Rights of the victim of a criminal offence arising from Article 6 of the Convention on the Human Rights and Fundamental Freedoms

Article 6 of the European Convention on Human Rights (referred as: Court) enshrines the utmost important role of judicial proceedings within a democratic society and it guarantees the right to a fair trial. Thus, no wonder that it is one of the most often referred provision of the Convention before the Strasbourg Court. This particular article is complex and consists of guarantees for the parties involved in civil proceedings, and also for defendants of criminal procedures. The former set of guarantees, which otherwise deals with both, is expressed by the first paragraph and the remainder two paragraphs are dealing with only criminal related matters.

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations 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.

The question in *Mihova v. Italy*[1] was whether Article 6 was applicable. The applicant lodged a complaint for sexual abuse of her daughter. The investigating judge applied a sentence resulting from a plea bargain between the accused and

[1] Mihova v. Italy, 30 March 2010
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98314

the prosecution. The applicant was not informed of the date of the hearing and appealed against the judgment. The Court of Cassation declared her appeal inadmissible on the ground that the injured party who was not joined to the proceedings as a civil party could not appeal against a conviction or acquittal. Meanwhile, the applicant commenced civil proceedings against the man in question. The applicant complained that she had been unable to challenge the sentence imposed, which she felt to have been too lenient. The Court held that the applicant's aim in the criminal proceedings had been to take punitive action, which was not guaranteed by the Convention. Even assuming that Article 6 (1) was applicable in such circumstances, the fact that domestic law did not allow the injured party to intervene in the plea bargaining between the accused and the prosecution could not, in itself, be considered contrary to the Convention. Furthermore, the applicant had been able to bring a civil action for damages against the man in question. She had therefore had access to a court with jurisdiction to examine her civil right to compensation. Consequently, the complaint was to be found inadmissible since there was no appearance of a violation of Article 6 (1).

This abovementioned example shows the very importance of the scrutiny that has got to be set forth from the scratch when delaing with any complaints.

Before getting any further, I find it essential to express my intent that, to the best of my belief, whenever we discuss Article 6, from any perspective, we have to give a whole view on the provision itself to understand the hollistic meaning and importance thereof.

Regarding both the substantive and procedural aspects of Article 6, it must be ascertained that it enjoys a significant autonomy within the national laws. This means that a procedural violation of a right might occur even if it does not considered to be violating at domestic level and, at the same time, a procedural deficiency of domestic law does not automatically mean a breach of Article 6. The Court, when it comes to fairness, generally examines the proceedings as a whole, which does not mean that it cannot examine certain crucial moments of the procedure in question.

We also have to underline the basic differences between the status of a victim in terms of the Convention and the status of a victim of a criminal offence in terms of it's everyday meaning in domestic jurisdictions. Under Article 6 of the Convention, a person can claim to be a 'victim' only if the proceedings are over, and once person is found guilty of a crime (or has lost a civil case). There are excemptions also to be observed, for instance when we are talking about the requirement of reasonable time or the presumption of innocence. All the Member States of the Council of Europe, by the meaning of Article 1, are required to organize their legal systems so as it to be complied with Article 6, where the failure to do so cannot be justified with reference to practical or financial difficulties.

The majority of Article 6 rights may be waived, but a waiver must be unambiguous, knowledgeable and cannot go against public interest. The waiver cannot considered as justified if it had been obtained by compel, or the person in question does not understand the consequences thereof. An example for the

waiver could be the *Gustafson v. Sweden* case[2], where the applicant's claim for compensation was rejected on account of his failure to adduce any new relevant evidence proving that he had been the victim of a crime. The applicant only submitted material that had already been considered by the domestic court which acquitted the alleged perpetrator. The application was rejected by the Court on the ground that the applicant could have requested an oral hearing but failed to do so being the applicant aware that the Board in question seldom had recourse to oral hearings. This may reasonably be considered to have waived his right to an oral hearing.

The basic interpretation of the right to a fair trial depends on whether the matter in hand concerns civil right or obligation, or a criminal charge. In case of civil rights and obligations, the cumulative presence of all the following elements are required: (i) there must be a 'dispute' over a 'right' or 'obligation', which is also referred as the 'Benthem criteria' (it was worked out in the case of *Benthem v. the Netherlands*[3]); (ii) that right or obligation must have a basis in domestic law, and; (iii) the right or obligation must be of a 'civil' nature. The 'dispute' has got to be construed in a substantive meaning and may relate only to an existing right within the scope it is excercised. It also has got to be genuinely and seriously relate to questions of fact or law and must be decisive for the rights of the applicant. In the case of *Georgiadis v. Greece*[4], the allegedly unlawfully detained applicant's claim for compensation, even though the right to compensation was only available under the national law in principle, not in the particular circumstances of the applicant, who was a conscientious objector, was regarded as 'dispute'. Thus, the Court examined the application on its merits and held that there had been a violation of Article 6 (1).

As we will see below, those victims of criminal offences might turn before the European Court of Human Rights, who - for instance - have been involved in a criminal act and, as a consequence, suffered loss or injuries and, subsequently initiated civil proceedings in order to seek compensation, but to no avail, or at least not to an extent with what he or she could have felt satisfied.

Now, let's turn to the to the issue of 'criminal charge'. Under the Convention it has an autonomous concept and applies irrespective of the definition of a charge in domestic law. It has a substantive rather than a formal meaning in the understanding of the Court. It definitely constitutes a "charge", when someone's arrest for a criminal offence is ordered, or; when officially informed of the prosecution against him. However, there are three elements which allows us to determine the applicability of Article 6 under its criminal headings, which are also known as 'Engel criteria', since these had been worked out in *Engel and*

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[2] Gustafson v. Sweden, judgment of 1 July 1997
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58051

[3] Benthem v. the Netherlands, judgment of 23 October 1985
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57436

[4] Georgiadis v. Greece, judgment of 29 May 1997
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58037

others v. the Netherlands[5]. If any of these criteria is to be observed, then the case will fall under the criminal headings of Article 6. The first Engel criterion is that the offence in question is categorized in the domestic law as 'criminal'. The second Engel criterion is the nature of the offence that counts, and the third criterion is the nature and degree of severity of the possible penalty. Not every judicial decision taken by the course of a criminal procedure falls within the ambit of Article 6, only those proceedings which may result in a criminal conviction.

Categorisation in domestic law means that if the categorisation on national level is criminal, it will automatically bring the matter in hand within the scope of Article 6 under its criminal limb.

However, if this first criterion cannot be observed, then the second and third criteria comes into play, which was clearly established in the case of *Weber v. Switzerland*[6].

By examining the nature of the offence, a comparison is needed between the domestic law and the scope of its application with other criminal offences within that legal system. Those domestic provisions which are aiming to punish a particular offence are usually considered to be "criminal", but in some cases, the aim of punishment can exist together with the purpose of deterrence. The 'criminal' nature does not necessarily require a certain degree of seriousness, the minor nature of an offence might also fall within the scope of Article 6. Where an offence is directed at a larger proportion of the population also might be a relevant circumstance that indicates the "criminal" nature of the offence. If the penalty is punitive rather than merely deterrent, it is ususally to be classified as 'criminal' and if so, the degree of severity, i.e. the amount of the penalty becomes irrelevant. There might be cases of a mixed nature, where the possibility of criminal and disciplinary liability can coexist. In these cases a more thoroughgoing analysis is needed. The offence is more likely to be considered as disciplinary and not criminal, where the facts of the matter do not seem to give rise to an offence outside a particular closed context, such as prison.

The third Engel criterion is to be considered if there no conclusion could be reached after the analysis of the first and second elements on their own. This is an alternative criterion which may attest a charge as criminal even where the nature of the offence is not necessarily criminal.

In any event, in cases concerning a 'criminal charge', the protection of Article 6 starts with an official notification of suspicion against the person, or with practical measures by which the person is first 'affected' by the charge. However, if someone is questioned by the police a potential suspect and his answers are used against him at a later stage (during the trial), Article 6 is applicable to this questioning as well, despite the fact that the person had not the formal status of suspect or accused.

Article 6 covers the whole of the trial in both civil and criminal cases, including the determination of the damages and sentence. However, it does not

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[5] Engel and others v. the Netherlands, judgment of 8 June 1976
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479

[6] Weber v. Switzerland, 22 May 1990
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57629

apply to different proceedings incidental to the determination of the 'criminal charge', i.e. procedures which are conducted after the conviction and sentence have become effective. For instance, a petition for retrial, or a request for reduction of a sentence, an application for release on probation, proceedings concerning the sentence in which prison to be served, determination of the security class of a prisoner fall beyond the ambit of Article 6. Meanwhile, if the domestic authorities agree to re-open the case, or on the request of an extraordinary review is granted, the guarantees of Article 6 will apply to the ensuing court proceedings.

The right to a fair trial involves the right to a court which has different forms in civil and criminal spheres.

The first and utmost important essential part of Article 6 is the right to access to court. There is no *expressis verbis* guarantee of the right of access to court in the text, but according to the Court, this provision secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court (or tribunal). However, the right of access to a court is not an absolute one since the Court expressed in the case of *Golder v. the United Kingdom*[7], that its very nature calls for regulation by the states, which regulation must never injure the substance of the right nor conflict with other rights envisaged in the Convention.

This is the right to submit a claim to a tribunal with the jurisdiction to examine points of fact and law relevant to the dispute concerned, with a purpose of adopting a binding decision. The right claimed in court must have a basis in domestic legislation and the claimant should have a personal interest in the outcome of the proceedings, but Article 6 does not create substantive rights, for instance, to obtain compensation or damages. In the domestic law there must be a structural right of appeal to a judicial body, that is, access to court involves the ability to apply for at least one stage of court review, which is an autonomous requirement of Article 6. It doesn't necesserily mean that this right can be excercised only in respect of an appeal from a lower court to a higher one, only if the domestic procedure foresees such a right. The right to a court involves, as such, the right to a reasoned decision as well.

The refusal of access to court requirement, in some cases, might be justified, because of the nature of the litigant. Limitations on access for persons of unsound mind, minors, bankrupts and vexatious litigants do pursue a legitimate aim.

There are several different formalities as obstacles of access to court, like court fees, time-limits for appeals, which are of a procedural nature. As to the domestic law, the applicant must show a considerable diligence to comply with these procedural requirements. One of these procedural requirements is the personal presence. Continuation of civil proceedings may be conditioned thereto. According to the Court, the accused in criminal proceedings must be present at the trial hearing, since the object and purpose of Article 6 paragraphs 1 and 3 c-e presuppose the presence of the accused. However, the absence of the accused or a party may be allowed in certain exceptional circumstances, e.g. if the authorities have acted diligently but not been able to notify the person concerned of the

[7] Golder v. the United Kingdom, judgment of 21 February 1975
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496

hearing. The restriction on access to court was held disproportionate in the case of *Atanasova v. Bulgaria*[8], where the criminal courts' refusal to the applicant's civil claim owing to statutory limitation in the criminal proceedings amounted to a violation. As to the essence of this case, the applicant was injured in a road-traffic accident in 1992. In 1994 she joined as a civil party the criminal proceedings that had been brought against the driver and claimed compensation for her alleged physical injuries. The domestic courts concluded in 2002 that they could not examine her claim as a civil party in the criminal proceedings as those proceedings had been discontinued under the statute of limitations, but that she retained a remedy in the civil courts. The question before the Court was whether the criminal courts' decision not to examine her civil claim once the criminal proceedings had been discontinued under the statute of limitations had infringed her right of access to a court or not. However, she retained the right to seek compensation in the civil courts. The applicant had exercised her right under domestic law to seek compensation in the criminal proceedings as a civil party. Therefore, she had had a legitimate expectation that the courts would determine her claim. Because of the Bulgarian authorities' delays in dealing with the case, the prosecution of the offence had become time-barred. It resulted that she could no longer obtain a decision on her compensation claim in the criminal proceedings. In such circumstances, it would not be right for her to be required to wait until the prosecution of the offence had become time-barred through the negligence of the judicial authorities before she was allowed, years after the accident had taken place, to bring a new action in the civil courts for compensation for her injuries. Thus, there had been a violation of Article 6 paragraph 1 and she was awarded EUR 4,000 in respect of non-pecuniary damage.

Another perspective of access to court is the question of legal aid. In some jurisdictions of the Contracting Parties, e.g. Cyprus, there is no legal aid scheme for civil cases, thus, whether or not the lack of a legal aid scheme leads to a violation of the Convention will depend on the facts of the particular case. Refusal of legal aid in civil case on the ground of the frivolous or vexatious nature of the claim will, of course not amount to a violation, nor will the statutory exclusion of certain types of civil dispute from the legal aid scheme. The right of access to court may sometimes be violated where an immunity exists that is effectively preventing a claim from being pursued. The position as to immunities enjoyed by certain domestic or foreign authorities from civil actions is rather unclear.

In the case of *Osman v. the United Kingdom*[9], the question of immunity arose. This particular case concerned the killing of the father of a schoolboy, by a teacher who had become obsessed by the boy. The boy was also involved in the shooting incident and, although wounded, survived. The teacher had a history of such infatuations and, following a psychiatric evaluation, had been suspended. He was convicted of two charges of manslaughter and pled guilty on grounds of

[8] Atanasova v. Bulgaria, judgment of 2 January 2009
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88659

[9] Osman v. the United Kingdom, judgment of 28 October 1998
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257

diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time. The question was whether the authorities could and should have done more to protect the victims. According to the applicants, the police had been informed of all the relevant facts from early on, and had promised to protect them, but had failed to do so. The police denied that they had made such a promise, and claimed that they never had enough evidence against the teacher to arrest him prior to the killings. An inquest was held, but since the perpetrator had been convicted of the killings, this was only a summary procedure, which did not establish the full facts. The applicants, Mrs Osman and Ahmet (mother and son) therefore instituted civil proceedings against the police for failing to take necessary steps to protect Ahmet and his father, but these proceedings were dismissed by the British courts, on the ground that the police was exempt from liability for negligence in the investigation and suppression of crime. The Commission found that the police had been made aware of the substance of the concerns about the teacher but the allegation of the applicants, namely that the police had promised protection to the victims of the crime had not been duly substantiated. It could not be proven that the police should have been aware of the seriousness of the threat by the teacher. However, the Court held that there had been a violation of Article 6, in that the applicants had been denied access to a court by the domestic regulation that the police could not be sued for negligence in the performance of their official task. The Court essentially confirmed the Commission's opinion and finally concluded that the absence of any judicial examination of the issues at the national level resulted a violation of Article 6.

Another essential element of the right to a fair trial is the finality of court decisions, in other words, the *res iudicata*. It draws its source from the principle of legal certainty and it means that once a criminal acquittal, or a civil judgment, has become final, it must instantly become binding. As we have seen, extraordinary review must be limited to very compelling circumstances and the mere possibility of there being two views on the subject of law in question, is not a reasonable ground for re-examination, only newly discovered circumstances may suffice for a case to be re-opened.

In addititon to the abovementioned issues, from the principle of effectiveness, the timely enforcement of a final decision of a court is also to be drawn as an immanent segment of the right to a fair trial. Lack of funds cannot be relied on by a state as an excuse for not honouring a debt incurred as a result of a judgment ordered against a state authority. However, it is not the case when the final judgment found against a private individual or a company, when this occurs, the lack of funds may justify failure to enforcement. In such cases the obligation of the state remains to assist (and not guarantee) successful claimants in enforcing the judgment in their favour. As to enforcement, a breach of domestic time-limits does not automatically mean a breach of Article 6, a delay for a certain period of time may be acceptable.

Article 6 states that everyone is entitled to a hearing by an independent and impartial tribunal established by law. These two requirements (independence and impartiality) are often considered together by the Court. The wording 'independent and impartial tribunal established by law' involves three main core-points, namely the tribunal *'established by law*'; '*independent*' tribunal, and;

'*impartial*' tribunal. It is utterly important, that these characteristics are applicable only to judicial bodies, since police or prosecution authorities need not be impartial, independent, or lawfully established. This latter provision deals with the question whether a particular disciplinary or administrative body has the characteristics of a 'tribunal' or 'court' within the meaning of Article 6, even if it is not called as such in the domestic system. This is the only provision of Article 6 which explicitly refers back to domestic law. The body need not be part of the ordinary judicial machinery, and must have the power to make binding decisions and not merely tender advice or opinions.

The notion of 'independence' of the tribunal overlaps with the 'tribunal established by law' to some extent. It is often analysed in conjunction with 'objective impartiality' of the member of the tribunal, there is no clear distinction being made between these two aspects. Anyway, the 'independence' requirement entails the existence of procedural safeguards to separate the judiciary from other powers, with special regard to the executive. The notion of the "independence" of the tribunal involves a structural examination of statutory and institutional safeguards.

On the other hand, 'impartiality' entails inquiry into the court's independence vis-à-vis the parties of a particular case. It is a lack of bias or prejudice towards the parties. As stated in the *Sander v. the United Kingdom*[10] case, the presence of even one biased judge in the bench may lead to a violation, even if there are no reasons to doubt the impartiality of other judges. There are two forms of impartiality, the subjective and the objective one. The former one is is presumed unless there is proof to the contrary, while the objective impartiality necessitates a less stringent level of individualisation and, accordingly, a less serious burden of proof for the applicant.

The fairness requirement of Article 6 covers the proceedings as a whole, where a cumulative analysis is needed on all stages. A deficiency at one level may be put right at another, at a later stage. 'Fairness' is completely autonomous from the domestic interpretation, which means that a procedural defect amounting to a violation during the national proceedings may not in itself result the establishment of the trial being unfair, but also, a violation of Article 6 can be found by the Court even if the domestic procedure was complied with the national law. Various minor deficiencies may lead, by a cumulative analysis, to a violation, even if each defect, taken alone, would not result in breach of 'fairness'. We should never forget and always have to bear in mind, that the Court is not allowed by Article 6 to act as a fourth instance court, it can never re-establish the facts of the domestic case and cannot overrule the descretion of weighing an evidence by the domestic court. Fairness within the meaning of Article 6 always depends on whether the applicants were afforded sufficient opportunities to state their case and contest an evidence which they consider false, and not whether the domestic courts reached a right or wrong decision.

'Fairness', as such, includes both in criminal and civil cases the requirements of adversarial proceedings, equality of arms, presence and publicity. In criminal matters it furthermore includes the requirement of

[10] Sander v. the United Kingdom, judgment of 9 May 2000
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58835

entrapment defence, right to silence and not to incriminate oneself and, finally right not to be expelled or extradited to a country where one may face a flagrant denial of a fair trial.

The adversarial principle means that the relevant material or evidence is made available to both parties, i.e. having then opportunity to know and comment at trial on the observations filed or evidence adduced by the other party. Access to the materials vital to the outcome of the case must be granted, however, access to less important evidence may be restricted. Alleged violations of adverserial proceedings under Article 6 (1) and defence rights under Article (3) are usually examined in conjunction, since these requirements usually overlap. A more specific requirement of adversarial proceedings in a criminal trial requires disclosure of evidence to the defence, however, the right to disclosure may be limited, e.g. in order to protect secret investigative methods. Whether or not to disclose materials to the defence cannot be decided only by the prosecution. To comply with Article 6, the question of nondisclosure must be put before the domestic courts at every level, and can be approved by the national courts and only when strictly necessary.

Equality of arms often overlaps with the adversarial requirement, but it essentially denotes equal procedural ability to state the case. The adversarial principle is a rather narrow understanding of the access to and knowledge of evidence and it is not clear in the Court's case-law whether these principles in fact have independent existence from each other. A minor inequality which does not affect fairness of the proceedings as a whole will not infringe Article 6. However, there's no exhaustive definition as to what are the minimum requirements of "equality of arms". There must be clear procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties, which may include opportunities to adduce evidence, challenge hostile evidence and present arguments on the matters.

Article 6 also guarantees to everyone a public hearing in any criminal charge against him or her. It further states that 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 require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This provision requires that in principle, there should be an oral hearing attended in criminal cases by the prosecutor and the accused. A public hearing is an essential feature of the right to a fair trial. It consists accordingly four implied rights: (i) right to an oral hearing and personal presence before the court; (ii) right to effective participation; (iii) right to publicity (i.e. third persons and media be allowed to attend the hearing); and (iv) right to publication of the court decision.

As to the right to an oral hearing and personal presence, it is to be noted that this presence presupposes an oral hearing, however, not every oral hearing must necessarily be public. However, there's no significant distinction between situations involving merely a lawyer being present (although it may be relevant for the purpose of Article 6 (3) b and c); and cases conducted by written procedure in the parties' total absence). According to the Court's opinion, where the case is to be heard before one instance only, and where the issues are not highly

technical or purely legal, there must be an oral hearing, written proceedings will not suffice. It is for the Court to define whether the appeal proceedings were alike. Written proceedings at the appeal stage are generally accepted as complying with Article 6, when no issues with the credibility of witnesses arose, or facts are not contested, or even if parties were given adequate opportunities to put forward their cases in writing and challenge the evidence against them. A party to be present before at least one level of court jurisdiction is an autonomous requirement, but exemptions might occur. For instance in misdemeanour cases (speeding or other road traffic offences), as long as there was no need to assess the credibility of witnesses, the Court has accepted that no oral hearing was required and the proceedings could be written. The physical presence of parties is required to collect evidence from them where they are witnesses to the events important for the case. On the other hand, it can be relevant to give the judge an opportunity to make conclusions about the applicants' personality, abilities, etc. Where proceedings at first instance were held in absentia, this may be cured at the appellate stage if the court of appeal is empowered to rule both on questions of fact and law and has got the power to completely re-examine the firts instance court's decision. In any event, presence before an appellate court is required if it deals both with questions of fact and law and is fully empowered to quash or amend the lower decision. This is also the case where an applicant risks a major detriment to his situation at the appeal level, even if the appeal court deals merely with points of law or, where the assessment of the applicant's character or state of health is relevant of the appeal court's legal opinion. Since most of Article 6 rights can be waived, a person can waive his or her right to be present but it must be made in an unambiguous manner. Trials in absentia will only be allowed as long as the authorities made their best efforts to track down the accused and inform of forthcoming hearings, and the possibility of full re-trial in case of their re-appearance.

The effective participation is important to take account of the defendant's physical and mental state, age and other personal characteristics at a court hearing. A criminal defendant must feel sufficiently uninhibited by the atmosphere of the courtroom (especially in case of excessive public scrutiny) in order to be able to consult with his lawyers and participate effectively. In criminal cases involving minors, specialist tribunals must be set up and make proper allowance for the handicaps.

The purpose of attendance by third parties and the media, i.e. the public nature of a hearing ensures greater visibility of justice, maintaining the confidence of the society in the judiciary. A merely technical character of the case is not a good reason to exclude the public. The public nature does not mean that the proceedings should be held in camera by default, but a court must individualise its decision when excluding the public. There are some sort of matters, where the procedure can be held in camera by default, like prison disciplinary cases. Failure to hold a public hearing at first instance will not be redressed by opening the appellate proceedings to the public, unless the appeal court has full review jurisdiction in the case, however, there's no right to a public hearing on appeal where the first instance has been public, unless it is a full appeal, i.e. on facts and law.

As to the fourth element of the 'public hearing' within the fair trial, it is to be noted that there's no obligation for a court to read out its full judgment in open court since publishing in writing is sufficient and the court decision must be available for consultation in the registry of the court.

There are specific elements of the 'fairness' requirement in criminal proceedings, namely (i) the entrapment defence, (ii) the right to silence and not to incriminate oneself and, finally, (iii) the right not to be expelled or extradited to a country where one may face a flagrant denial of a fair trial.

As to the first requirement, the case of *Ramanauskas v. Lithuania*[11] wears a great significance. In this case the applicant worked as a prosecutor and in his application he submitted that he had been approached through a private acquaintance by a person previously unknown to him who was, in fact, a police officer from a special anti-corruption unit. The officer offered the applicant a bribe of USD 3,000 in return for a promise to obtain a third party's acquittal. The applicant refused the offer first but later agreed as it was repeated a number of times. The officer informed his employers and the Deputy Prosecutor General authorised him to simulate criminal acts of bribery. Shortly afterwards, the applicant accepted the bribe from him. In 2000 he was convicted of accepting a bribe of USD 2,500 and sentenced to imprisonment. On appeal, the second instance court upheld the judgment. The Supreme Court dismissed the applicant's cassation appeal and held that the question of incitement was of no consequence for the legal classification of the applicant's conduct. According to the Court, the national authorities could not be exempted from responsibility for the actions of police officers simply by arguing that, although carrying out police duties, the officers were acting "in a private capacity". It was particularly important that the authorities should have assumed responsibility, as the initial phase of the operation had taken place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the officer to simulate acts of bribery and by exempting him from all criminal responsibility, the authorities had legitimised the preliminary phase afterwards and made use of its results. Moreover, no satisfactory explanation had been provided as to what reasons or personal motives could have led the officer to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he had not been prosecuted for his acts during that preliminary phase. On that point, the Government had simply referred to the fact that all the relevant documents had been destroyed. The authorities' responsibility was thus engaged for the actions of the officer and the applicant's acquaintance prior to the authorisation of the bribery simulation. To hold otherwise would open the way to abuse and arbitrariness by allowing the applicable principles to be circumvented. The actions of the officer and the applicant's acquaintance had gone beyond the mere passive investigation of existing criminal activity: there was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences; all the meetings between the applicant and the officer had taken place on the latter's initiative; and, the applicant seemed to have been subjected to blatant prompting on the part of his acquaintance and the

[11] Ramanauskas v. Lithuania, judgment of 5 February 2008
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935

officer to perform criminal acts, although there was no objective evidence to suggest that he had been intending to engage in such activity. The applicant had maintained, throughout the proceedings, that he had been incited to commit the offence. The domestic authorities had denied that there had been any police incitement and had taken no steps at judicial level to carry out a serious examination of the applicant's allegations. More specifically, they had not made any attempt to clarify the role played by the protagonists in the applicant's case, despite the fact that the applicant's conviction was based on the evidence that had been obtained as a result of the police incitement complained of. The Supreme Court found that, once the applicant's guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. The Court contested these statements. The actions of the officer and the applicant's acquaintance had had the effect of inciting the applicant to commit the offence of which he had been convicted. There was no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial had been deprived of fairness. Finally, the Court held that there had been a violation of Article 6 (1), and awarded the applicant EUR 30,000 in respect of all damages.

As we can see, the Court's case-law uses the term entrapment interchangeably with the phrase police incitement but, anyway, these terms appear be construed in an equivalent way for Convention purposes, despite of the fact that there is a substantial difference between them, since police incitement relates to instigation of crime in the context of an official investigation. However, while someone offering of a bribe may amount to incitement, it does not necessarily amount to entrapment. The protection against entrapment under the fair trial provision of the Convention is of an absolute nature, which menas that even the public interest cannot justify conviction based on evidence obtained by police incitement. Similarly, in the case of *Teixeira de Castro v. Portugal*[12] two policemen procured small amount of drugs from applicant without previous criminal record during an unsupervised investigation, where no good law-enforcement reason existed to carry out the operation, thus the court concluded the violation of Article 6 (1), since the active behaviour of the police officers went beyond the burden of an acceptable level.

When it comes to police incitement, there is a two-step test to be examined, namely whether the state agents remained within the limits of "essentially passive" behaviour or had gone beyond them, and whether the applicant had been able to raise the issue of entrapment effectively during the domestic proceedings, and how the domestic courts had dealt with that. During the examination of the state agents' "essentially passive" behaviour the Court, under its analysis, reexamines the facts whether the authorities created a risk that an ordinary reasonable person would commit an offence under the influence of the investigation in question, and also the quality of the national legal basis regulating those undercover operations. As to the scrutiny of the legal basis, it is to examined whether the special activities by undercover agents leading to the

[12] Teixeira de Castro v. Portugal, judgment of 9 June 1998
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58193

commission of an offence were properly supervised (by a judge), whether the authorities remained essentially passive, and whether the authorities had good reason to commence the investigation (not just against incidental target). It might be also relevant, whether the target had started performing criminal acts by him or herself. If these elements of the analysis are inconclusive, only then will the Court go on to examine whether the applicant had been enabled by the national law to raise the issue of entrapment during a trial. In this latter case the prosecution has got to show that the applicant's allegations of entrapment are, at least, unsubstantiated.

The right to silence and not to incriminate oneself is another important aspect to take into consideration when dealing with Article 6 (1), which essentially prevents the prosecution from obtaining evidence by defying the will of the accused not to testify against himself. The law itself might impose an obligation for someone to testify under the threat of sanction (e.g. to give evidence as a witness at a trial). Moreover, there are other types of situation which involve defying the will of accused persons who had decided not to give a testimony, namely the physical or psychological coercion and, also the coercion with the use of covert investigation techniques. As a basic rule, the admissibility of the domestic evidence cannot be reexamined by the Court since it would go against the fourth-instance rule. Wether the coercion or oppression of the will of the accused is permissible or not, depends on various factors, namely on the nature and degree of compulsion, the weight of the public interest in the investigation and, finally, existence of any relevant safeguards regarding the procedure. It is still not clear-cut, whether the warning of the suspect of his right to silence is always compulsory but it appears that at least a formal warning is inevitably required before the first questioning if there is a chance that the person being questioned might become a suspect and the questioning takes place without the absence of a lawyer. The right to silence overlaps with the presumption of innocence under Article 6 (2). In the case of *Shannon v. the United Kingdom*[13] the applicant, charged with false accounting and conspiracy to defraud, was required to attend before a financial investigator to answer questions on whether any person had benefited from the false accounting. The applicant failed to attend because he feared his replies could be used as evidence against him during the trial. The applicant was, as a result, convicted and fined for the offence of failing without reasonable excuse to comply with the investigators' requirements to answer questions. His appeal against conviction was initially allowed by the County Court, but the Court of Appeal confirmed the applicant's conviction on the ground of not having a reasonable excuse for refusing to comply with the investigators' requirements because the information sought could be potentially incriminating. The Court finally held that the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in respect of events of which he had been charged was not compatible with his right not to incriminate himself, therefore there had been a violation of Article 6 (1).

[13] Shannon v. the United Kingdom, judgment of 4 October 2005
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70364

It is not always unequivocal whether a person is being questioned as a suspect or a witness. Though it is a relevant circumstance, since the former having the right to silence, and the latter not. In analysing such cases the Court takes into account not only the formal status of the person being questioned, but also the factual circumstances of the questioning in order to establish whether or not the he or she could reasonably be considered as a potential suspect, in which case the right to silence may also be claimed.

The right to a reasoned decision is also immanent part of the fair trial requirement. The domestic decision should contain reasons that are sufficient to reply to the essential aspects of the party's factual and legal argument. Article 6 does not allow complaining about the factfinding and legal competence of domestic courts by alleging that they reached a wrong decision. As long as some reasons are given, the decision in question will in principle be compatible with Article 6, it does not require a detailed answer in the judgment to every argument raised by the parties.

When it comes to the reliability of an evidence obtained by the domestic court, the the Court will verify whether the 'unlawfulness' in the domestic terms coincides with the 'unfairness' in the autonomous terms of the Convention and whether the applicant had been able to to raise the matter before the domestic courts. However, most complaints under Article 6 about unreliable evidence are likely to be rejected as being of fourth instance nature.

The reasonable time requirement, a quite often referred violation, arose from the principle of effectiveness and is *expressis verbis* envisaged in the wording of Article 6 as a fully autonomous need. It concerns the length of procedural actions and applies both to civil and to criminal cases. Under the Court's case-law there is no fixed time-limit for any type of the proceedings, all situations are examined on a case-by-case basis. Length cases are the first area where the Court has issued pilot judgments. The "reasonable time" requirement must not be confused with the length of detention test, which latter applies only as long as the person is deprived of his or her pre-trial liberty. In a criminal case, the beginning of period to be taken into account for the purpose of the "reasonable time" requirement is determined by the date the "charge" was notified. It may vary in different national laws, so there's not an exhaustive list or proper definition to establish an exact date. The date of opening an investigation indicating the applicant as a suspect may be taken as a starting date, but also the date of arrest, search, or questioning, even as a witness may count. The ending date is the date of notification of the final domestic decision determining the dispute by a higher court. Where a case is re-opened, for instance upon a supervisory review, the period when no proceedings had been pending is excluded from the calculation. There are some basic criteria which is to be taken into account by dealing with length issues. First of all the nature and complexity of the case, which involves the number of defendants, number of charges and what is at stake for the applicant in the domestic proceedings. For example child-care or compensation claims for blood tainted with HIV, or even action for serious injury in a traffic accident related cases usually enjoy priority and always call for special diligence. The conduct of the applicant and the authorities are also taken into consideration when length complaints arise. Delays attributable to the authorities are taken into account but delays

(deliberate or not) attributable to the applicant will not be taken into consideration in assessing "reasonable time". However, the defendant cannot be blamed for taking all the legal resources (appeals, requests, etc.) afforded by domestic law, unless these were not abusive. There is no general rule on the time allowed by Article 6, but more attention is to be payed to cases that last more than 3 years at 1 instance, 5 years at 2 instances, and 6 years at 3 levels of jurisdiction.

Length related claims are those which considered one of the most typical complaints victims of criminal offences may successfully complain of. The case of *Pantea v. Romania*[14] concerned a Romanian lawyer (formerly public prosecutor) who was involved in an altercation with a person who sustained serious injuries. He was prosecuted and remanded in custody for months. The case was still pending at the time of the Court's decision. The Court noted that the proceedings had begun to affect the applicant's situation as soon as the prosecution began. The criminal proceedings, which were currently pending at the first level of jurisdiction, had lasted eight years and eight months. Considering that the Romanian authorities could be held responsible for the overall delay in dealing with the case, the Court held that the proceedings failed to satisfy the 'reasonable time' requirement under Article 6 (1) of the Convention, and thus there had been a violation.

The interesting thing about the abovementioned Pantea case is, that the applicant can be considered as a 'victim' in the understanding of both the Convention and the national aspects.

Article 6 (2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This is the presumption of innocence principle, by which not only the courts but also other State organs are bound and must equally be upheld after acquittal as before trial. This basic principle applies during criminal proceedings in their entirety, included the pre-trial stage and also when the criminal proceedings are over, irrespective of their outcome, but a violation thereof can occur even in absence of a final conviction.
Article 6 (3) is often examined in conjunction with the right to a fair trial under Article 6 (1), since the former contains the defence rights listed in a form of minimum guarantees, which means, at the same time, that it is not an exhaustive list. The sub-paragraphs a) - e) indentify different aspects of the right to a fair trial.

Article 6 (3) a) stipulates that everyone charged with a criminal offence has the right to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him. This provision is aimed at the information that is required to be given to the accused at the time of the charge or the commencement of the proceedings and in a language that the accused understands, it does not necessarily have to be his or her mother tongue.

The information provided must be sufficient enough to enable the accused to begin formulating his defence, however, full evidence against the accused is not required at the earliest stage, it may be presented later. No written

[14] Pantea v. Romania, judgment of 3 September 2003
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61121

notification of the "nature and cause of the accusation" is needed as long as sufficient information is given orally.
As to Article 6 (3) b), everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his or her defence. The adequacy of the time is a subjective test and always depends on the circumstances and the complexity of the case, including the stage the proceedings have reached, and what is stake for the applicant. Any restrictions on this requirement can be justified only if it is no more than strictly necessary and must always be proportionate to identified risks. A certain overlap can be explored between this right and the right to adversarial proceedings and equality of arms. As stated in *Öcalan v. Turkey*[15] a delicate balance must be struck between the need to ensure trial within a reasonable time and the need to allow enough time to prepare the defence, in order to prevent a hasty trial which denies the accused an opportunity to defend himself properly.

Article 6 (3) c) consists of four distinct elements, namely the right to defend oneself in person, which is actually not an absolute right; to choose a lawyer; to have free legal assistance where someone cannot afford it and where the interests of justice so require; and finally, the right to practical and effective legal assistance, which latter means that the legal assistance should not be soly theoretical and illusory. The right to choose a lawyer arises only if the accused has sufficient means to pay the lawyer, however, a legally aided person has no right to choose his representative, or to be consulted in the matter.

Article 6 (3) d stipulates that the accused has the right 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. It cannot be interpreted as an absolute right for an accused to call witnesses, its basic conditions shall be layed down by the domestic law. The evidence relied on by the prosecution should be produced in the presence of the accused person at a public hearing and in the meantime with a view to adversarial argument. It could cause problems if the prosecutor provides written statements by a witness who does not appear at the hearing for some reasons. A good example of this is e.g. when the witness, actually a victim of a crime fears to show up. In the *Al-Khawaja and Tahery v. the United Kingdom*[16] case from 2011, where the first applicant a physician, was charged with two counts of assault on two female patients. One of the patients, died before the trial, but had made a statement to the police prior to her death which was read to the jury. The judge stated that the contents of the statement were crucial to the prosecution on count one as there was no other direct evidence of what had taken place. During the trial, the jury heard evidence from a number of different witnesses and the defence was granted the opportunity to cross-examine all the witnesses who gave live evidence. Finally, the first applicant was convicted on both counts. The second applicant was charged, amongst others, with wounding deliberately following a gangland stabbing. None of those questioned at the scene claimed to have seen the

[15] Öcalan v. Turkey, judgment of 12 May 2005
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022

[16] Al-Khawaja and Tahery v. the United Kingdom, judgment of 15 December 2011
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108072

applicant stab the victim, but two days later one of those present, made a statement to the police implicating the second applicant. At the trial, the prosecution applied for permission to read out this particular witness's statement on the ground that he was feared to appear in court, and this statement was finally read to the jury in his absence. The applicant was convicted and his conviction was upheld on appeal. Both applicants turned before the Court complaining that their convictions had been based on statements from witnesses they had been unable to cross-examine at the trial and this circumstance apparently violated their right to a fair trial. The Chamber of the Court held in both cases that there had been a violation of Article 6 (1) in conjunction with Article 6 (3) d) on the grounds that the loss of the opportunity to cross-examine the witnesses concerned had not been effectively counterbalanced in the proceedings. As to Article 6 (1) in conjunction with Article 6 (3) d), it was noted that originally before an accused can be convicted, all evidence must be produced in his presence at a public hearing with regard to adversarial argument. Exceptions are possible but those must not infringe the rights of the defence. Two consequences were drawn from this general principle. Firstly, there has got to be a good reason for admitting the evidence of an absent witness. Good reason exists, amongst others, where a witness had died or was absent because of fear attributable to the defendant or his accomplices. If the witness's absence is due to only a general fear of testifying and it cannot directly attributable to the defendant or accomplices, it is for the domestic court to conduct appropriate enquiries to determine whether there were objective grounds for that fear. Secondly, if a conviction is based on the statement of an absent witness whom the accused has no opportunity to examine, during the proceedings, would generally be considered incompatible with Article 6. Accordingly, the national courts have to balance under a heavy scrutiny because of the dangers of the admission of such evidence. The question in each case was whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of that evidence. In this connection, the Court considered that the domestic law had contained strong safeguards as to to ensure fairness. As regards how those were applied in practice, it considered three issues, namely whether it had been necessary to admit the absent witnesses' statements; whether these untested evidence had been the sole or decisive basis for the applicants' conviction; and whether there had been sufficient counterbalancing factors.

As to the first applicant's case, it was not disputed that the victim's death had made it necessary to admit her and it had to be regarded as decisive. The reliability of that evidence was supported by two friends, who had both given evidence at the trial. Moreover, there were strong similarities between her description of the assault and that of the other complainant, with whom there was no evidence of any collusion. The Court considered that the jury had been able to conduct a fair and proper assessment of the reliability of the deceased witness's allegations against the first applicant so there had been sufficient factors to counterbalance the admission in evidence of the statement in question, and the Court held that there had been no violation of the relevant Article.

As to the second applicant's case, the witness's statement concerned was the only one which had claimed to see the stabbing and it was a decisive evidence against

the applicant. It was not sufficiently counterbalanced. Even though the applicant had given evidence denying the charge, he had not been able to test the reliability of the absent witness's evidence through cross-examination.However, a warning of the dangers by the judge to the jury of relying on untested evidence could not be a sufficient counterbalance where an untested statement of the only prosecution witness was the only direct evidence against the applicant. By the decisive nature of the statement without any strong corroborative evidence, examining the fairness of the proceedings as a whole, the Court concluded that there had been a violation of Article 6, and awarded EUR 6,000 to the second applicant in respect of non-pecuniary damage.

Another example from the recent case-law regarding the fair trial, is the case of *Gani v. Spain*[17]. It concerned the criminal proceedings of the applicant, who was arrested and charged with, amongst others, rape, following the criminal report to the police by his former partner and the mother of their child. She testified at a hearing before the investigating judge in absentia of the applicant's counsel, who otherwise gave no reasons for his absence. The statement was written up and, at the trial, the woman started to answer the public prosecutor's questions. Her evidence had to be interrupted, as she was said, medically confirmed, to be suffering from post-traumatic stress symptoms and as a consequence, she could not be cross-examined. As an alternative, the court ordered that her statement should be read out. The applicant was finally convicted and imprisoned. The Court held that the applicant had been allowed to challenge the woman's truthfulness by giving his own account of the facts, which he had duly done. The domestic courts had carefully compared both versions of the facts and had also taken into account the statement given by the victim at the hearing which, although incomplete, had served to corroborate her pre-trial statements. The reliability of her statements had further been supported by indirect evidence and by the medical reports confirming that her physical injuries and psychological condition were consistent with her account of the facts. There had been sufficient counterbalancing factors admit the evidence of the woman's statements, therefore there had been no violation of Article 6 (1) read in conjunction with Article 6 (3) d) of the Convention.

However, there are utterly important exemptions to be observed since the majority of the Convention States grant rules which excuse, for instance family members, from giving evidence.

The free assistance of an interpreter requirement envisaged in Article 6 (3) e) sets forth that the accused is entitled to free assistance of an interpreter if he can not understand or speak the language used in court. If interpretation is denied, the onus is on the authorities to prove that the accused has sufficient knowledge of the court language. In contrast to the right to free legal assistance under Article 6 (3) c), which is basically subject to a means test, Article 6 (3) e) applies to everyone charged with a criminal offence. There is an overlap between this provision and the rights to adversarial proceedings and the equality of arms, the right to notification of a charge in a language one understands, and the right

[17] Gani v. Spain, judgment of 9 September 2013
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116836

to adequate time and facilities to prepare one's defence. In *Diallo v. Sweden*[18] a heroin smuggler from France was arrested and questioned by Swedish customs officer without the contribution of an interpreter during first interview at the customs office, but since the customs officer had sufficient command of French, the Court was satisfied with that and held that there had been no appearance of a violation and the application was declared inadmissible.

The Court's principle role is primarily to state whether the Convention has been violated or not and, in case of a violation, to award compensation if it considers appropriate. The Court cannot order a re-trial at domestic level, nor quash a judgment of a national court but reveals the actions or inactions of a state which has amounted to a violation of the Convention. This system, with its boundaries, offers protection of the provisions set forth in the Convention for applicants, let them be 'only' victims of the Convention, victims in our general understanding, or both at once.

[18] Diallo v. Sweden
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96885