was refused copies of those documents, taking notes and using the documents in the court proceedings (**Matyjek v Poland (dec.)(2006)**).

Equality of arms may be violated in view of serious practical obstacles to plead one's case. Thus the Court found a violation of Article 6(1) in criminal proceedings where the defence lawyer was made to wait for around 15 hours before finally being given a chance to plead his case in the early hours of the morning (**Makhfi v France (2004)**). The Court also held that equality of arms was violated where the winning party was refused to have their costs reimbursed by the prosecution office, which initiated the proceedings (**Stankiewicz v Poland (2006)**).

The principle can also be breached where a law is passed in order to influence the judicial determination of an on-going legal dispute. In the aforementioned **Stran Greek Refineries and Stratis Andreadis** case, at the time of the legal proceedings for validity of a tender contract signed between the applicants and the old military regime, the Greek Parliament passed a new law providing that all clauses concluded by the military regime were null and void, and that all claims arising from the termination of such contracts were statute-barred. The Court noted that the law had a decisive effect for the applicant – it represented a turning point in the proceedings that until that moment, had gone against the State. The Court further had regard to the timing and manner of passing the law. Shortly before the law was passed, the State had asked for an adjournment of the proceedings on the grounds that a draft law concerning the case was before the Parliament. It was thus established that the relevant provision in the law was aimed at the applicant company. It held that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. There was accordingly a violation of Article 6(1).

- Similarly, in **Arnolin and Others and 24 Other v France (2007)** and **Aubert and Others and 8 Others v France (2007)**, the Court found a violation of Article 6(1) as a result of legislation adopted by the French Parliament, which retrospectively regulated disputes pending before the national courts on pay due to employees of private institutions in the health and welfare sectors. The Court reaffirmed the general principle that, while the legislature was not completely precluded from adopting retrospective provisions to regulate rights arising under existing law in civil matters, such interference could only be in compliance with Article 6 if compelling grounds of the general interest exist. In deciding that there were no such compelling grounds of general interst in the specific cases, the Court held that in principle financial reasons could not by themselves warrant retrospective legislation, and as there was no risk for the health and welfare systems as a whole and the State had a stake in that financial dispute, the retrospective legislation in the particular case could not be justified.

Finally, while the requirement of equality of arms applies both to civil and criminal cases, the standards required by Article 6 are more stringent in regard to an applicant facing criminal prosecution rather than an applicant in a civil case or a civil party in criminal proceedings. Thus, the Court found a violation of the principle of equality of arms where an accused in a criminal case was denied access to the case-file at the pre-trial stage on the ground that he had chosen to represent himself (under

the French system, only his legal counsel could have such access) (**Foucher v France (1997)**). At the same time, the Court found no violation of Article 6 where a civil party in criminal proceedings was denied access to the case-file on the same ground (**Menet v France (2005)**).

Questions:

1. How does the domestic law protect the principles of adversarial process and equality of arms?
2. By what means may a party challenge non-disclosure of certain evidence?
3. Do time-limits for lodging of written submissions or appeals ensure that the parties are on an equal procedural footing?
4. What if the status and procedure of appointing a court expert? Does such an expert have the same procedural rights as other witnesses in the case?
5. If certain senior judicial or governmental officials are allowed to intervene in legal proceedings on behalf of one of the parties, how does the law ensure that the principle of equality of arms is respected?

3.3.3. The right to a public hearing

The first element of this right is the right of a party to be present before the court. The second element is the right of the party to participate effectively at the hearing. The third aspect is the public character of court hearings, that is the right of the party to claim that the public, including the media, be allowed to attend in open court. The fourth element is the obligation for a court to make its judgment public.

As to the first element, this right means that an applicant should participate personally at a hearing of his case. It must be underlined that the Court's case-law under Article 6(1) seems to point no significant distinction to a difference between cases where an applicant was not personally present but was nonetheless represented by a lawyer, and cases where the domestic courts conducted the proceedings by way of written procedure, without even hearing the parties' representatives. In the context of the right to a public hearing, the Court has placed onus between cases where the applicant was enabled to attend personally, and where he was not. While the lawyer's presence in court may be relevant in the context of a breach of certain other rights guaranteed by Article 6 (such as those guaranteed in points b) and c) of paragraph 3), the focus under Article 6(1) must be on the applicant's personal presence in court.

In this respect, it depends on the nature of the proceedings whether a failure to allow the individual accused or civil litigant to attend in person will constitute a violation of Article 6(1). The Court has held that Article 6(1) entails entitlement to an oral hearing before a court of first and only instance (See the aforementioned **Goc** case). Thus, in **Allan Jacobsson (No. 2) v Sweden (1998)**, a violation of Article 6(1) was found where a person was not invited to a court hearing reviewing the validity of an executive decision concerning a building permit. The Court held that, in proceedings, as here, before a court of first and only instance, the "right to a public hearing" entails an entitlement to an oral hearing, unless there are exceptional circumstances that justify dispensing with such a hearing. An applicant himself must therefore be as a general rule present at least before one level of jurisdiction in order for the impugned domestic procedure to comply with Article 6(1).

- In **Jussila v Finland (2006)**, however, the Court set clear limits to the right to an oral hearing, refusing to find a violation of Article 6 on account of the fact that no oral hearing took place in a tax surcharges case. The Court considered the tax surcharge proceedings under the criminal head of Article 6, but continued by saying that even in a criminal case the right to oral hearing

is not absolute and there may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (See **Salomonsson v Sweden (2002)**, for the limits on the right to an oral hearing in civil cases.). Two further arguments weighed in the Court's view for finding no violation of Article 6 in the particular case. First, the fact that although Article 6 was applicable under its criminal head, it was a rather minor case, with the applicant risking only a surcharge as a penalty. The Court made it clear that it considers an oral hearing in criminal cases as a rather important guarantee of the fairness of the trial. And second, the Court put particular emphasis on the fact that the denial of an oral hearing was not automatic and the applicant could and did request an oral hearing and the domestic court provided detailed reasons in refusing to grant that motion. Where domestic law does not provide for an opportunity for the defendant to request a public hearing, however, there will be a violation of Article 6 (**Martinie v France (2006)**).

While Article 6 does not guarantee, as such, the right to appeal, this provision applies to the appeal proceedings where a right to appeal exists under domestic law (See below. Also, a right of appeal in respect of criminal proceedings is contained in Article 2 of Protocol 7 to the Convention). The precise manner in which Article 6 applies to appeal hearings depends on the special features of the proceedings involved. Thus, the question of whether a civil litigant is entitled to be heard at appeal hearings, or whether a person convicted of a crime should be entitled to a hearing at appeal level, depends on an assessment of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (See the aforementioned **Ekbatani** case).

- In the **Ekbatani** case, the applicant was convicted following a hearing at first instance. The examination of the applicant's appeal took place in the absence of a hearing. The Court was obliged to examine the nature of the Swedish appeal system, the scope of the appeal court's powers and the manner in which the applicant's interests were actually presented and protected before the court of appeal. In this case, the court of appeal was obliged to examine questions of both law and fact, and it's main task was to make an assessment of the applicant's guilt. In such circumstances, the Court held that the question of the applicant's guilt or innocence could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant. The appeal proceedings should have thus included a full re-hearing of the applicant and the prosecution. As this was not the case, there was a violation of Article 6(1).

- In **Kremzow v Austria (1993)**, the applicant was represented by a lawyer at the hearing of his appeal against sentence, but was not himself brought to court from prison. In finding a violation of Article 6(1) in this respect, the Court made it clear that, as a general rule, an accused should always be present at first instance trial. It further held that the applicant should have been enabled to attend the hearing of his appeal against sentence, since an increase from twenty years to life imprisonment was an important issue, during the determination of which the applicant should have been able to attend. The Court emphasised that Article 6(1) requires personal attendance of the defendant, alongside his counsel, on appeal in order to assess his character and state of mind at the time of the offence and also his motive, where evaluations of this kind are to play a significant role and where their outcome could be of major detriment to him. Thus, in contrast, no issue arose under Article 6(1) by virtue of Kremzov's absence during the appeal court's consideration of his plea of nullity, since he was represented and the nature of the hearing did not require him to be there.

- In **Axen v Germany (1983)**, the applicant sued a company for damages. The hearings at first instance and on appeal were held, and the applicant participated in them. He then submitted an appeal on points of law to the Federal Court of Justice (FCJ), which examined the case in the absence of the parties and upheld the lower decisions. In finding no violation of Article 6(1), the Court noted

that there had been public hearings at first and appellate instances. It also noted that, had the FCJ been minded to reverse the lower judgment, it would have been obliged by law to hold a hearing.

Therefore, where proceedings at first instance did not involve the applicant's attendance, this may be cured at the appeal level, so long as the appeal court is entitled to rule on questions of fact as well as law. And where the applicant was heard at first instance and where an appeal or cassation court is called upon to examine only questions of law, that court of appeal or cassation may dispose of hearing an applicant in person, as long as that higher court does not foresee a reversal or significant amendment of the conviction to the applicant's detriment. The same principles apply to an appeal or cassation stage in civil cases. Thus the individual concerned should be allowed to attend where, for example, an assessment of his or her character or state of health is directly relevant to the formation of the court's opinion, as in the case of a parent seeking access to a child (**X. v Sweden (1959)** or a claimant seeking disability benefits (**Salomonsson v Sweden (2002)**), or where the higher-instance decision has reversed the lower decisions.

- In **Diennet v France (1995)**, the applicant did not participate at first instance in the context of proceedings as a result of which he was disqualified from practising medicine. The applicant appealed on points of law to the Conseil d'Etat, which held a hearing on points of law to which the applicant was invited to attend. However, the Court found a violation of Article 6(1) in that the Conseil d'Etat did not have the power to assess whether the penalty was proportionate to the misconduct. Thus the fact that hearings before the Conseil d'Etat were held in public could not remedy the defect contained in the disciplinary proceedings.

It follows from this case that, where the only avenue for appeal was by way of cassation proceedings, the right to a public hearing requires the applicant's attendance before the court of first instance. This is because courts of cassation do not always have the jurisdiction to examine both the questions of fact and law, and therefore cannot always substitute their own judgment for that of the court of first instance (Also see in this context, the **Goc v Turkey** case cited above).

The Court has held that a person can waive his right to be present at a hearing, whether criminal or civil. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (**Poitrimol v France (1993)**).

- In **Zana v Turkey (1997)**, the respondent State argued that the applicant had implicitly waived his right to be present at the National Security Court which had tried and convicted him. It based this assertion on the fact that the applicant had previously wished to defend himself in Turkish; he had been warned that if he insisted on using Kurdish, he would be deemed to have waived his right to defend himself. The applicant did not give in, and was therefore not permitted to defend himself. The trial of the offences for which the applicant was accused, took place in the local National Security Court in his absence; his lawyers were present, but the applicant was not even requested to attend the hearing. The Court rejected the respondent Government's argument; the applicant's behaviour did not signify a waiver of his right to be present at his hearing. In any event, the Court reiterated the principle that waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner.

Domestic criminal courts may try accused persons *in absentia* in certain limited circumstances. However, as such a trial will only be permitted where the national authorities can show that they used due diligence to attempt to locate the accused person and inform him of the criminal charges and the details of the trial. Further, the Court has held that trials *in absentia* will only be deemed compatible with the Convention so long as the accused may subsequently obtain, from a court which has heard him, a fresh determination of the merits of the charge. The domestic courts could refuse to grant a request for a re-trial of a person convicted *in absentia* only where it could be demonstrated that this person had been informed of the criminal proceedings against him/her

prior to such proceedings (See for example **Colozza v Italy (1985)**, **Krombach v France (2001)** and **Sejdovic v Italy (2006)**).

The applicant's right of being present in court does not, however, mean an obligation of the authorities to bring him before the court if he does not himself show sufficient efforts to participate in the proceedings. Thus where an applicant, defendant in civil proceedings, moved house and could not be traced at the address given by the plaintiffs, the Court found no fault with the fact that the domestic courts decided the case without him, given in particular that the domestic authorities had made all the necessary efforts to trace him by way of enquiries with the police as well as a newspaper announcement of the court hearing (**Nunes Diaz v Portugal (dec.)(2003)**).

The second element of the right to a public hearing is the right of effective participation. It is not thus sufficient that the criminal defendant or civil party is present in court. He or she must, in addition, be able effectively to participate in the proceedings. In **Stanford v United Kingdom (1994)**, the applicant was slightly deaf and had not been able to hear some of the evidence given at trial. The Court did not, however, find a violation of Article 6(1) in view of the fact that the applicant's counsel, who could hear all that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses.

In the aforementioned **T. and V. v United Kingdom** case, the applicants were 11 years olds at the time of their trial for the murder of a toddler. The proceedings were held in view of the excessive publicity, and there was medical evidence to show that both applicants were suffering from post traumatic stress. The Court found a violation of Article 6(1), commenting that it was highly unlikely that the applicants would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with their lawyers during the trial.

- In **S.C. v United Kingdom (2004)**, which involved an 11 year-old boy with a long history of offending who was tried for robbery, the Court found a violation of Article 6(1) on the ground that the applicant had been found to have the intellectual capacity of a child aged six to eight, and appeared to have little understanding of the nature of the proceedings or what was at stake. The Court stated that when the decision is taken to deal, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, with a child who risks not being able to participate effectively because of his young age and limited intellectual capacity, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.

The third element of the right to a public hearing is the right for the applicant to demand that the public, including the media, would be allowed to attend court proceedings. Article 6(1) requires that hearings are held in public, although it does also spell out exceptions to this general rule. The presumption will therefore always be in favour of a public hearing. The public nature of a hearing offers protection to litigants against the secret administration of justice with no public scrutiny. Further, it provides a means to maintain the confidence of the public in the administration of justice, and in the courts themselves. Visibility of justice contributes to ensuring the fairness of trials, the purpose of Article 6 which is regarded as fundamentally important in a democratic society (See the **Axen** case cited above). A public hearing also permits the press to exercise their vital role as public watchdog, the function also protected by Article 10 of the Convention. The Court has thus insisted that the right to a public hearing can only be restricted where strictly required by the circumstances, by incorporating the notion of proportionality into the consideration of the necessity of excluding the public (See the **Campbell and Fell** case cited above). Failure to hold a public hearing at first instance will not usually be remedied by an appeal, unless the appeal body has full jurisdiction.

- In the **Diennet** case cited above, the Court held that the need to protect professional confidentiality and the private lives of patients may justify holding disciplinary hearings in private. However, it stated that a private hearing could only be held where it was strictly required by the circumstances of the case. In this case, the only issue that the domestic tribunal had to consider was the applicant's method of consultation by correspondence. There was nothing to suggest that the details of any individual patient or any confidences would have been revealed during the legal proceedings. The Court went on to state that, if a risk of a breach of medical secrets had become apparent during the proceedings, it would have been open to the tribunal to exclude the public at that stage. In this case, the proceedings were been held in camera by default. There was therefore a breach of Article 6(1).

In the aforementioned **Axen** case, there was a public first instance hearing of the applicant's civil clam, but the appeal was heard in camera, pursuant to a scheme to reduce the workload of the courts. This did not violate Article 6(1) since the proceedings taken as a whole could be regarded as "public". The role of the appeal court was limited to dismissal of the appeal on points of law, thus making the decision of the first instance court final.

- In **B. and P. v United Kingdom (2001)**, the courts held hearings in private to determine the residence of children. The Court stated that proceedings concerning the residence of children were prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment. There was thus no violation of Article 6(1).

In addition, hearings held inside the confines of a prison generally exclude the public. The Court has drawn a distinction between disciplinary hearings and criminal proceedings held inside prisons. With regard to disciplinary hearings, the Court has accepted that reasons relating to security can justify private hearings; it has also held that it could not be expected that states should hold such hearings outside the prisons, since this would place a disproportionate burden on the state (See the **Campbell and Fell** case cited above). However, with regard to criminal proceedings, the Court has been more demanding. If a trial is to be held inside a prison, the Court has insisted that the national authorities take special measures to ensure that the public is informed of the trial, its whereabouts, and the fact that the public is entitled to attend.

- In **Riepan v Austria (2000)**, the applicant was tried for offences committed in prison in a special hearing room in the prison. The public was not excluded, but no steps were taken to let anyone know that the hearing would take place. The Court held that only in rare cases could security concerns justify excluding the public. It observed that a trial would comply with the requirement of publicity only if the public was able to obtain information about its date and place and if this place was easily accessible. In many cases these conditions would be fulfilled by holding the hearing in a normal courtroom large enough to accommodate spectators. The holding of a trial outside a regular courtroom, in particular in a place like a prison to which the general public usually has no access, presented a serious obstacle to its public character, and the State was under an obligation to take compensatory measures to ensure that the public and the media were informed and granted effective access. There was thus a violation of Article 6(1).

The fourth element of the right to a public hearing is the obligation for a court to make its judgment public.

- In **Pretto and Others v Italy (1983)**, the Court decided that it was not necessary for the judgment actually to be read out in open court, and that States enjoyed discretion as to the manner in which judgments would be made public. In that case the applicant complained that the judg-

ment of the Court of Cassation had not been pronounced at a public hearing. The Court of Human Rights stressed the need to take account of the entirety of the proceedings. The form of publicity to be given to a judgment had to be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1). Furthermore, although the Court of Cassation's decision had not been pronounced in open court, anyone could consult or obtain a copy of it. There was thus no violation of Article 6(1). Accordingly, the requirement of publicity of judgments under this provision may be satisfied by making judgments available in court registries or publishing them in writing.

The requirement in Article 6(1) for public pronouncement of judgments can be subject to limitations only in exceptional circumstances. In the aforementioned **B. and P. v United Kingdom** case, the Court agreed with the Government that it would frustrate the purpose of holding child residence hearings in private – namely, to protect the privacy of the children and their families and to promote justice – if judgments were freely available to the public. The Court held that the requirements of Article 6(1) were satisfied in child residence cases by the facts that anyone with an established interest could, with the leave of the court, consult or obtain a copy of the full text of the orders and/or judgments of first instance courts, and that the judgments of the Court of Appeal and of first instance courts in similar cases were routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them.

Questions:

1. In what cases the domestic law restricts participation of a party at a specific stage of proceedings?
2. Does the domestic law ensure that criminal trials held in prisons are consistent with the requirement of publicity of a hearing?
3. In what situations does the domestic law provide for exceptions to the principles of public character of a trial and judgment?

3.3.4. Specifics of fairness in criminal proceedings

Even before charges are brought against an accused, unfairness on the part of the police responsible for the investigation against him or her may be sufficient to give rise to a violation of Article 6(1).

- In **Teixeira de Castro v Portugal (1998)**, the applicant was offered money by undercover police officers to supply them with heroin. Although he had no previous criminal record, the applicant did have contacts who were able to get hold of drugs, and, tempted by the money, he complied with the officers' request. He was subsequently charged and convicted of a drugs offence. There was no evidence that the trial proceedings in themselves were unfair, but the Court held that, since the police officers appeared to have instigated the offence, which would not otherwise have been committed, from the outset the applicant was deprived of a fair trial in breach of Article 6(1). The Court contrasted the officers' actions with those of 'true' undercover agents, who conceal their identities in order to obtain information and evidence about crime, without actively inciting it; the second type of situation would not normally in itself give rise to an issue under Article 6.

Similarly, in the aforementioned **Vanyan v Russia** case, the Court found a violation of Article 6(1) in considering a "test buy" of drugs as an issue of entrapment which – while being executed not by the authorities but a third person acting as an undercover agent – was effectively organised and supervised by the police. In cases where the initiative and plans in a criminal scheme flow from the defendant, the Court will not find a breach of Article 6(1) (See **Butkevicius v Lithuania**

(dec.)(2000)). On the other hand, where the domestic law and practice have clearly disallowed entrapment, in establishing compliance of the impugned domestic proceedings with Article 6(1), the Court has concentrated on whether the defendant was afforded the procedural safeguards such as adversarial proceedings and equality of arms, and not on re-examining the relevant factual details surrounding the applicant's allegations of entrapment (See the **Edwards and Lewis** case cited above).

It is only in rare and extreme cases, such as the **Teixeira** and **Vanyan** cases cited above, that the Court considers unlawful behaviour by the police or investigators sufficient in itself to bring the trial into breach of Article 6 – as a rule, the Court does not undertake to re-examine the factual or legal findings of the domestic courts from the point of view of Article 6. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation by national law. Even if the conviction was in part based on evidence which had bee unlawfully obtained (from the point of view of the domestic procedure), this does not necessarily mean that the principle of fairness within the meaning of Article 6 was violated (See the **Schenk** case cited above). The Court has also refused on a number of occasions to find a violation of the right to a fair trial, where evidence was used, collected through electronic surveillance found by the Court to be in breach of Article 8 (**Heglas v Czech Republic (2007)**). Hence, if the domestic courts choose to accept the prosecution evidence as to the compliance of process with substantive as well as procedural domestic provisions, the Court will usually accept that decision, unless the abuse of domestic process has been fundamental or has in some way rendered the evidence against the accused completely unreliable, as in the cases about the breach of the right to silence.

In several recent cases the Court has decided that where fundamental breaches have taken place in the earlier stages of the criminal proceedings, namely evidence was collected in violation of Article 3 of the Convention, the use of such evidence at trial would lead to a violation of the right to a fair trial under Article 6. In **Harutyunyan v Armenia (2007)**, and **Gocmen v Turkey (2006)**, the applicants were convicted on the basis of confessions extracted through torture. In **Harutyunyan** the applicant was convicted of murder of a fellow serviceman in the army, on the basis of his confession and testimony by two other servicemen. It was established within the domestic proceedings that both the applicant's confession and the testimony of the two other witnesses were coerced. Though the two other witnesses confirmed their testimony later at trial and the domestic courts accepted it, the Court refused to accept such testimony, reasoning that the combination of the initial coercion and the fear of later reprisal, as the witnesses were still serving in the army, rendered such evidence unreliable.

- In **Jalloh v Germany (2006)**, the Court held that there had been a violation of Article 6, on account of the fact that the applicant was convicted of drug trafficking on the basis of evidence obtained in violation of the prohibition of inhuman and degrading treatment. The applicant was forced to take medicine that made him vomit a plastic bag, containing drugs, which was later used in evidence for his conviction. Besides holding that the use of this evidence has rendered the trial unfair, the Court also stated that there has been a violation of the applicant's right not to incriminate himself.

While the right to remain silent and not to incriminate oneself is regarded as an integral part of the right to a fair trial for the purposes of Article 6(1), it is sometimes also considered in relation to the presumption of innocence guaranteed in Article 6(2). The rationale is that this serves to protect the accused against improper compulsion by the authorities; this in turn contributes to the avoidance of miscarriages of justice and to the fulfilment of the general aims of Article 6. The right to silence therefore requires the prosecution to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression, in defiance of the will of the accused.

However, certain civic obligations to inform the authorities are acceptable from the point of view of Article 6, since they are a common feature of the States parties' legal orders, e.g. as the obliga-

tion to reveal one's identity to the police (**Vasileva v Denmark (2003)**), or the requirement to make a declaration of assets or income to the tax authorities (**Allen v United Kingdom (dec.)(2002)**).

The Court has recognised that presumptions of fact or of law operate in every legal system and that the Convention does not prohibit such presumptions in principle. However, the Convention does require States to confine such 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 (1988)**, **Vos v France (dec.)(2006)**). An automatic application of a legal presumption without a careful assessment of all the evidence would be likely to violate the presumption of innocence (**Pham Hoang v France (1992)**).

The provisions of Article 6 place, in most cases, the burden of proof on the prosecuting authorities. It requires that the trial court should not start with the preconceived idea that the accused has committed the offence charged and that any doubt should benefit the accused (See the **Barbera, Messegue and Jabardo v Spain** case cited above). As will be seen from analysis below, the burden of proof may be transferred to the accused in two specific circumstances, first, where the accused is attempting to establish a particular defence, and second where the domestic law provides for certain presumptions of law or fact. The important thing to note in this context is the fact that the Court cannot rule on the abstract compliance of legal presumptions or the shifting of burden of proof; its case-law is confined to the particular circumstances of a given case.

- In **Funke v France (1993)**, the applicant's premises were searched by customs officials. He was asked to produce a number of financial statements for the previous three years, but refused to do so. On account of his refusal, customs authorities summonsed him to a police court where he was fined, and ordered to produce the documents. The applicant claimed that this violated his right to a fair trial and to the presumption of innocence under Articles 6(1) and (2). The Court held that the special features of customs law cannot justify such an infringement of the right of anyone "charged with a criminal offence", to remain silent and not to contribute to incriminating himself. There was thus a violation of Article 6(1). The Court decided that it was not necessary to consider the same issue from the point of view of Article 6(2).

- In **Saunders v United Kingdom (1996)**, the applicant was the subject of investigations conducted by inspectors appointed by a government ministry, in relation to a business take-over. In accordance with the relevant domestic provisions, the applicant was compelled to co-operate with the inspectors. Refusal to co-operate would have resulted in contempt of court proceedings and a period of up to 2 years' imprisonment; there was no defence that co-operation would have led to statements of an incriminating nature. He was interviewed nine times. Subsequently, the national authorities decided to bring criminal proceedings against the applicant, among others; the statements he made under compulsion were passed to the prosecution service and later read out in open court during trial. The Court stated that what was of the essence in this context was not the precise content of the statements, but the use to which evidence obtained under compulsion was made at the trial. The Court noted that considerable reliance was made on the statements by the prosecution during the trial. The Court stated that this strongly suggested that the prosecution must have believed that the reading of the transcripts assisted their case in establishing the applicant's dishonesty. In other words, the statements were used in the course of the proceedings in a manner which sought to incriminate the applicant. The Court further held that public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. There was a violation of Article 6(1).

- In **J.B. v Switzerland (2001)**, the applicant was the subject of tax evasion proceedings brought by a tax authority, which requested him to submit all documents in his possession relating to investments in a number of companies. He admitted that he had made investments without

properly declaring the income, but he refused to submit the documents requested. As a result of his continuing refusal, three separate disciplinary fines were imposed on him, totalling 3,000 Swiss francs. The Court held that, given the amount of the fine imposed and its punitive character, the proceedings could be characterized as "criminal" for the purposes of Article 6(1). It appeared that the authorities were attempting to compel the applicant to submit documents which would have provided information about his income and thus his liability to tax, and it could not be excluded that the documents would have provided evidence which could have been used against the applicant in a prosecution for tax evasion. The fines imposed for non production of possibly incriminating documents violated the right to silence and the privilege against self incrimination, included in the right to a fair trial under Article 6(1).

- In **Khan v United Kingdom (2000)**, the police had installed a hidden listening device in a hotel and obtained a recording of the applicant discussing a drugs deal. At the time of the investigation and trial there was no legislation in the United Kingdom governing the use of such apparatus by the police; in consequence, the Court found that Article 8 of the Convention had been violated. It declined, however, the applicant's invitation to find that Article 6(1) had also been breached by virtue of the unlawful methods employed during the investigation. Instead, the Court examined the fairness of the proceedings as a whole and found no violation of Article 6(1), referring to the fact that the applicant had had the opportunity to contest the authenticity of the recording and its admission in evidence. It reached a similar conclusion in **Schenk**, where the obtaining of a tape recording by the police was unlawful not only according to the Convention, but also under domestic law.

- In **Allan v United Kingdom (2002)**, the applicant was suspected of shooting the manager of a convenience store during a robbery. During his interviews with the police he elected to remain silent. The police began secretly recording the applicant's conversations in prison with his girlfriend and co-accused, and then put the applicant in a cell with a long-standing informant. After four months of shared custody, the informant was able to produce a 60-page statement regarding his conversations with the applicant, which was used at the latter's trial for murder. The Court, following its **Khan** judgment, that the use at trial of the secret recordings of the applicant's conversations did not as such breach of Article 6(1). However, the admissions made by the applicant to his informant cell-mate, which formed the main or decisive evidence against him, were not spontaneous and unprompted statements but were induced by persistent questioning. This was ruled by the Court to amount to a *sui generis* interrogation by the informant, without any of the safeguards which would attach to a formal police interview, including the attendance of a lawyer solicitor. The Court concluded that the information gained by the informant had been obtained in defiance of the applicant's will and its use at trial impinged on his right to silence, in violation of Article 6(1).

The right to silence in the domestic laws of some countries is not absolute. Thus, in England and Wales, the right to silence is qualified, to the effect that if a suspect remains silent during questioning, and later in his defence, relies on a fact that he failed to mention during questioning, the judge is entitled to direct the jury that it may draw adverse inferences from such silence; the suspect must be informed of his right to qualified silence and an explanation must be given as to the possible consequences of the exercise of the right to silence. The Court has accepted that it is consistent with the right to silence for national courts to take into account the silence of the accused in assessing the persuasiveness of the evidence adduced by the prosecution. Thus, for example, the fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused's silence either during police interview or during his trial, cannot of itself be considered incompatible with the requirements of a fair trial.

However, given the importance of the right to silence and the privilege against self-incrimination which lie at the heart of a fair procedure, particular caution is required before a domestic court can invoke an accused's silence against him (**Beckles v United Kingdom (2002)**).

- In **Condron v United Kingdom (2000)**, the Court emphasised that particular caution is also required in circumstances where an accused person has been denied access to a solicitor for a period of time, and where interviews are conducted prior to the accused receiving legal advice, in which incriminating matters are put to the accused who refuses to comment. Weight should be given by the domestic court to the fact that an accused was advised to remain silent by his solicitor. There may be good reasons why a solicitor would advise an accused person to remain silent, such as being unfit through drugs or alcohol etc. It would not be consistent with Article 6(1) for a domestic court to base a conviction solely or mainly on an accused's silence, or refusal to answer questions or to give evidence at trial.

Whether or not drawing adverse inferences from silence is consistent with the right to silence in any given case, must be assessed in the light of the circumstances of each individual case. The Court has regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence, and the degree of compulsion inherent in the situation. Particularly relevant in this context are the directions the judge gives to the jury concerning the inferences that may be drawn.

- In **Telfner v Austria (2001)**, the applicant was convicted of a hit-and-run driving incident. The victim of the incident had been able to give the police the make and registration number of the car, but could not identify the driver. The applicant gave no evidence at trial, and the prosecution case relied almost entirely on the findings of the police that the applicant was the principal user of the car. The Court held that in the instant case the evidence for the prosecution was extremely weak. In requiring the applicant to provide an explanation, without having first established a convincing *prima facie* case against him, the courts in effect shifted the burden of proof from the prosecution to the defence, giving rise to a violation of Article 6(2).

At the same time, the Court found no violation of Article 6 where an applicant, owner of the car established by radar to have exceeded the speed-limit, was not himself prosecuted for speeding, but was only fined as a result of having wrongly indicated an address of a third person who had allegedly driven the car at the time (**Weh v Austria (2004)**). The Court found also no violation of Article 6 in cases involving speeding offences, where the defendants were forced to identify the driver of the car they owned or risk being prosecuted (**O'Halloran and Francis v United Kingdom (2007)**).

- In **John Murray v United Kingdom (1996)**, the Court found that it was compatible with Article 6(1) for the trial judge to draw an inference of guilt from the fact that the applicant had remained silent under police questioning and at trial. The evidence against him was strong, and he had been warned at the time of his arrest that he did not have to say anything, but that his failure to mention any fact which he subsequently relied on in his defence might be treated in court as supporting the case against him.

- In the aforementioned **Salabiaku v France** case, the Court was asked to consider the compatibility with Article 6(2) of a law reversing the burden of proof in respect of certain elements of an offence. The applicant had been found in possession of illegal drugs at a Paris airport. He was not, however, charged with and convicted of an offence of simple possession, but instead with offences of smuggling and importation, which include an element of knowledge or intent. The French Customs Code setting out the offences stated generally that "the person in possession of contraband goods shall be deemed liable for the offence". The Court held that Article 6 placed a duty on legislators to respect the rights of the accused when framing offences. It found that the presumption created by the Code and applied to the applicant was not irrebuttable, since the courts which had dealt with the applicant had followed case-law to the effect that once the fact of possession had been established by the prosecution, the burden shifted to the defence to prove, if they could, that the accused was the victim of "force majeure" or for some reason could not have been expected to know about the goods in his possession, in which case he would have been acquitted. The courts

had examined all the evidence, including evidence that the applicant had shown no surprise when the drugs were discovered in his suitcase, and had found him guilty without relying on the statutory presumption. In these circumstances, there was no violation of Article 6(2).

In the aforementioned **Beckles** case, the applicant was arrested, tried and convicted of robbery, false imprisonment and attempted murder. The applicant told the police that the victim was not pushed, but rather that he jumped. He thereafter remained silent upon his lawyer's advice, and was convicted partly as a result of the jury drawing inferences from that. The Court noted that the applicant had been ready to speak, but that the police had advised him to wait until he was interviewed at the police station, and his solicitor advised him not to answer questions during the interview. The Court was concerned that the judge did not draw the jury's attention to these facts. The Court also noted that the applicant's defence had not wavered from the moment he was arrested, until his trial; he did not rely on new facts at trial. For the Court, these were matters that went to the plausibility of the applicant's explanation and which, as a matter of fairness, should have been built into the direction in order to allow the jury to consider fully whether the applicant's reason for his silence was a genuine one, or whether, on the contrary, his silence was in effect consistent only with guilt and his reliance on legal advice to stay silent merely a convenient self-serving excuse. The Court also noted that the judge invited the jury to reflect on whether the applicant's reason for his silence was "a good one" without also emphasising that it must be consistent only with guilt. The Court concluded that the jury should have been reminded of all of the relevant background considerations and directed that if it was satisfied that the applicant's silence at the police interview could not sensibly be attributed to his having no answer or none that would be stand up to police questioning, it should not draw an adverse inference as to his guilt. The jury's discretion on this question was not confined in a manner compatible with the exercise by the applicant of his right to silence at the police station. There thus was a violation of Article 6(1).

It follows from these cases that Article 6 requires the prosecution at least to establish *prima facie* that the accused has committed an offence, and that it is permissible for a court to draw an inference of guilt from the accused's failure to provide an explanation only where this is the sole common sense conclusion to be drawn.

The Court has also emphasised in the context of criminal cases that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion, and, consequently, a tribunal called upon to decide the guilt of an accused. At the same time, the Court has noted notes that the press coverage of current events is an exercise of freedom of expression guaranteed by Article 10 of the Convention. If there is a virulent press campaign surrounding the trial, 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. At the same time, no general breach of "fairness" under Article 6(1) has been found by the Court to this date simply on account of the excessive media coverage of any criminal case, even where that press campaign involved public statements from certain High State officials which were eventually considered by the Court to breach the applicant's presumption of innocence under Article 6(2) (see the aforementioned **Butkevicius v Lithuania (dec.)**, and also the judgment in that case in 2002). The major consideration in the Court's opinion in assessing whether the domestic courts were able to sustain inappropriate pressure by the media and remain unbiased, is whether the judges that decided the merits of the case were professional judges (trained lawyers) or civilian jurors, the latter being considered to be much more likely to succumb to the pressure of the public opinion and develop a prejudice vis-à-vis the defendant Article 6(1).

In certain exceptional cases the Court has also examined the question whether Article 6 can impose an obligation on the State to refrain from deporting or extraditing an individual to a country where he could face "a flagrant denial of a fair trial" in a criminal case. In one recent case on

the matter, **Mamatkulov and Askarov v Turkey (2005)**, the Court found no violation of Article 6 where the applicants, after being extradited from Turkey to Uzbekistan on terrorism charges, were eventually convicted in private without access to legal representation. In finding no fault with the Turkish authorities' extradition decisions, the Court noted that at the time of the extradition there was no sufficient evidence to foresee what would have awaited the applicants in Uzbekistan. Similarly, the Court found no violation in the case of the extradition to the United States of a person on terrorism charges. The Court took into account the assurances received by the German authorities that the applicant would not be detained in a detention facility where he could be kept indefinitely without access to lawyer and due process (**Al-Moayad v Germany (dec.)(2007)**).

In sum, with regard to the assessment of "fairness" of criminal proceedings within the meaning of Article 6(1), what is important is not the compliance by the domestic authorities with the formal rules of domestic process in collecting and handling the evidence, but the lack of indication that the use of that evidence for conviction breached the autonomous principles of "fairness" within the meaning of Article 6 – adversarial proceedings, equality of arms, as well as the absence of entrapment and undue pressure to renounce the right to remain silent.

Questions:

1. Is entrapment prohibited by the domestic law? If so, is there a specific test to establish entrapment in the domestic legal practise?
2. To what extent is the right to silence protected by the domestic law?
3. Does a qualified right to silence exist in domestic law? If so, what protection is given to the accused to guarantee a fair trial?

3.3.5. A reasoned judgment

The right to a fair hearing includes the requirement that a court give reasoned judgments. This right is rooted in a more general principle embodied in the Convention, which protects an individual from arbitrariness. This right does not require detailed answers by the domestic courts to every argument raised by the parties. However, the courts' answer should be sufficient to reply to the essential element of a person's factual or legal claim.

- In **Ruiz Torija v Spain (1994)**, in civil proceedings concerning termination of lease, the court of first instance ruled in favour of the applicant. The lessor appealed; the appeals court failed to address the applicant's argument that the lessor's claim was time-barred, and found for the lessor. The Court noted that the question whether the action was time-barred fell within a completely different legal category from that of the grounds for termination of the lease; it therefore required a specific and express reply. There was therefore a violation of Article 6(1).

- In **Hiro Balani v Spain (1994)**, the applicant was involved with a foreign company in a dispute over a trademark. The applicant stated *inter alia* that her trademarks were "established" and had priority over the foreign company's trademarks. The court of first instance ruled in favour of the applicant, addressing only the first argument that the applicant's trademark was "established". The appeal court reversed this judgment and ruled in favour of the company, without addressing the applicant's argument concerning priority. The Court considered that, in the absence of a reply by the Spanish courts, it was impossible to ascertain whether the appeal court simply neglected to deal with the applicant's submission, or whether it intended to dismiss it and, if that were its intention, what were its reasons for so deciding. Article 6(1) was thus violated in this regard.

- In the aforementioned **H. v Belgium** case, the applicant was struck from the roll of the Bar. The relevant rules enabled a person to claim re-admission after 10 years had elapsed and where he could prove that "exceptional circumstances" applied. The applicant applied for re-admission but was refused. The domestic decisions simply noted that he had failed to demonstrate "exceptional circumstances", without explaining that notion in detail. The Court noted that the lack of precision in the rules meant that it was very difficult for the applicant to adduce evidence as to the "exceptional circumstances" possibly pertaining to him. The national case-law did not contain reasoned decisions on the matter. In finding a violation of Article 6, the Court concluded that the lack of precision made it all the more necessary to give sufficient reasons for refusing the applicant's readmission to the bar.

- In **Hirvisaari v Finland (2001)**, in the context of proceedings for entitlement to a disability pension, the applicant's action was partly accepted by the mere reference to the relevant provisions of law, indicating the general conditions under which an employee is entitled to receive pension. In the second part of the reasoning the domestic decision briefly referred to the applicant's deteriorating state of health, but considered the condition too mild to entitle him to the pension. The Court noted that, while this brevity of the reasoning would not necessarily as such be incompatible with Article 6, in the circumstances of the present case the decision failed to satisfy the requirements of a fair trial. In view of the fact that the applicant had earlier received a full invalidity pension, the reference to his deteriorating state of health in a decision confirming his right to only a partial pension must have left the applicant with a certain sensation of confusion. In these circumstances the reasoning could not be regarded as adequate. Nor was the insufficiency of the decision's reasoning corrected on appeal, which simply endorsed the lower decision. There was thus a violation of Article 6(1).

In a number of recent judgments the Court found violations of Article 6, because of the failure of the domestic courts to address essential elements of the case they were hearing. Thus in **Kuznetsov and Others v Russia (2007)**, the Court was critical of the domestic courts, which found that the police authorities had stepped into a hall, where Jehovah Witnesses were having a religious meeting and that the meeting did not continue afterwards, but failed to give any reasons for their finding that there was no causal link between the actions of the police and the termination of the meeting. In **Tatishvili v Russia (2007)**, the domestic courts failed to respond to the applicant's arguments that she was not a Georgian citizen and was not required to obtain a visa, but simply reaffirmed those claims without reference to the effective laws. And in **Boldea v Romania (2007)**, the Court found a violation of Article 6 in the court proceedings against the applicant, in which the applicant was charged with libel for accusing a colleague of plagiarism. The domestic courts fined the applicant stating that he acted in bad faith, without analyzing the texts submitted in evidence and without taking into account the legislation of copyright and related rights.

- In **Garcia Ruiz v Spain (1999)**, also in the context of civil proceedings, a first instance judge took into account in his decision the defendant's statements denying the facts alleged by the applicant in his claim to be paid for certain services. The judge held that the evidence of a witness called by the applicant was not conclusive and ruled that the applicant had not proved that he had performed the services for which he was claiming a fee. The applicant appealed. The appeals court stated that it accepted and deemed to be reproduced in its own decision the statement of the facts set out in the judgment at first instance, thus ruling that the applicant had not proved his claim. The appeals court then went on to say that it likewise endorsed the legal reasoning of the impugned decision. The case was thereafter upheld by the Constitutional Court by reference to the lower courts' findings. The Court noted that the applicant had the benefit of adversarial proceedings. The factual and legal reasons for the first-instance decision dismissing his claim were set out at length. The Court found no fault with the proceedings simply on the ground that the higher courts endorsed the first instance decision without stating any additional reasons. There was no breach of Article 6(1).

While it is established that the domestic court must state a reason or a number of reasons clearly required to answer the essential arguments of the parties, the applicant is not empowered to complain about the inadequacy of that reply from the point of view of the domestic substantive or procedural law. Nor does Article 6(1) specify that the reasons given in a judgment should always be submitted in a written form or at a certain time – for example, it is perfectly acceptable for a first instance court to pronounce reasons for a decision some time after its adoption, as long as this does not deny the applicant's right to effectively exercise his right to lodge an appeal (See the **Hadjianastassiou** judgment and **Jodko** decision cited above, also see chapter 3.1.1.). Hence, if a court gives reply to the main arguments submitted by the parties, then the requirements of Article 6(1) will, as a rule, be satisfied, even if the judgment does not deal specifically with one point considered by the applicant to be material. In any event, any failure of the first instance court to indicate sufficient reasons may be put right on appeal. Finally, the appeal and cassation courts are not prohibited by Article 6(1) from endorsing a first instance decision without stating any additional arguments in support, provided that the lower decision itself is reasoned.

Questions:

1. In what circumstances does the domestic law permit exceptions to the right to a public hearing?
2. Does the domestic law provide for the right to public pronouncement of judgments?

3.4. Trial within a reasonable time

The right to a trial within a reasonable time applies to both civil and criminal cases.[1] The purpose of this provision is to protect civil litigants and criminal defendants against excessive delays in legal proceedings, and to underline the importance of "rendering justice without delays which might jeopardise its effectiveness and credibility (**H. v France (1989)**). The question of what period of time is "reasonable" is judged in each case according to its particular circumstances. In making the assessment of reasonableness, the Court has regard to three issues, namely the complexity of the case, the conduct of the applicant, and the conduct of the state authorities. The Court examines the three issues separately, and then considers whether at certain stages, or overall, there have been excessive delays.

As to the length of time which may be "reasonable", it is not possible to derive more than the most general guidance from the case-law, since each case depends on its own circumstances, namely the above mentioned factors. It also depends on the nature of the proceedings as well as the number of instances involved. Some of the periods considered by the Court have lasted many years. Violations have been found, for example: where proceedings relating to the withdrawal of the rights to run a clinic and to practice medicine lasted nearly eleven and seven years respectively (See the case cited above), where criminal proceedings lasted almost ten years in a single instance (**Milasi v Italy (1987)**) or thirteen years including appeal proceedings (**Baggetta v Italy (1987)**), or where civil proceedings lasted ten years (**Capuano v Italy (1987)**). In such cases it may be almost self-evident that a reasonable time has been exceeded. In **Capuano,** for instance, the Court found it unnecessary to make a detailed scrutiny of appeal proceedings which had lasted four years, observing that such a lapse of time in itself appeared excessive and followed earlier stage of proceedings which had already lasted too long. Closer scrutiny may be required of lesser periods, where the criteria mentioned in the chapters below becomes of paramount importance in establishing whether or not the length of proceedings was excessive within the meaning of Article 6(1).

1. There is an additional guarantee for those detained pending criminal trial, contained in Article 5(3); see *INTERIGHTS, The Right to Liberty and Security under the European Convention on Human Rights.*

The Court is called upon to determine more complaints about the unreasonable length of proceedings than any other type of case under the Convention. In **Bottazzi v Italy (1999)**, the Court even observed that the frequency with which violations of this provision were found against Italy reflected a continuing situation that had not been remedied, constituting a practice of systematic human rights breaches incompatible with the Convention. In **Kudla v Poland (2000)**, the Court went even further by establishing the principle that the domestic law should guarantee a separate legal procedure giving an effective remedy with regard to a complaint about the protracted length of proceedings, the failure of the national legislation to guarantee such a remedy itself amounting to a violation of Article 13.

Where countries have adopted domestic procedures, in line with the Article 13 finding of the Court in **Kudla**, the Court has insisted that the damages awarded for violation of the right to a fair trial within reasonable time should be in line with the damages awarded by the Court itself in similar cases. Thus, in **Cocchiarella v Italy (2006)**, and nine other Italian cases, the applicants, complained of what they considered to be a derisory amount of compensation for the unreasonable length of proceedings. They have all applied to the Italian courts for compensation under the Pinto Act complaining of the excessive length of civil proceedings to which they had been parties. In all these cases the Italian courts found that the proceedings had exceeded the reasonable time and awarded the applicants compensation ranging from EUR 1,000 to EUR 5,000. In finding a violation of Article 6, the Court noted that, in these nine cases, the amounts awarded by the Italian courts were a minimum of 8% and a maximum of 27% of what it awarded generally in similar Italian cases. The Court has followed the same approach in a case coming from Croatia, finding a violation where the compensation awarded by the Constitutional Court for excessively lengthy proceedings was significantly lower than amounts awarded by the European Court in similar cases (**Tomasic v Croatia (2006)**).

3.4.1. Cases requiring special diligence

Some types of proceedings will be required to be conducted more speedily than others. For example, criminal proceedings, given what is at stake for a defendant, are normally required to be conducted with particular expedition. The same applies with regard to care proceedings, where the passing of time may have the effect of determining the central issue of the best interests of the child. The Court has also adopted a strict interpretation of what amounts to a reasonable time in a number of other types of cases where, for a variety of reasons, speed is of the essence.

- In **H. v United Kingdom (1987)**, the case involved the proposed adoption of the applicant's child. The Court noted that the case was fairly complex, given the fact that there were several parties involved, namely the applicant, her husband and the prospective adopters. After having considered all the relevant factors, the Court stated that cases involving the care of children call for exceptional diligence, since there is always a danger that any procedural delay will result in the de facto determination of the issue, and had a particular quality of irreversibility.

- In **X. v France (1992)**, the applicant was a haemophiliac who died one month prior to the Court's judgment. He had undergone a number of blood transfusions and had contracted HIV as a result of receiving infected blood. X applied for compensation against the state authorities. By the time the case was examined by the Court, the domestic legal proceedings had lasted more than two years. The Court held that although the State authorities had not caused undue delays, they should have acted with exceptional diligence, given that the applicant had a greatly reduced life expectancy as a result of his illness. The Court noted that the national authorities failed to use powers available to it to speed the progress of the legal proceedings. The Court found a violation of Article 6(1).

- In **Martins Moreira v Portugal (1988)**, the applicant was seriously injured in a car accident. He brought proceedings against the person who was responsible for the accident. The Court held that special diligence was required in proceedings to determine compensation for victims of road traffic accidents. The Court found a violation in view of various unjustified delays on the part of the authorities (also see chapter 3.4.4. below).

3.4.2. Period to be taken into consideration

In civil proceedings, the period to be taken into account for the purpose of length of proceedings normally begins to run from the date of initiation of court proceedings concerning the determination of a dispute relating to civil rights and obligations, such as the date of the filing of a civil action by an applicant. However, in some cases, time will run from before the issue of a writ commencing proceedings (See the **Golder** case cited above).

In the above-mentioned case, which concerned the withdrawal of licence to practice medicine, the applicant was barred by a statute from seizing the competent court pending certain preliminary proceedings before an administrative authority. The Court held that, for the purposes of determining the reasonableness of the length of proceedings, time ran from the date that the applicant lodged an objection against the withdrawal of his licence, rather than a later date on which he was finally allowed to file a complaint with the courts.

In criminal proceedings, time runs from the moment a person is "charged". The word "charge" for the purposes of Article 6(1) also does not mean the moment of a formal charge brought under the domestic criminal procedure. Rather it starts on the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened indicating that person as a suspect. Thus the word "charge" means the official notification given to an individual by the competent authority of an allegation that he may have committed a criminal offence". The Court has also interpreted the word charge to include "other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect" (**Eckle v Germany (1982)**).

Time runs, in respect of civil and criminal proceedings, until the date of the final determination of the issue at stake. This will normally include the completion of appeal and even constitutional proceedings where they attract application of Article 6(1), that is where those review proceedings can directly affect the outcome of a case (**Buchholz v Germany (1981)**, also see chapter 2.4. above).

3.4.3. Complexity of the proceedings

"Complexity" of the case concerns primarily numerous factual circumstances to be determined, such as a vast number of charges to be determined in a criminal case joining various alleged offences (**Vaivada v Lithuania (dec.) (2005)**). At the same time, a case can be considered complex as a result of legal complexity of the proceedings which may arise, for example, from the task of the domestic courts to apply a fresh piece of legislation (See the **Pretto** case cited above). Where the impugned proceedings have been established as complex, the Court as a rule will allow a longer period of time for the authorities to finalise the case.

In the above-mentioned **Ringeisen** case, the Court held that five years and two months was not excessive time in a complex fraud case. In the **Pretto** case cited above, the Court considered a period of some three and a half years in civil proceedings, which had already lasted some two years before the right of individual petition became effective for Italy. It held that although there had

been some avoidable delays on the part of the authorities, they were not sufficient to give rise to a breach of Article 6(1).

By contrast, the Court has found a breach of Article 6(1) in a number of cases involving similar or shorter periods in cases that were not deemed to be complex. In **Zimmermann and Steiner v Switzerland (1983)**, a rather short period, three and a half years, was held to be excessive for an administrative law appeal at a single instance where adequate steps had not been taken to deal with a backlog of cases (also see chapter 3.4.4. below). Three years and ten months at first instance in a civil action was held excessive where there had been two periods of near inactivity on the part of the authorities, totalling some two years (**Guincho v Portugal (1984)**). In a case concerning adoption and parental access, two years and seven months including appeal proceedings was held excessive when there had been eight months delay by a local authority in filing evidence (See the **H. v United Kingdom** case cited above).

3.4.4. Conduct of the parties

Not all delays are attributable to the State authorities. In some instances, litigants or accused persons themselves are the cause of a deliberate or negligent delay. The applicants can cause delay either deliberately, or as a result of taking maximum advantage of all legal avenues available. Where delays are caused by a litigant or defendant, they are not taken into account for the purposes of calculating reasonableness of the length of proceedings from the point of view of Article 6(1). Hence, only delays which are attributable in some way to the State are relevant for the purposes of Article 6 **(**See the **H. v United Kingdom**). If a public authority is a party to the proceedings, delays on its part in (for instance) filing evidence, this will be attributable to the State which will be responsible for them under Article 6 (See the **Baraona** case cited above). Where a private party has caused delay, the State will not be directly responsible but questions may still arise as to whether the court has taken proper steps to expedite the proceedings or whether (for instance) it has extended time-limits excessively or without good reason and so allowed them to exceed a reasonable time. The fact that the parties to a civil case are responsible for the conduct of the proceedings does not absolve the judicial authorities from ensuring the expeditious trial of the action (See the **Guincho** case cited above).

Thus State authorities are responsible for delays such as granting of adjournments, where as a result of the adjournment proceedings are protracted in an unnecessary manner. Where adjournments are necessary, they should be granted in order to cause the least possible delay. Thus the suspension of proceedings to await the outcome of other related proceedings or a test case is acceptable in principle under Article 6(1) (**Zand v Austria (1978)**). It is as a rule acceptable to suspend certain charges against an accused while other more serious charges are proceeded with, or adjourn a case pending the determination of constitutionality of a certain law before the constitutional courts.

- An example of a number of types of delays attributable to the authorities can be found in the above mentioned **Martins Moreira** judgment, where the Court noted various delays attributable to the national courts, including a three-month delay between hearing the applicant and giving a preliminary decision, and a four-month delay in acceding to the applicant's request for a medical opinion. Other delays included an eight-month delay between the applicant lodging an appeal and the date of the file being transmitted to the registry of the appeal court. The Court noted that the domestic courts were suffering from large case-loads that were part of a structural problem. However, it also noted that nothing had been done to address these problems. Other delays resulted from the process of acquiring medical reports; it took two years to carry out three medical examinations. The Court stated that since the medical institutions were public bodies, and since they were prevented from acting swiftly owing to a lack of resources, the national authorities were responsible for these delays too. And in any event, the courts had overall responsibility for ensur-

ing the speedy conduct of all stages of the proceedings. The Court concluded that there had been a violation of the right to a trial within a reasonable time, contrary to Article 6(1).

- In the aforementioned **Zimmermann and Steiner** case, the applicants' appeal took three and a half years to be processed by the appeals court. The Court noted that during this period of time the appeals court was experiencing a backlog. The national authorities treated it as a temporary problem and took some measures to address it. However, while the appellate court recognised the existence of a structural problem and was willing to take steps to remedy the situation, the measures adopted by the legislature, namely voting for an increase in the number of judges from 28 to 30, and the number of registrars and secretaries from 24 to 28, were insufficient to meet the need. The Court noted that the number of cases continued to increase as the volume of litigation continued to grow. The time lapse of three and a half years to process a case through the level of appeal jurisdiction was found by the Court to be excessive. Accordingly, there was a violation of Article 6(1).

The Court has thus recognised that national courts do from time to time, experience backlogs. It takes the view that a temporary backlog will not engage the responsibility of the State, so long as steps are taken in order to address the problem. Such steps may include choosing to deal with cases based on their urgency and importance and, in particular, on what is at stake for the persons concerned. At the same time, if delays are prolonged and are evidence of structural problems, then more stringent measures to address the situation will be required, and such a delay may be regarded as unjustified by the Court (See the **Zimmermann and Steiner** case cited above). The rationale for this is that the Contracting States are required by the Convention to organise their legal systems so as to ensure compliance with Article 6(1) (A long series of Italian cases illustrates this point. See for example, **Salesi v Italy (1993)**).

In another case, the Court found that a duration of some two and a half years at first instance until the sentence was pronounced was acceptable in a fraud case of some complexity, but that a breach of Article 6 arose from the fact that the trial judge then took thirty-three months to produce his full judgment, without which an appeal could not proceed (**B. v Austria (1990)**).

Questions:

1. Does the domestic law guarantee an efficient remedy against the protracted legal proceedings?
2. Are sufficient measures taken by the domestic authorities to meet the demands of reducing the backlog of cases pending before the courts?

4. THE PRESUMPTION OF INNOCENCE – ARTICLE 6(2)

Article 6(2) provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". It thus provides for the presumption of the innocence of the accused in criminal proceedings. This provision applies in terms only where a person is "charged with a criminal offence". The right to the presumption of innocence governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution; but it is not restricted to the examination of the merits of a charge (**Minelli v Switzerland (1983)**). In addition, the principle of the presumption of innocence may apply in some kinds of civil cases, as for instance in professional disciplinary proceedings (**Agosi v United Kingdom (1986)**), civil proceedings for damages as a result of an acquittal (**Lutz v Germany (1987)**) or stay of proceedings where a criminal prosecution is time-barred but an accused is requested to pay costs (See the **Minelli** case cited above). Where the compensation proceedings are a consequence and the concomitant of the criminal proceedings, Article 6(2) will apply (**Ringvold v Norway (2003)**).

To the extent that the question of the respect of the presumption of innocence may also arise as a result of the shifting of burden of proof or inferences drawn in the conviction from the fact of the defendant remaining silent, the Court examines such cases under the general notion of fairness of proceedings under Article 6(1), as discussed above (see chapter 3.3.4.). Cases of confiscation of criminally derived property have been considered by the Court, however, under Article 6 (2). In a number of cases the Court treated the confiscation proceedings following from a conviction as part of the sentencing process and therefore beyond the scope of Article 6(2) (**Phillips v United Kingdom (2001)**, and **Van Offeren v Netherlands (dec.) (2005)**). The Court relied in these cases on the fact that the applicants were convicted, that they continued to be suspected of additional drugs offences, and that it could be reasonably presumed that assets were obtained through illegal activity and the applicants failed to provide a satisfactory alternative explanation. However, in **Geerings v Netherlands (2007)**, the Court held that there was a violation of Article 6 (2) as a result of the confiscation of property following on from criminal proceedings. The applicants have been convicted of numerous counts of theft, burglary and attempted burglary, deliberately handling stolen goods and membership of a criminal gang. The judgment was later quashed on appeal and the applicant acquitted of all the charges against him except for one theft, but the appeal court still issued a confiscation order, stating that there were strong indications that the applicant committed the crimes. The Court reached the conclusion that the presumption of innocence was violated, as following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

In view of a separate complaint under Article 6(2), the Court focuses its attention not on the entirety of the proceedings (as the Court does in the context of a complaint under Article 6(1) of the Convention) to see the effects of a certain procedural act on the applicant's conviction, but on a specific statement or statements made by the State officials with regard to the question of the applicant's guilt. The onus is on whether the context, wording and meaning of a particular statement, in its own right, is sufficient to amount to a premature finding of guilt in breach of Article 6(2).

The obligation to respect the presumption of innocence is placed by the Convention not only on judges and court, but on any public official.

- In **Allenet de Ribemont v France (1995)**, an MP was murdered, and the applicant was one of a number of persons arrested for the murder. Shortly after the arrests, a televised press conference took place involving the Minister of Interior and two senior police officers. During the press conference, a number of questions were posed, leading these public figures to state that all the people involved in the murder had been arrested, and that the applicant was one of the instigators of the murder. The Court held that Article 6(2) cannot be interpreted as preventing the authorities from informing the public about criminal investigations in progress. However,

it requires that the authorities do so with the discretion and circumspection, in order to protect the presumption of innocence. The Court held that the statements of some of the highest ranking police officers to the effect that the applicant was one of the instigators of the crime were made without any qualification or reservation. This amounted to a clear declaration of guilt which encouraged the public to believe him to be guilty and also prejudged the assessment of the facts by the competent courts. This violated the presumption of innocence contained in Article 6(2). Similarly, the Court has found a violation of Article 6(2) in regard to unequivocal declarations of guilt made by judges, parliamentarians and prosecutors while giving interviews to the press about a criminal case (See the **Lavents** and **Butkevicius** judgments cited above).

- In **Daktaras v Lithuania (2000)**, the applicant was arrested and charged with a number of offences. His lawyer applied to the prosecutor with a request that the criminal proceedings be discontinued on the ground of lack of evidence. The lawyer asserted that the evidence in the case-file failed to "prove" his client's guilt. The prosecutor replied in writing, rejecting this submission, stating that the applicant's "guilt was proved" by the evidence collected in the course of the pre-trial investigation. The Court reiterated that the prosecutors should be very careful in the choice of words regarding a person who has not been tried and found guilty of an offence, particularly concerning a legal system where the prosecutor performed a quasi-judicial function when ruling on the applicant's request to dismiss the charges at the stage of the pre-trial investigation, over which he had full procedural control. However, the Court noted that the statement was not made in an independent and public context such as a press conference, but as part of a reasoned decision at the preliminary stage of the criminal proceedings. Further, the prosecutor's choice of words echoed the defence lawyer's assertion that the evidence did not "prove" his client's "guilt". While the Court found this choice of words ("guilt" and "proved") to be "unfortunate", it was not sufficient to amount to a violation of Article 6(2) because, in employing those words, both parties were arguing as to whether there was sufficient evidence for the applicant's criminal case to proceed to trial, not as to whether the applicant's guilt was established by law. In this case the Court emphasised that the context as well as meaning of a particular statement, and not only its wording, should be taken into account in establishing whether that statement was compatible with the requirements of Article 6(2).

- In **Bohmer v Germany (2002)**, the applicant was sentenced to two years' imprisonment, the execution being suspended on probation. Later, in the context of fresh criminal proceedings pending in relation to other alleged offences of the applicant, al court revoked the suspension of the original sentence on the ground that the applicant had committed further crimes in breach of his probation. The Court held that, in revoking the suspension of the sentence on this ground, the court unequivocally declared that the applicant was guilty of a criminal offence in the pending set of criminal proceedings. The Court emphasised that the presumption of innocence excludes a finding of guilt for an offence outside the criminal proceedings before the court competent to establish the commission of that particular offence. There was a violation of Article 6(2).

It is important to note that even when statements are made at the early stage of criminal proceedings whereby the presumption of innocence is breached, this fault can still be made good by the domestic authorities so that the subsequent trial may be acceptable from the point of view of Article 6.

- Thus in **Arrigo and Vella v Malta (dec.)(2005)**, the Prime Minister made unequivocal statements about their guilt during a press conference called on the same date when the applicants were charged. Upon the applicants' request, the Constitutional Court found a breach of the principle of the presumption of innocence. In addition, the Constitutional Court ordered that its judgment be brought to the attention of the tribunal called upon to determine the criminal charges pending against the applicants. This measure was aimed at providing redress for the violations found and at ensuring that all the safeguards contained in the domestic criminal law were scrupulously applied. In the Court's view, the Maltese Constitutional Court had thus

made clear that the applicants' guilt or innocence should be established by the trial court only on the basis of the evidence produced during the trial, and that the declarations of the Prime Minister should not have any influence on the outcome of the criminal proceedings. The Court concluded that the applicants lost their status as "victims" of a violation within the meaning of Article 34 of the Convention.

In a number of cases judicial statements were made after criminal proceedings had been discontinued and where the defendants were seeking reimbursement of expenses. After a detailed analysis of the wording and meaning of those statements, the Court concluded that the terms used by the judges described a state of suspicion rather than a finding of guilt (See the **Lutz** case cited above). Article 6(2) was not violated. A decision discontinuing the prosecution on the ground of its trivial nature can properly set out an alleged or suspected state of affairs, but should not include findings indicating that the accused is guilty (albeit only of a trivial offence) unless guilt has been proved according to law. In addition, Article 6(2) does not as such require to reimburse the accused's costs or otherwise compensate him where a prosecution is discontinued or ends in acquittal. The strength of a suspicion against the person at the time may be sufficient for the domestic authorities to later refuse to award any compensation (**Adolf v Austria (1982)**).

Clearly, the presumption of innocence no longer applies once guilt has been finally determined. However, sometimes the presumption of innocence is violated after a trial in which an accused person was acquitted. In **Sekanina v Austria (1993)**, the applicant was tried and acquitted for the murder of his wife, and then brought proceedings for reimbursement of costs and compensation for detention on remand. The claim for compensation was dismissed on the ground that his acquittal had not dispelled the suspicion of his having committed the murder. The Court distinguished the **Lutz** and other earlier cases which concerned the discontinuance of proceedings before a final determination, whereas the **Sekanina** case concerned proceedings following an acquittal. The statements made by the national courts were found to be inconsistent with the presumption of innocence.

In proceedings for compensation for detention on remand, if the civil court judge in some way expresses doubts as the litigant's innocence, this may violate the right to the presumption of innocence. The Court has stated: "the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty (See the **Minelli** case cited above). However, if criminal proceedings against a suspect are dropped for procedural reasons, a rejection of claim for compensation may be supported by statements expressing doubts as to his innocence.

The rule of the presumption of innocence will not be applicable to all civil proceedings arising from or relating to the prior criminal case.

- In **O. v Norway (2003)**, the applicant was tried and acquitted of committing sexual offences against his daughter. He later claimed compensation for damages he asserted he suffered as a result of the criminal proceedings. The Court noted that the proceedings for compensation were required by law to be lodged within three months from the close of criminal proceedings, to the same court and, where possible, the same bench, that had conducted the trial. Further, the Court gave particular weight to the fact that the damages claimed were damages suffered as a result of the prosecution – i.e. this was damage engaging the responsibility of the State as opposed to a private person. The outcome of the criminal proceedings was crucial, since a claim lay only in respect of an acquittal or discontinued proceedings. In the compensation proceedings, an individual had to show that it was more than 50% probable that s/he did not carry out the act that formed the basis of the charge. In other words, the compensation claim was

determined on the basis of evidence from the criminal trial, by the same court, sitting with the same judges. The Court concluded that the compensation claim not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter. Its object was to establish whether the State had a financial obligation to compensate the burden it had created for the acquitted person by the proceedings it had instituted against him. The Court held therefore that although the applicant was not "charged with a criminal offence", in the circumstances, the conditions for obtaining compensation were linked to the issue of criminal responsibility in such a manner as to bring the proceedings within the scope of Article 6(2).

- By contrast, in the aforementioned **Ringvold v Norway** case, the applicant was charged and acquitted of sexual abuse of a child. The same court, in the same judgment, rejected the victim's claim for compensation. On appeal, the Supreme Court made an award of compensation against the applicant. The applicant claimed that Article 6(2) was applicable to the proceedings concerning the victim's claim for compensation. The Court noted that the claim for compensation in this case, was based on principles of tort applicable to personal injuries. Criminal liability was not a prerequisite for liability to pay compensation. Further, the Court noted that the compensation issue was the subject of a separate legal assessment based on criteria and evidentiary standards which differed from those that applied to criminal liability in a number of important ways. The question of compensation was the sole issue in the appeal before the Supreme Court, involving private parties only. The fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence cannot provide grounds for regarding the person allegedly responsible for the act, in the context of a tort case as being "charged with a criminal offence". Nor could the fact that evidence from the criminal trial was used to determine the civil-law consequences of the act, warrant such a characterisation. To hold otherwise, would mean that Article 6(2) would give a criminal acquittal the effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under Article 6(1) of the Convention. Article 6(2) was not applicable.

5. BASIC DEFENCE RIGHTS IN CRIMINAL PROCEEDINGS – ARTICLE 6(3)

The guarantees in paragraph 3 of Article 6, set out as minimum defence rights in criminal proceedings, have long been recognised by the Court as specific aspects of the right to a fair trial set forth in Article 6(1) (**T. v Austria (2000)**). Thus the Court has always examined an alleged violation of one of the rights in Article 6(3) together with Article 6(1). This means that in order to prove a violation of one of his defence rights, an applicant has to also show the effect of the restriction of his defence on the fairness of the criminal proceedings taken as a whole, including the appeal and cassation process.

5.1. Notification of the accusation – Article 6(3)(a)

This right is central to the conduct of the defence in respect of criminal charges laid against an individual. There are some points worth noting at the outset, concerning overlaps with other rights. There is an overlap between this right and the right contained in Article 5(2)[2] However, while the latter is intended to permit an accused person to challenge the legal basis for his detention, the former is concerned with supplying the accused with information relating to his defence. The duty of the State under Article 6(3)(a) is thus far more explicit, and it entitles an accused to more specific and detailed information about the accusation against him than is recognised in Article 5(2).

There is also some overlap between Article 6(3)(a) and 6(3)(b); however, the information required to be given to an accused under Article 6(3)(a) is not the same as the information required to be supplied under Article 6(3)(b). The latter concerns information required in order for the accused to be able to prepare and conduct a proper defence at trial, while the former is concerned with earlier stages of the criminal process and the initial preparation of the defence. Overlaps occurs where inadequate information is supplied under Article 6(3)(a), which hampers the preparation of the defence for trial.

5.1.1. The information required

The information required to be given to the accused relates to the "nature and cause" of the offence. The nature means the offence with which he is charged (i.e. the legal characterisation), and the word "cause" denotes the acts he is alleged to have committed. The particulars of the offence are critically important, since it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him. The question of whether, in any individual case, sufficient information was given to an accused, must always be examined in the context of the overall right to a fair trial, contained in Article 6(1). The Court has stated that provision of full, detailed information of the charges against a defendant, the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (**Pellisier and Sassi v France (1999)**). The essence of the right to receive information under Article 6(3)(a) is that it should be sufficient to enable an accused to begin formulating his defence. It does not require the details of all the evidence against him – such information does need to be made available to an accused, but at a later stage in the proceedings, as required by Article 6(3)(b) (See chapter 5.2. below).

- In **Mattoccia v Italy (2000)**, the applicant was arrested on suspicion of having raped a mentally disabled child. At the moment of his arrest the prosecution was in possession of information to the effect that the rape had been committed at the end of October or on 10 November 1985,

2. See *INTERIGHTS, The Right to Liberty and Security under the European Convention on Human Rights.*

in a lavatory on the second floor of the school attended by the victim. The applicant was sent a judicial notification of the allegation that he had raped the victim in Rome in November 1985. None of the other information was conveyed to the applicant at that stage; nor was it conveyed to him during interviews with the police, even though he had adopted a line of defence that was manifestly inadequate. During the trial, the dates and place where the alleged offence took place differed entirely to the information the applicant had been initially given. The applicant was not permitted at any time to adapt his defence accordingly. The Court was critical of the vagueness of the information contained in the accusation, and especially the vagueness as to essential details concerning time and place, which were repeatedly contradicted and amended in the course of the trial, as well as the lengthy period that had elapsed between the committal for trial and the trial itself (more than three and a half years) compared to the speed with which the trial was conducted (less than one month). The Court held that fairness required that the applicant should have been afforded greater opportunity and facilities to defend himself in a practical and effective manner, for example by calling witnesses to establish an alibi. It concluded that the applicant's right to be informed in detail of the cause of the accusation against him, as well as his right to have adequate time and facilities for the preparation of his defence, were infringed.

- In the above mentioned **Campbell and Fell** case, one of the applicants was charged in prison disciplinary proceedings with "mutiny". The relevant time and place were specified but no further detail was given. The applicant did not choose to attend either the hearing or the charge or a preliminary hearing before the Governor of the prison. The Court, taking into account the fact that he could have obtained further information at these hearings, held that the information given was sufficient. There was thus no violation of Article 6(3)(a).

There is nothing in the Court's case-law requiring the provision of the "nature and causes of the accusation" in writing, so long as sufficient information is given orally (**Kamasinski v Austria (1989)**). Clearly, detailed written information is preferable, and its provision can serve to pre-empt a challenge on the basis of Article 6(3)(a).

In some instances, the prosecution authorities may change their minds as to the legal classification of the charge they wish to lay against an accused. In such circumstances Article 6(3)(a) requires that the accused must be duly and fully informed of the fresh charges 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 (See the **Mattoccia** case cited above).

- In **Sadak and Others v Turkey (No 1) (2001)**, the applicants were charged and tried in respect of the offences of separatism and subversive activities. On the final day of the trial, the applicants were told by the State Security Court that they were charged with a fresh charge, namely belonging to an illegal organisation. The applicants were not permitted an adjournment to consider the fresh charges and prepare their defences to the charges. The Court noted that during the trial, the applicants' links with the banned organisation, the PKK, were mentioned by the prosecution throughout the investigation. However, they were examined only in order to establish the constituent elements of the offence for which they were originally indicted, and for which they were tried until the final day of the trial. The Court stated that the question to be answered, was whether it was sufficiently foreseeable for the applicants that the characterisation of the offence could be changed from the one of treason against the integrity of the State, to that of belonging to an armed organisation set up for the purpose of destroying the integrity of the State. According to the case-law of the Turkish National Security Courts, the two offences differed both in their objective and subjective aspects. The Court stated that it would be reasonable to argue that the defences for the two offences would have been different. The applicants were thus denied the right to detailed information concerning the nature of the fresh charges, in breach of Article 6(1)(a) as well as (b).

The Court has stated on a number of occasions that the question of the nature of the judicial functions – inquisitorial or accusatorial – is a matter for the States to regulate, and Article 6 or indeed any other provision of the Convention does not prevent the States from choosing the system that it deems appropriate. At the same time, in inquisitorial systems, problems have arisen under Article 6(3)(a) where the courts used their power under the domestic law to re-classify charges brought by the prosecution, thus restricting the defendant's right to know the "nature" (or the legal classification under the domestic Criminal Code) of the alleged offence within the meaning of Article 6(3)(a) up until the moment of the court's judgment on the merits. The Court has reviewed reclassifications in the context of the particular circumstances of the case and the extent to which they could require, or might have allowed a different defence. The Court found a violation of the applicants' defence rights in a number of such cases, where the higher courts subsequently refused to re-examine the "discretion" of the lower court in reclassifying the charge (See the **Pellissier and Sassi** judgment cited above), where the applicant's complaints against the re-classification were rejected as constituting "new facts" and thus inadmissible on appeal (See the **T. v Austria** case cited above), where the appellate court reclassified the offence only at the stage of delivering the judgment (**Mattei v France (2006)**), or the trial court reclassified at the end of the trial, when inviting the defendant for his last pleadings (**Miraux v France (2006)**). By contrast, it found no violation of Article 6(3)(a) and (b) where the trial court offered adjournment for the parties to prepare their defence against the new charge before the conviction, or where the applicants were fully enabled to defend themselves against the re-classified charge on appeal (**Dallos v Hungary (2001)**; **Sipavicius v Lithuania (2002)**). It also found no violation, where the charges were changed at the closing of the appellate hearing, but the facts underlying the adjusted charge were known to the applicants long before and they were made aware of the possibility that they might be convicted of the completed offence of robbery rather than of an attempted robbery (**Backstrom and Andersson v Sweden (dec.) (2006)**).

An accused person whose own conduct has been the principal cause of his not receiving notification of the charges against him cannot complain under Article 6(3)(a) (**Hennings v Germany (1992)**). Discrepancies resulting from a clerical error in the statement of the provision which is the basis of the charge will not amount to a violation of the provision (**Gea Catalan v Spain (1995)**).

Questions:

1. From what stage in criminal proceedings does domestic law oblige the authorities to inform the accused about nature and causes of the offence?

5.1.2. The right to be informed "promptly"

There is little case-law on the requirement that information should be given "promptly". However, any relevant information, whether of fact or law, must obviously be given to the accused in sufficient time to enable him to prepare his defence in accordance with his entitlement under Article 6(3)(b) (**Chichlian and Ekindjian v France (1989)**). In the aforementioned **Mattoccia** case, the Court was critical of the fact that the applicant had not been supplied with the date, time and place of the alleged offence. It further noted that as a result the applicant was unable to supply an adequate defence during the interview the police. It is suggested that this implies that an accused person should be furnished with the basic information about the accusation at least prior to his interview with the police.

5.1.3. Information in a "language he understands"

This right is designed to ensure that an accused can understand the nature and cause of the charges, even if he speaks another language to that used by those charging him. It does not, how-

ever, entitle an accused the right to have the charges put to him in his mother tongue as a matter of preference; the thrust of this right is "understanding".

- In **Brozicek v Italy (1989)**, the applicant, a German national, was sent a judicial notification amounting to an "accusation" for the purposes of Article 6(3)(a). The applicant wrote to the public prosecutor concerned, indicating that he had difficulties understanding the contents of the notification and requesting a fresh one in German or one of the official languages of the UN. The public prosecutor's office ignored this request, and continued to draw up documents only in Italian. The Court held that it was incumbent upon the national authorities to have taken steps to comply with the applicant's request, unless they were in a position to establish that the applicant did in fact have sufficient knowledge of Italian to understand the nature and cause of his accusation. There was no evidence that the Italian authorities attempted to do this. Accordingly, there was a violation of Article 6(3)(a).

It follows from this case that, where a foreign national requests translation of a charge which has been sent to him, the competent authorities should comply with the request unless they are in a position to establish that the accused in fact has sufficient knowledge of the national language. In addition, the requirement that the accused be informed in a "language he understands" might entail the provision of a written translation of the indictment or other formal charge if the accused is not to be put at a disadvantage. Oral interpretation may however be sufficient if in all the circumstances it is apparent that the accused has been sufficiently informed (**Kamasinski v Austria (1989)**).

5.2. Adequate time and facilities to prepare defence – Article 6(3)(b)

The notions of "time" and "facilities" in most cases are inter-twined. As mentioned above, there is also a considerable overlap between the rights guaranteed in this Article and those protected by Article 6(3)(c) and Article 6(3)(a), as well as the general principles of fairness within the meaning of Article 6(1). In order to determine whether these provisions have been respected, it is necessary to have regard to the general situation of the defence, and not merely the situation of the accused in isolation (**Krempovskij v Lithuania (dec.)(1999)**).

- In **Ocalan v Turkey (2003)**, the applicant was tried before the state security court for offences relating to his leadership of the banned party, the PKK (The Workers Party of Kurdistan). The Court examined a number of complaints together and noted that the applicant was not assisted by his lawyers when questioned in police custody, was unable to communicate with them out of hearing of third parties and was unable to gain direct access to the case-file until a very late stage in the proceedings. It further noted that restrictions were imposed on the number and length of his lawyers' visits and his lawyers were not given proper access to the case file until late in the day. It concluded that the overall effect of those difficulties taken as a whole, as well as the fact that he was tried before a court that was neither independent nor impartial, severely impaired the rights of the defence in violation of Article 6 (1), taken together with Article 6(3) (b) and (c).

5.2.1. Adequate time

There is an obvious logical link between the "time" requirement in Article 6(3)(b) and the requirement in Article 6(3)(a) that the accused should be informed "promptly" about the charges. There is sometimes a delicate balance to be struck between ensuring that a person is tried within a reasonable time, while at the same time being afforded adequate time to prepare his defence. The essence of the right to have the time to prepare defence is to prevent the national courts from conducting a hasty trial which denies the accused the opportunity to defend himself properly.

The time needed by the defence will be so widely variable that examples from the case-law on Article 6(3)(b) are of limited value. The question as to what amounts to adequate time varies from case to case, and depends on a number of factors including the nature and complexity of case, as well as the stage the proceedings have reached.

In straightforward cases, only a very short time may be needed between the initial charge and the hearing on the merits. Thus the Court has held that five days was adequate in a prison disciplinary case concerning a charge of mutiny (See the **Campbell and Fell** case cited above), and that fifteen days was sufficient in professional disciplinary proceedings against a doctor on charges of having issued certificates of unfitness for work without adequate justification (See the **Albert and Le Compte v Belgium** case cited above).

- In **G.B. v France (2001)**, the applicant was tried for a series of sexual offences. At the start of the trial, the prosecution had submitted new evidence relating to the applicant's personality. Copies of the evidence were given to the defence, but there was no adjournment. The applicant claimed he and his lawyer had not had time to consider the evidence. The Court held that it was lawful for the prosecution to submit new evidence; the evidence was communicated to the defence and it was examined by way of adversarial process. It also held that the applicant had had adequate time to consider this evidence; in this context, it noted that the new evidence had been submitted at 10am on the 13 March, and that the trial took place over three days, ending at 8.45 pm on the third day. There was no violation of Article 6(3)(b) on this count.

It is the State's responsibility to inform those appealing judgments of the lower courts of relevant time-limits applicable for lodging appeals and the grounds for appeal. In **Vacher v France (1996)**, the applicant was convicted of an offence of constructing without a building permission. He lodged an appeal with the court of cassation. He was later informed by the court of cassation that, as he had failed to state his grounds for appeal within the time-limit, his appeal was inadmissible. The Court emphasised that the State had obligations under the Convention to ensure that everyone charged with a criminal offence benefits from the safeguards under Article 6(3). It held that placing the onus on convicted appellants to find out when an allotted period of time starts to run or expires is incompatible with the "diligence" which the Contracting States must exercise to ensure the effective exercise of Article 6 rights. The Court examined the complaint under Article 6(1), (3)(b) and (3)(c) taken together, although it concluded simply that there had been a violation of Article 6.

5.2.2. Facilities

The question what "facilities" are necessary for the preparation of the defence will also depend largely on the particular circumstances, although certain facilities such as the right of the accused to communicate with his lawyer can be regarded as essential. The right to confer with counsel may however be subject to restrictions. In cases where an accused was placed in solitary confinement and prevented from communicating with his lawyer for limited periods, no breach of Article 6(3)(b) was found where adequate opportunity was available to communicate with the lawyer at other times (**Bonzi v Switzerland (dec.)**(1978). In another case, no breach of Article 6(3)(b) was found where defence counsel was placed under an obligation not to disclose the identity of certain witnesses to his client (**Kurup v Denmark (dec.)**(1985).

In a number of cases, the question has arisen whether under Article 6(3)(b) a right of access to the prosecution file is to be regarded as a necessary facility for the preparation of the defence. The facilities available to the defence should include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. It matters a little by whom and when, or under whose authority, the investigations were carried out. This includes the right of the accused to have at his disposal, for the purposes of exonerating

himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities (**Jespers v Belgium (1981)**). However, the Court confirmed that a restriction under which only the defence lawyer, not the accused himself, had access to the case-file did not to infringe Article 6(3)(b) (See the **Kamasinski** case cited above).

While it is thought that the "facilities" would include, for instance, the inspection of all the documents or articles, it is for an applicant alleging a breach of Article 6 § 3 (b) to show in each case that in all the circumstances a particular "facility" was necessary to enable him adequately to prepare his defence (See the **Bricmont** case cited above).

The Court has also held that that material relevant to the defence should be placed before the trial judge for his or her ruling on questions of disclosure, namely, at the time when it can serve most effectively to protect the rights of the defence. It is not sufficient that the prosecution make the material available at the appeals level (See the **Dowsett** case cited above).

The right of the defence to have access to all the information held by the prosecution is not, however, absolute; there may be competing interests. Thus, the interests of national security, or the need to protect certain witnesses from reprisals, may compete with the interests of the defence. Where there are such competing interests, it is incumbent upon the court concerned to ensure that restrictions of the rights of the defence are strictly necessary in the circumstances of the individual case. The prosecution must not be permitted to make this decision; the requirements of a fair hearing mean that it should be a matter for the trial judge to decide. Any ensuing difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (See chapter 3.3.1 above; also see chapter 5.4 below).

New evidence can come to light in a trial, which may require that the defence is accorded time to consider it. Whether or not additional time is indeed required depends on the nature of the new evidence, and the surrounding circumstances. In the aforementioned **G.B. v France** case, during the trial of the applicant, an expert witness, who had assisted in preparing the medical report on the applicant during the investigation, gave oral evidence in which he dramatically changed his opinion. The applicant had applied for a second expert opinion after the expert gave his testimony, but was refused. The applicant claimed the refusal was, contrary to Article 6(3)(b), given that the expert's change of mind had strongly influenced the jury's opinion in a direction that was unfavourable to him. The Court held that the mere fact that an expert expresses a different opinion to that in his written statement when addressing a trial court is not in itself an infringement of the principle of a fair trial. Further, Article 6 does not place an obligation on a court to appoint, at the request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case. However, the Court noted that in this case, the expert's opinion was not merely different to his written report, but it consisted of a complete change of mind in the course of one and the same hearing, after only 15 minutes of examining the fresh evidence; furthermore, the change of opinion reflected very badly on the applicant. The Court held that in these circumstances, there had been a violation of Article 6(1) and (3)(b) taken together.

The right to have adequate facilities to prepare one's defence also includes the right to know the reasons of a court judgment to prepare an appeal (See also, in a similar context, the right to a court (chapter 3.1.) and the right to a reasoned decision (chapter 3.3.5)).

- In the aforementioned **Hadjianastassiou v Greece** case, the applicant was court-martialed. He appealed against the judgment of the court martial. The operative part of the appeal court judgment was read out in court, but no reasons of the judgment were indicated. The applicant had five days in which to lodge an appeal. He received a written copy of the appeal judgment nearly three weeks later; it did not contain any reasons. Nearly one month after that, following his request, the applicant received a properly reasoned judgement. He was not permitted at that

stage to expand on his appeal. At the hearing before the Court of Cassation, the applicant filed a memorial containing complaints relating to the short time-limit for appeals, and the fact that it was impossible for the persons concerned to gain access, in good time, to the contents of the contested judgments. His appeal was declared inadmissible, on account of its vagueness, in as much as it failed to identify any concrete and specific error in the contested judgment. The Court, noting that the applicant was barred from expanding his grounds for appeal once he had received a properly motivated copy of the judgment, concluded that he had not been afforded sufficient time, or facilities to conduct his defence, contrary to Article 6(3)(b).

5.3. The right to defend oneself or to legal representation – Article 6(3)(c)

The rights guaranteed in Article 6(3)(c) is an important element of defence rights. It contains three distinct elements, namely: the right to defend oneself in person, the possibility in certain circumstances to choose a lawyer, and the right to free legal assistance where he has insufficient means and where the interests of justice so require.

5.3.1. The right to defend oneself in person and the possibility to choose a lawyer

The right to defend oneself in person is not absolute, and the State authorities can deny an accused the right to represent himself as in some situations the domestic law requires that a person be legally represented, in particular where serious alleged offences are at issue. Further limitations might also be placed on a criminal defendant, without this leading to a violation of Article 6.

- In **Marcello Viola** the applicant was not allowed to be physically present in the court room on the appeal against his conviction, as on other charges he had been sentenced and ordered to be kept in solitary confinement for three years for security reasons. In finding no violation of Article 6 (1) and (3)(c), the Court held that the applicant could sufficiently follow the proceedings via a videoconference connection and that in light of the fact that he was accused of crimes related to the mafia's activities, those measure taken to protect public order, prevention crime, protect the right to life, freedom and security of witnesses and victims of offences, were justified (**Marcello Viola v Italy (2006)**).

However, the majority of cases that have come before the Court concern mostly the opposite situation, that is where an accused or defendant is required to defend himself in person or is refused free legal assistance for a substantive part or the whole of the criminal proceedings. In deciding whether to award free legal assistance, the national authorities must take account of the means of the accused as well as the interests of justice. This includes a consideration of the nature and complexity of the alleged offence, the severity of the penalty that might be imposed, and the capacity of the accused to represent himself adequately.

- In the above mentioned **Ezeh and Connors** judgment, the applicants, serving prisoners, were required to attend hearings before the prison governor on account of their aggressive behaviour towards prison staff. They were both found guilty of breaching prison rules and sentenced to additional days in custody. Both applicants were permitted an adjournment to take advice from a solicitor, but legal representation at the hearings was not permitted on the basis that the governor did not deem it necessary. The Court noted that the domestic case law that regulated the prison governors' hearings did not recognise, as such, a right to legal representation. The Court therefore held that, since Article 6 applied to the proceedings under its "criminal" heading, the applicants' rights under Article 6(3)(c) had been violated.

The question whether "the interests of justice" require the grant of free legal assistance will depend largely on other relevant factors such as the seriousness and complexity of the case, the importance

of what is at stake for the accused. In the above mentioned **Engel** case, the Court held that it was compatible with the interests of justice that the accused in military disciplinary proceedings involving very simple facts defended themselves in person and received legal assistance limited to dealing with legal issues on appeal. In the **Monnell and Morris** case mentioned above, a refusal of legal aid for appeals which had no objective likelihood of success was also held compatible with the interests of justice. By contrast, in **Pakelli v Germany (1983)**, where substantial issues of law arose in appeal proceedings, the Court held that the interests of justice did require the grant of free legal assistance.

The requirements of the "interests of justice" must therefore be kept under review at all stages of a case. A decision refusing legal aid should, in particular, be susceptible to review if it becomes apparent at a later stage in the proceedings that the interests of justice require the provision of legal aid. In the aforementioned **Granger** case, legal aid was refused for an appeal which was considered (on counsel's advice) to have no reasonable prospect of success. At the hearing of the appeal, it became apparent that a question of law of some difficulty in fact arose. The Court held that it would have been in the interests of justice for legal aid to have been available from that point on, and that in the absence of any review of the original decision there was a breach of Article 6(3)(c).

- In **Quaranta v Switzerland (1991)**, the applicant was refused free legal assistance during proceedings before the investigating judge as well as at trial, on the basis that the interests of justice did not require it and that the case was not complex. The applicant was convicted and sentenced to six months' imprisonment. The Court took into account the maximum sentence that could have been imposed (3 years' imprisonment) for the alleged offence, as well as the applicant's personal circumstances, such as the fact of his being a young foreigner, the lack of visible means to support himself, and his history of drug-taking. It concluded that his appearance before both the investigating judge and the trial judge unrepresented, did not enable the applicant to present his case in an adequate manner. There was a violation of Article 6(3)(c). This case also shows that the rights protected by Article 6(3)(c) apply not only to the trial stage, but also to the pre-trial stage, in respect of any person charged with a criminal offence.
- In **Berlinski v Poland (2002)**, the applicants were held in pre-trial detention for one year before they received a reply to their request for legal assistance in a criminal case for resisting the police officers. The Court admitted that restrictions could be imposed on the right to legal assistance during the early stages of an investigation. However, Article 6(3)(c) could not allow the Polish authorities to ignore the applicants' requests for legal representation for such a long time, given that during that period a number of procedural acts, including the questionings of the applicants and their medical examinations, were carried out. There was a violation of Article 6(3)(c).

An accused can defend himself through legal assistance of his own choosing only if he has the necessary means (See the **Campbell and Fell** judgment cited above). If he does not have the necessary means, he can only be required to defend himself in person if the "interests of justice" do not require legal representation. The right to choose a lawyer can arise only where the accused has sufficient means to pay the lawyer. A legally aided accused thus has no right under Article 6(3)(c) to choose his representative, or to be consulted in the matter (See the **Krempovskij** decision cited above). The right to choose a representative – even where one has the means – is not in any event an absolute one, the State being free to regulate the appearance of lawyers in its courts and, in certain circumstances to exclude the appearance of particular individuals. For instance, the State can lay down the qualifications of those entitled to appear, and rules of professional conduct governing their appearance. A restriction (to three) on the number of lawyers entitled to appear on behalf of one defendant has been held compatible with Article 6(3)(c), as has the exclusion of individual lawyers on the ground that they were strongly suspected of supporting the criminal association in which the accused were allegedly involved (**Ensslin and Others v Germany (dec.)(1978)**).

Where an accused is tried *in abstentia*, Article 6(3)(c) requires to allow his lawyer to represent his

absconded client (**Karatas and Sari v France (2002)**).

5.3.2. Restrictions on access to a lawyer at the pre-trial stage

While there is not necessarily a violation of the presumption of innocence in circumstances where a person is denied access to a lawyer during the early stages of an investigation, there may be a violation of Article 6(3)(c). A violation may occur in circumstances where the rights of the defence were irretrievably prejudiced.

- In the **John Murray** case cited above, the applicant was denied access to a solicitor during the first 48 hours following his arrest, during which he refused to give any evidence. The Court held: while it is permissible for the national authorities to attach consequences (such as the drawing of adverse inferences) to the silence of accused at the initial stages of the police interrogation, Article 6 will normally require that the accused is permitted some legal assistance early on during the investigation; this right may be subject to restrictions for good cause. The question to ask in each case is whether, in the light of the entirety of the whole proceedings, the accused was denied a fair trial. The Court concluded that the scheme that was in place, enabling adverse inferences to be drawn from the silence of the accused, was of such paramount importance that an accused should have access to a lawyer at the initial stages of police interrogation. In such a case, the accused was presented with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the relevant law. On the other hand, if the accused opts to break his silence during the course of the interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. In such conditions, the Court held that the applicant should have had access to a lawyer. Denial of access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence were irretrievably prejudiced, was not compatible with the rights of the accused under Article 6. There was therefore a violation of Article 6(1) taken together with Article 6(3)(c) (See also, in the Court's interpretation of the shifting of burden of proof and inferences drawn from the accused's silence, chapter 3.3.4. above).

However, the authorities cannot be blamed where the absence of legal representation at the initial stage of the proceedings is the applicant's own fault, even if it results in damaging submissions which are later taken into account in convicting the person.

- In **Zhelezov v Russia (dec.)(2002)**, on the date of his arrest the applicant was interrogated and wrote a confession of murder without a lawyer being present. He also signed a paper attesting that he was aware of the statutory right to be represented by a lawyer already at that stage, but that he needed no defence counsel. On the next date the applicant was however appointed an official counsel, who failed to appear during the applicant's questioning. For six days the applicant had no lawyer at all, before his family employed a private defence counsel and the applicant started arguing that the confession had been obtained unlawfully. The applicant complained that his conviction was partly based on that confession obtained in the absence of a lawyer, in breach of the principles of fairness and defence rights. In finding no violation of Article 6(3)(c) or Article 6(1) the Court noted the following circumstances: first, there was no importance whether the authorities were to blame for the official counsel's failure to appear during the first days after the arrest, given in particular that the applicant clearly had sufficient means to employ a private lawyer of his choosing right from the outset; second, the applicant was aware of his statutory right to have legal representation from the moment of the arrest, and he was also able to choose between silence and active participation in the interrogations during which he confessed; finally, there was no evidence (medical reports, etc) attesting that the applicant was forced or intimidated to confess, given in particular that he confirmed the confession in the course of a number of initial questionings.

- Similarly as in the above case, the Court found no fault under Article 6(1) and (3)(c) in **Latimer v**

United Kingdom (dec.)(2005), where the domestic courts took into account the applicant's self-incriminating statements obtained at the arrest stage without a lawyer being present. First of all, the applicant in that case did not duly request a solicitor to be present immediately following the arrest. In addition, the admissibility, and reliability, of the confessions which the applicant made during his interrogations in the prison, were scrutinised on several occasions in full adversarial proceedings, before the trial judge and on three occasions by the Court of Appeal, after hearings at which the applicant was represented and allowed to call evidence. In these circumstances, regardless of the intimidating conditions of detention in which the self-incriminating statements were made, the applicant was not deprived of a fair trial or the right to be represented by a lawyer.

At the same time, the rights of the defence may however be infringed in other circumstances, where, or example, the whole environment in which the police interrogation takes place is particularly oppressive and the rights of the accused are irretrievably prejudiced.

- In **Magee v United Kingdom (2000)**, the applicant was arrested in Northern Ireland under the anti-terrorism legislation. He was refused access to a lawyer for more than 48 hours, during which he was interviewed by teams of police officers eight times. He was given the usual caution regarding the possibility of drawing adverse inferences if he remained silent. At first, he maintained his silence, but during the sixth interview he confessed, and during the seventh interview he signed his confession. At his trial he did not give evidence; the trial judge did not draw adverse inferences from this, although he had been entitled to do so. The applicant's central complaint was that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice. The Court noted that the applicant had been interviewed for extended periods by trained teams of officers, and that in between times, he had been kept in solitary confinement in a detention centre notorious for the austerity of the conditions. The Court held that as a matter of procedural fairness, the applicant should have been given access to a lawyer at the initial stages of the investigation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators. It concluded that to deny access to a lawyer in such a situation was irretrievably prejudicial to the applicant's defence rights in breach of Article 6(3)(c) and Article 6(1).

5.3.3. Confidential and efficient communication with a lawyer

Whether the accused has free legal assistance or a private defence counsel, it may not be enough for the competent authorities merely to nominate or allow a lawyer to act for him, since the accused is entitled to legal assistance which is "practical and effective" and not merely "theoretical and illusory". The State is not responsible for every shortcoming of a legal aid lawyer and the conduct of the defence, whether under legal aid or not, is essentially a matter between the accused and his counsel. However, if a failure by, or inability of, legal aid counsel to provide effective representation is either manifest, or sufficiently brought to the attention of the competent national authorities, there is an obligation on them to intervene. They may do so either by replacing the lawyer or causing him to fulfil his duties or by taking other measures, such as an adjournment of the trial, which will enable him to carry out his functions effectively (**Artico v Italy (1980)**).

One of the basic requirements is the right of the accused to communicate with his lawyer in private; it flows from the rights under Article 6(3)(c) (**Brennan v United Kingdom (2001)**). However, this right may be restricted in circumstances where there were compelling reasons for so doing. The national authorities may not rely on any assertions, without any evidence to support them, for restricting this important right.

- In **S. v Switzerland (1991)**, the applicant was arrested in connection with a series of arson attacks, and 16 other persons were the co-suspects. His contacts with his solicitor over the next nine and a half months took place almost always under the supervision of a police officer. The

respondent State argued that the supervision was required to prevent collusion with the other accused persons. The Court held that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c). If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness. At the same time, it stated that the respondent's assertion regarding the potential for collusion merited consideration. There was indeed a reason to fear that the applicant's lawyer would collaborate with another accused, who in turn, had informed the prosecutor's office that all the lawyers proposed to collaborate in their defence. However, this could not justify the restrictions as there was nothing out of the ordinary in the lawyers seeking to coordinate their defence strategy. Further, there had been no indication that the professional ethics the applicant's lawyer, nor the lawfulness of his conduct were at any time called into question in this case. There was thus a violation of Article 6(3)(c).

- In **Brennan**, the applicant was arrested under the provisions of the anti-terrorism law. He was denied access to his solicitor for 24 hours, after which his first consultation took place within the sight and hearing of a police officer. The officer warned them both not to mention any names, and not to pass on any information that might assist a suspect. The Court held that if a lawyer could not confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, and render Article 6(3)(c) ineffective. However, it recognised that this right may be restricted in certain circumstances; the question of compatibility with the requirements of fairness under Article 6 had to be examined according to the particular circumstances of each case. In this case, the national authorities did not allege that the solicitor was likely to collaborate in an attempt to pass information to suspects at large, and it was not clear that the police officer present could prevent the passing of a coded message, for instance. The Court concluded that there was no compelling reason arising in this case for the imposition of the restriction, in breach of Article 6(3)(c).

In the above case the Court also held that the right to communicate in private with a lawyer must, in addition to being supported by compelling reasons, be a proportionate response to a perceived need. The Court noted that, while the police officer was only present for one meeting with the applicant's solicitor, the presence of the officer must have prevented him speaking frankly to his lawyer, in the light of the fact that the applicant had made certain admissions during his earlier interviews and the fact that the lawyer would not be permitted to be present during subsequent interviews. There was thus potential for the applicant to respond in those interviews in a way that would irretrievably affect his defence at trial, and it was therefore crucial that the applicant should be able to seek advice in private.

The Convention excludes, as a rule, the right to complain about the acts of a private person, such as a lawyer, even if he is officially designated by court. However, in certain exceptional circumstances, the quality of legal representation may be so below-par as to raise issues under Article 6(3)(c). Since the State has a responsibility to ensure that the legal assistance is effective, the competent authorities must intervene where the failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.

- In **Daud v Portugal (1998)**, the applicant was an Argentinean, who was arrested in Portugal in March 1992 for possession of a large quantity of cocaine. A legal aid lawyer was appointed immediately, but did not even once communicate with the applicant until January 1993, when he was asked to be excused on health grounds. The court appointed a new lawyer three days before the applicant's trial. That lawyer represented him at trial, and also lodged an appeal against the conviction – on the same day as the conviction was pronounced – with the Supreme Court. The Supreme Court dismissed the appeal. The Court took note of the fact that the applicant had tried to conduct his own defence during the period when the first official lawyer had

failed to contact him. As for the second lawyer, the Court noted that her appointment only three days prior to trial meant that she did not have sufficient time to study the case papers and visit her client in prison. The Court held that there had been a failure to guarantee effective legal representation, contrary to Article 6(3)(c).

- In **Czekalla v Portugal (2002)**, the applicant, a German national, was arrested for drug-trafficking offences. At an early stage in the proceedings, a legal aid lawyer was appointed for the applicant. A new lawyer was appointed, at the applicant's request, during the trial. After the applicant was convicted, his lawyer lodged an appeal with the Supreme Court. The Supreme Court rejected the appeal on the grounds that the lawyer had failed to include any submissions in her pleadings, she had merely pleaded breaches of a number of laws. In finding a violation of Article 6(3)(c), the Court noted the lawyer's negligent failure to comply with a formal condition resulting in the defendant being deprived of an appeal remedy, against the background of the serious alleged offences and the fact of the applicant being a foreigner.

- In **Sannino v Italy (2006)**, the Court considered the failure of the domestic courts to remedy manifest shortcomings in the defence. A court assigned counsel was informed of the date of the hearing, but neither he nor the applicant, were informed that counsel was appointed to represent the defendant. Counsel failed to appear at the hearings and the court ordered his replacement by a different assigned counsel at each hearing. As a result, witnesses on the applicant's list were not called and never questioned. The Court also held that he applicant's failure to draw the trial court's attention to the problems encountered in his defence, did not by itself release the trial court from its obligation to ensure that the defendant was afforded effective representation. As the shortcomings in the defence in the particular case were patent, the trial court should have intervened and by failing to take steps to ensure that the accused was effectively represented and defended, violated Article 6(3)(c).

It should be noted however that only shortcomings in legal representation which are imputable to the State authorities can give rise to a violation of Article 6(3)(c).

- In **Tripodi v Italy (1994)**, the applicant's lawyer was ill and unable to attend a hearing before the Court of Cassation, which refused his request for an adjournment and determined the matter in his absence, on the basis of written pleadings. As the lawyer did little to ensure that he was replaced for the day of the hearing, the Court found no violation of the above provision.

Questions:

1. On what conditions does the domestic law provide for free legal aid to persons charged with criminal offences?
2. What are the possible restrictions of access to a lawyer allowed by the domestic law?
3. What are the possible restrictions on communication with a lawyer at the pre-trial stage?
4. What steps are normally taken in the domestic practice to ensure that the accused have effective legal assistance?

5.4. The right to examine witnesses – Article 6(3)(d)

The word "witness" in Article 6(3)(d) has an autonomous meaning, and is not restricted to persons giving live evidence at trial. It includes the authors of statements that have been either read out at trial, or are in some other way, put before, and taken into account by, the trial court (**Kostowski v Netherlands (1989)**). It also includes depositions by a co-accused, where they serve to a material degree as a basis of a conviction and thus amount to evidence for the prosecution (**Luca v Italy (2001)**). Witnesses, unlike courts, are not required by Article 6 to be independent or impartial.

Experts are therefore also deemed as "witnesses" for the purposes of Article 6(3)(d), unless they are court-appointed experts with certain procedural privileges, in which case they have to satisfy certain conditions of neutrality (see the **Bönish** and **Brandstetter** cases cited above, chapter 3.3.2.).

Article 6(3)(d) guarantees the right to attendance and examination of defence witnesses, and the right to examine or have examined witnesses on the part of the accusation. This provision must be considered in the context of both the accusatorial system – where it is for the parties, subject to the control of the court, to decide which witnesses they wish to cal -and the inquisitorial system – where the court decides for itself which witnesses it wishes to hear. In the former system, the witnesses are examined and cross examined by the parties or their representatives, although additional questions may be put by the judge, while in the latter system witnesses are examined as a rule by the court. As mentioned above, both systems are in principle compatible with the Convention, but the Court has to take account of the domestic specifics in this respect in order to establish whether the proceedings taken as a whole satisfied the requirements of Article 6(3)(d) taken together with Article 6(1).

5.4.1. The right to call witnesses for the defence

Article 6(3)(d) does not require the attendance and examination of every witness that the defence wishes to call. The essential aim of Article 6(3)(d), as the words "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", is full equality of arms with regard to the examination of witnesses. The domestic law can lay down conditions for the admission of witnesses and, in particular, the competent judicial authorities can properly refuse to allow a witness to be called if it appears that his evidence will not be relevant (**Vidal v Belgium (1992)**).

- In **Vidal v Belgium (1992)**, the applicant was a prison governor who was accused of having supplied a weapon to an inmate to facilitate his escape. The inmate was subsequently caught, and a promissory note written by the applicant had been found his pocket on arrest. The applicant was tried with the inmate. The trial court heard four witnesses called by the applicant, who testified to the effect that the applicant had not supplied the weapon. He was acquitted, while the inmate was convicted. On appeal, the court of appeal convicted the applicant, basing its decision on the statement given by the inmate, and the promissory note. The applicant had asked the court of appeal to call four witnesses; the court of appeal refused; indeed, it did not call any witnesses. The Court noted that when the court of appeal substituted its decision for that of the trial court, it did not have any fresh evidence before it, apart from the oral statements of the applicant and his co-defendant. The appellate court therefore based its decision on the papers in the case-file. The Court also noted that the court of appeal did not at all examine the applicant's request to call witnesses. The Court held that this was not inconsistent with the concept of fairness under Article 6.

- In **Solakov v Former Yugoslav Republic of Macedonia (2001)**, the applicant, suspected of drug-trafficking, complained that he had been unable to call two witnesses for the defence. The Court noted that the applicant was given the opportunity to request the summoning of these witnesses during the preliminary investigation and later during the trial. However, the applicant failed to request their attendance at any of these stages, but only asked at a late stage during the trial. The Court also noted that the addresses of the persons he wished to summon were unknown, making it very difficult to make them appear at trial. It concluded that the rights of the defence under Article 6(3)(d) were not restricted to such an extent that he was not afforded a fair trial within the meaning of Article 6(1) and (3) (d).

- In **Perna v Italy (2003)**, the applicant was a journalist charged with criminal defamation against a senior public prosecutor, whom the applicant had accused of improper political leanings. The applicant requested permission for two press articles to be admitted as evidence, and for the

complainant to be required to give evidence. On appeal, he repeated this request, and asked for two witnesses to be called; he asserted *inter alia* that these witnesses would establish the complainant's improper political leanings. The Court noted that the domestic courts addressed these issues fully, and it did not substitute its assessment of the fact that no additional evidence was necessary to rule on the merits of the case. There was therefore no violation of Article 6(1) taken with Article 6(3)(d).

In view of the "fourth instance" doctrine, it is for the national courts to decide whether it is necessary or advisable to call a witness to trial, and, provided the principle of equality has been respected, the Court would find a violation only in exceptional circumstances (See the **Vidal** and **Bricmont** cases cited above). A domestic court can refuse to hear a witness for the reason that his statement would be irrelevant, and even where the evidence is relevant, the court fulfils its obligation if it takes all appropriate steps to try to ensure the appearance of the witness (**Thomas v United Kingdom (dec.)(2005)**). The Court, however, has found a violation of Article 6(3)(d), where the domestic court granted the request to have witnesses questioned, only to withdraw it later without giving any reasons (**Popov v Russia (2006)**).

A person alleging a breach of Article 6(3)(d) arising from inability to call a particular witness must therefore prove not only that he was unable to call a certain witness, but also that the hearing of the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole (See the **Krempovskij** and **Butkevicius** decisions cited above).

5.4.2. The right to examine or have examined witnesses against him

The right to a fair hearing normally requires that all evidence must be produced in the presence of the accused with a view to adversarial argument. However, it does not mean that the author of a statement must attend the trial. Such statements may be used in trial, in circumstances where the rights of the defence were fully protected during the pre-trial stage. This requires that the accused should be given a proper chance to put questions to the witness and to challenge his evidence and credibility. Such an opportunity could be given either at the time the author made his statement, or at some other stage (**Unterpertinger v Austria (1986)**).

- In **Isgro v Italy (1991)**, upon information supplied by D, the police arrested the applicant. The identity of D was known to the applicant, and during the investigation he told the authorities that he knew D. The investigating judge confronted the applicant with D, though the applicant's lawyer was not present. Both D and the applicant were able to give their versions of events in each other's presence and to address one another. Subsequently, the national authorities attempted but failed to locate D to appear as a witness at trial or appeal. Records of interviews with D and of the confrontation were used in evidence at trial. The applicant was convicted. He complained at the use of D's statements in evidence. The Court noted that an investigating judge and the applicant questioned D several times at the pre-trial stage. This had given the opportunity for the applicant to provide the investigating judge with all the information which was capable of casting doubt on the witness's credibility. The fact that the applicant's lawyer was not present at the confrontations was not problematic since the applicant himself had had the chance to put questions to D. At trial and on appeal, D's statements formed part of the evidence but did not form the sole or main basis for the applicant's conviction. The Court concluded that the inability to locate D for trial was not sufficient to deprive the applicant of a fair trial, and that the use of D's pre-trial evidence to support the applicant's conviction did not disclose a violation of Article 6(1) taken with Article 6(3)(d).
- In the above mentioned **Solakov** case, concerning the alleged trafficking of drugs between Macedonia and the USA, an investigating judge travelled to the USA to hear the prosecution

witnesses. The applicant's first lawyer was present at these hearings and was able to put questions to the witnesses. These witnesses were not called at trial, though their statements were used as evidence; the applicant complained that this violated his rights under Article 6(3)(d). The Court noted that there was no indication that either the applicant or his second lawyer intended to attend the hearings in the USA, or that they were denied the opportunity to attend. There was accordingly no violation of Article 6(3)(d) on this basis.

Whilst Article 6 does not specifically refer to the interests of witnesses to be taken into account, their lives may be threatened by the fact of giving evidence in criminal proceedings. Accordingly, their rights are protected under other Articles of the Convention (e.g, Articles 2 and 3). The Contracting States are under an obligation to organise their criminal proceedings in such a way that the interests of witnesses, including victims, are not unjustifiably imperilled (**Doorson v Netherlands (1996)**). States may therefore have to engage in balancing acts, weighing the interests of the accused with those of the witnesses against him.

- In **Kostovski v Netherlands (1989)**, a witness who wished to maintain anonymous made a statement to the police. The witness attended the judicial investigation, and gave his evidence in the absence of the accused, his counsel, or the prosecution. Even the examining magistrate was not permitted to know the witness's identity. The applicant was sent a copy of the transcript of the witness's evidence, and was invited to submit questions to the examining magistrate. Another examining magistrate held a hearing, during which he put the applicant's questions to the witness; neither the applicant, nor his lawyer were permitted to attend the hearing. The statements made by this witness as well as the statement of a second witness who did not appear before the examining magistrates, were used in evidence at trial. The applicant's conviction was based to a decisive extent on the evidence of the anonymous witnesses. In finding a violation of Article 6(3)(d), the Court noted the serious handicaps to contest the reliability of the anonymous evidence experienced by the defence, as well as the fact that the identity of the secret witnesses was not known even to the courts. A conviction based exclusively on the testimony of two anonymous witnesses, only one of whom questioned by the trial judge, and the domestic court failed to weigh and review the reasons for accepting the testimony, was also found to be in violation of Article 6(3)(d) (**Krasniki v Czech Republic (2006)**).

- In addition to providing an accused with an opportunity to put questions to, and challenge the credibility of, anonymous witnesses, the Court has stated in **Doorson v Netherlands** that other precautions are required. First, a conviction must not be wholly, or to a decisive extent, based on anonymous statements. Second, statements obtained from anonymous witness should be treated with extreme care by the trial court. In that case, during the course of the appeal proceedings the applicant's lawyer was present while the secret witnesses were questioned by the investigating judge, and he had an opportunity to put questions to them himself. The investigating judge then drew up a full report for the Court of Appeal, explaining her reasons for considering that the anonymous witnesses could be relied upon. The Court found that the difficulties caused for the defence in this case were adequately counterbalanced by the procedures followed by the investigating judge. There was no violation of Article 6(3)(d).

- In **Ludi v Switzerland (1992)** and **Van Mechelen and Others v Netherlands (1997)**, the Court found a violation of Article 6(3)(d) in view of the fact that the applicants' conviction was based to a decisive extent on anonymous evidence given by police officers. The Court stated in those cases that police officers should not normally be able to claim anonymity in criminal proceedings. The Court has stated that while the interests of police officers and their families do deserve protection, there are distinct differences between the police and ordinary witnesses. The police owe a general duty of obedience to the State; their duties normally include giving evidence in open court. The Court has therefore stated that the anonymity of police officers in criminal proceedings may only be maintained in exceptional circumstances. For example, it

may be that an officer working as an undercover agent may be in particular danger and require protection, or he may need to maintain anonymity in order to be useful as an undercover agent in future investigations. However, such restrictions to the defence rights, as with regard to all anonymous witnesses, must be counter-balanced by procedures that enable the defence to put questions to the witnesses and challenge their evidence and credibility.

- In **Sapunarescu v Germany (2006)**, however, the Court found no violation of Article 6 (3)(d), despite the fact that the police informer who was the main witness for the prosecution, was never examined in person. In this case the applicant was charged with drug trafficking and the Ministry of Interior refused to grant the police informer permission to testify for fear of reprisals from the drug dealers. He only answered in writing the applicant's questions transmitted to him via his supervisor from the police and the supervisor was also questioned in court. In finding that there was no violation of the right to fair trial, the Court reasoned that although the informer had been the main witness for the prosecution, the applicant's conviction had not been based to a decisive extent on his statements, but also on the applicant's confession and that of his two co-defendants. The domestic courts had also treated cautiously the written evidence given by the informer and expressly questioned the police officer supervising him in order to assess his credibility.

In criminal proceedings concerning accusations of sexual abuse, particularly where the complainant is a child, the Court has held that certain measures may be taken to protect the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.

- Thus in **S.N. v Sweden (2002)**, the Court found no violation of Article 6(3)(d) in respect of conviction of a schoolteacher of sexually assaulting her 10 year-old pupil. The main piece of evidence of the crime was a video-taped interview of the boy with a specially trained police officer. Under the domestic law, in such cases child complainants were rarely called to give evidence in court because of the traumatising effect this might have on them. The Court found that it was sufficient for the purposes of Article 6 that the applicant's counsel could have attended the interview of the child or given the police officer any questions which the defence wanted to be put to the boy.

5.5. Free assistance of an interpreter – Article 6(3)(e)

In terms of Article 6(3)(e), an accused is entitled to "the free assistance of an interpreter if he cannot understand or speak the language used in court". If the accused can adequately understand and speak the language of the court, he does not have the right to the assistance of an interpreter to enable him to conduct his defence in another language. It is thought that in principle an inability to understand or speak arising from a physical disability (such as deafness or dumbness) may constitute inability to understand or speak the language used in court for the purposes of Article 6(3)(e) and give rise to an entitlement to "free assistance" of an appropriate interpreter. The level of understanding or speaking ability at which the right to free assistance arises must be a question of fact and degree, and will have a bearing on the degree of "assistance" which is necessary. In general, however, the accused must be in a position where, either through his own abilities or through the assistance of an interpreter, he can understand and participate in the proceedings to a degree that ensures that he receives a fair trial.

The right of an accused to free assistance of an interpreter is an absolute one. The word free means not only that the service should be free to the accused during the trial, but also that the domestic authorities may not reclaim the costs at the end of criminal proceedings (**Luedicke, Belkacem and Koc v Germany (1978)**). Article 6(3)(e) further extends to cover the translation of some material, but not all the relevant documentation. It covers the translation or interpretation of all those documents or statements in the proceedings instituted against an accused which it is necessary for

him to understand or to have rendered into the court's language in order to have the benefit of a fair trial. However, this does not mean that there must be a written translation of all items of written evidence or official documents in the procedure (**Kamasinski v Austria (1989)**). The interpreter is deemed to be able to provide assistance to enable the defendant to have knowledge of the case against him and to defend himself. The onus is upon the trial court to ensure that the absence of an interpreter would not prejudice the defendant's full involvement in a matter of crucial importance for him.

- In **Cuscani v United Kingdom (2002)**, the applicant ran an Italian restaurant in England. He was charged and convicted of a number of tax offences. During a series of preliminary hearings, it was never suggested by counsel that the applicant required an interpreter. However, at trial, the lawyer claimed his client had considerable difficulty with understanding English, and that he had difficulties communicating with his client. The trial court adjourned in order to permit the attendance of an interpreter. However, no interpreter turned up when the trial resumed. The applicant's lawyer suggested that applicant's brother could help out where necessary. The applicant pleaded guilty and was sentenced to a period of imprisonment. The Court noted that the trial judge had been put on notice of the applicant's difficulties. The verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant; this was particularly so in the light of the fact that the lawyer had indicated difficulties experienced in communicating with his client. The Court pointed out the relevance of the penalty at stake for the applicant. Accordingly, it held that the onus was thus on the judge to reassure himself that the absence of an interpreter at the relevant hearing, would not prejudice the applicant's full involvement in a matter of crucial importance for him. The Court concluded that this had not been done here; there was a violation of Article 6(3)(e).

The obligation of the competent authorities under Article 6(3)(e) is not limited to the mere appointment of an interpreter but may also extend to exercising a degree of control over the subsequent adequacy of the interpretation, if they are put on notice of the need to do son (See the **Kamasinski** case cited above). This may involve, for instance, the replacement of an inadequate interpreter.

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