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# Organisational and operational aspects of the criminal justice system

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## INTRODUCTORY THOUGHTS

In this monograph I attempt to present the basic institutions of Hungarian criminal proceedings. With Hungary's membership of the European Union, the ECrHR's case-law, which I will examine in each case, must of course also be taken as authoritative.

I try to point out issues that are significant not only from a legislative, but also from a law enforcement point of view. In particular, controversial issues have recently arisen in relation to the indictment and its alternatives. The use of coercive measures is also a matter of concern, and the European Court of Human Rights (hereinafter: ECrHR) has handed down a number of decisions in this area which have also fundamentally influenced the practice of national courts. In particular, the use of pre-trial detention appears to be a matter of concern, but it is clear that in many cases this must be ordered, primarily in the interests of the investigation.

The Hungarian Criminal Procedure Code (hereinafter: CPC) provides for a number of remedies, and in this paper I will make a particular effort to describe them in detail, with a special focus on extraordinary remedies. I should note that Hungary has a two-tier system of remedies, which in some cases may even lead to a procedure at third instance. Some authors argue that this slows down the process of justice, while others argue that it improves its quality.

I deal with some specific procedures in a separate chapter. The reason for the different rules is that the accused has special characteristics. Thus, different rules of evidence, including coercive measures, apply. In particular, the principles relating to juveniles are relevant, as this age group is particularly vulnerable in proceedings. On this basis, the standards set out in various international instruments must also be taken into account.

I would also like to make a special mention of the possibilities of various summary proceedings, which have been introduced in Europe, including Hungary, primarily on the model of the Anglo-Saxon legal system.

I would like to express my special thanks to my wife Karolina, my parents, Dr. László Bérces, university professor, and Gabriella Reisz for their patience in helping me write this book.

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# CHAPTER I

# BASIC FEATURES OF THE HUNGARIAN JUDICIAL SYSTEM

## 1.1. Administrative issues

Pursuant to the Constitution the operation of the Hungarian state is based on the principal of the distribution of powers: the task of the dispensation of justice belongs to the courts. Courts render decisions in criminal and civil law cases, on the legality of public administration decisions, on the collision of local government decrees and other laws that are ranked higher in the legal instrument hierarchy and on their annulment, on the establishment of the failure of local government to pass decrees when they are required by law to do so and in other cases prescribed by law.

The judicial organization is one of the basic pillars of the Hungarian rule of law. Currently there are 158 courts in a four-tier hierarchy: district courts, administrative and labour courts, regional courts, regional courts of appeal and the Curia.

The different court levels are closely interconnected but there is no subordination between the respective levels: the courts situated higher in the hierarchy do not have any right to give instructions. Judges are independent and shall not obey any instructions concerning their adjudication activities and they render their decisions pursuant the applicable laws and their own belief. The main judicial body is the Curia that ensures the consistent dispensation of justice and renders decisions for the sake of consistent dispensation of justice that are binding for the courts.

11,000 people work in ’s court system, the number of judges barely falls short of 3,000. This headcount has been basically unchanged since 2011, contrarily to the significantly increased worklo ad that awaits its completion.[1]

The justice system created by the reform of 1997, which entrusted the National Council of Justice as a self-governing body with the administration of courts, did not exist then and is still non-existent elsewhere in Europe. As a natural consequence of management performed by a body, the decisions of the NCJ were influenced by particular interests and no operability could be achieved: problems that had to be addressed swiftly could remain unsolved for moths. This is why the new regulations introduced on 1 January 2011 and on 1 March 2011 deprived NCJ of many of its rights and delegated them into the competence of the president of NCJ. 16-20 new rights were added to the original 7-10 rights of the president of NCJ.

The rules coming into effect on January 1st, 2012 divided the powers into two groups. The task of central administration of courts is performed by the President of the NOJ, supported by deputies and the Office. The administrative work of the NOJ’s President is supervised by the National Judicial Council (NJC).

The President of National Office for the Judiciary (NOJ) set out the following strategic goals:

- courts shall fulfil their constitutional obligations: independent judges shall adjudicate in a timely manner and at a high professional quality,
- optimal allocation and utilization of human resources,
- provision, optimal allocation and utilization of material conditions,
- integrity of judicial organization, transparency of judiciary and administration, predictability and control of administration,
- simplification of access to courts and
- development of training system, cooperation with other legal professions.

[1] https://birosag.hu/en/hungarian-judicial-system (08.03.2024.)

The president of NOJ shall keep the competences of the president of the National Judicial Council, and further rights are also vested on the president in order to secure operability. To mention some of the latter, the right to issue regulations, resolutions and recommendations is a right usually exercised by the heads of the institutions with a national scope of competence.

The president of NOJ shall bear a serious personal responsibility for the central administration and for its effective operation, i.e. to perform the president's duties – as enshrined in the Act of Parliament – with due regard to the constitutional principle of judicial independence.

The president of NOJ shall perform the work under serious control:

a) The president shall provide for the publicity of the administration of the courts and the related decision-making.

b) The president is under an obligation of publication and notification in respect of decisions of the president of NOJ, regulations, recommendations and reports.

c) Between the rules of termination of the mandate also prevails the corporative control. The deprival of office of the president of NOJ may be initiated at the Parliament by NJC with its resolution adopted by two-third majority vote.

d) The customary control over the person responsible for a budgetary heading.

e) The president shall ensure the rights of the advocacy organisations.

f) Obligation of providing information: the president shall

- inform the NJC on her activities on a half year basis;
- inform annually the presidents of the Curia, of the high courts and of the tribunals;
- report to the Parliament annually on the general situation of the courts and on the administrative activities of the courts and once in between annual reports to the Parliamentary Committee of the Judiciary.

g) Appointment of court executives: In the appointment of court executives, the right of the judicial bodies to form an opinion on the appointment remains unchanged. Some of the court executives shall be appointed by the president of NOJ, while a much larger part of executives shall be appointed by the presidents of high courts and of tribunals.

The powers of the bodies forming an opinion remain intact with regard to all executive appointments. Indeed, the rights of the president of NOJ are more limited than the powers of the presidents of high courts and of tribunals. The president of NOJ has to obtain the advance opinion of NJC, if she would like to appoint an executive who had not received the majority of the votes of the body forming an opinion on the appointment. The president of the NOJ shall – at the same time as the appointment – provide a written notification to the NJC and present the reasons of the decision on the next session of NJC, in the case of appointing another person than the one proposed by the body providing an opinion.

The system of applications court executive posts will remain unchanged: The applicants shall refer to his/her long-distance plans and the way of realization concerning the operation of the division in question.

The president of the NOJ may propose to initiate legislation in the interest of legislation affecting the courts.

The NJC has the central administrative supervisory rights regarding to the president of the NOJ as follows:

- Supervising the central administrative activity of the president of NOJ, and making a notification as necessary;
- Making a proposal to the president of NOJ on initiating legislation affecting the courts;
- Forming an opinion on the regulations and recommendations issued by the president of NOJ;
- Approves the rules of procedure of the service court and publish it on the central website;
- Forming an opinion on the proposal on the budget of the heading and on the report on the implementation of the budget;

- Forming an opinion on the detailed conditions and the amount of other benefits;
- Expresses a preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview;
- Determines the principles to be applied by the President of the NJO and the President of the Curia when adjudicating the applications in the context of using their power to award a position to the applicant in the second or third position in the rankings;
- Have the right of consent in the adjudication of applications where the President of the NJO or the President of the Curia wishes to award a position to the applicant in the second or third position in the rankings;
- Exercises the right of consent regarding the appointment of court leaders who did not receive the approval of the reviewing board;
- Publishing annually its opinion on the relevant practice of the president of NOJ and of the Curia regarding the assessment of the applications for judiciary posts, and court executive positions, may awarding honorary titles etc., on the initiative of the president of NOJ;
- Performing checks related to the property declarations of judges;
- Deciding on the repeated appointment of certain executives, if the office has already been filled by the applicant two times;
- Forming an advance opinion on the application for an executive post, if the president of NOJ or the Curia would like to defer from the majority opinion of the body that has formed an opinion on the appointment;
- Forming an opinion on the rules pertaining to the training system of judges and to the performance of the training obligation;
- The member of NJC may observe the documents related to the operation of NOJ and the president of NOJ, and may request data and information from the president of NOJ;
- The deprival of office of the president of NOJ may be initiated by NJC.[2]

### 1.2. The Appointment of judges

In order to be appointed as judge, the candidate must
- be at least thirty years old,
- have the capacity to act,
- be a Hungarian citizen,
- hold a diploma from a university of law, and
- have passed the bar examination,
- have experiences in the profession of at least one year,
- be willing to make an asset declaration
- have valid aptitude test results, and
- have a valid official certificate of good character.

The first judge appointment will be made for a definite period of 3 years.

The duties of judges typically include: the delivering of judgments in and regarding criminal cases, legal disputes in private law cases, other cases stipulated in legislation, the legitimacy of administrative decisions, the conflicts of municipality rules with other legislation and their annulment and the conclusion of a failure to comply with the statutory obligation of the municipality to pass legislation.

Their status is regulated by the Act CLXII of 2011 on the Legal Status and Remuneration of Judges (the Judges Act).

[2] https://birosag.hu/en/national-office-judiciary/scope-authority-president (03.03.2024.)

Applications invited to fill a position at the respective courts must be submitted to the presidents of these courts (i.e. in case of a position at the district court: to the president of the district court, in case of a position at the administrative and labour court: to the president of the administrative and labour court, in case of a position at the general court: to the president of the general court, in case of a position at the court of appeal: to the president of the court of appeal and in case of a position at the Curia: to the president of the Curia).

Within 15 days following the expiry of the deadline for application, the judicial council of the specific court of appeal or general court will interview the applicants. Based on objective and subjective points given to the applicants, the judicial council will rank the applications in line with Section 14 (4) of the Judges Act. Further information on developing ranking is available in KIM Decree 7/2011 (III.4.) on the detailed rules of the assessment of applications for judge positions and the points given in developing the ranking of applications.

The appointment of court leaders is for 6 years, except in the case of appointment as president of a chamber for an indefinite term. Court leader offices can only be held by judges appointed for an indefinite term.

Court leader positions are filled via application procedures. The opinion-giving body (full meeting, general judicial meeting, division, regional division, judiciary or group) gives its opinion on the applicants via secret ballot. The person with appointment power assesses the applications based on the application documents, the personal interviewing of the applicant and the suggestion of the opinion-giving body. Pursuant to 132. § (4) of Act CLXI of 2011 (hereinafter: „Court Organisation Act"), the person with power to appoint is not bound by the suggestion of the opinion-giving body, but he/she must justify in writing if he/she makes a different decision.[3]

### 1.3. The Code of Judicial Conduct

The judicial power in accordance with the Fundamental Law fulfils its constitutional role through a transparent judicial system consisting of independent, impeccable judges.

The judicial profession sets requirements for judges that are based on stricter moral rules than ethical norms generally accepted by society. The aim of creating a Code of Judicial Conduct is to strengthen the public confidence in the judicial system by laying down ethical norms for judges to follow. It defines guidelines for ethical requirements of the judicial professions, provides support in recognising behaviours carrying ethical risk and protects judges who show demeanour worthy of their profession.

The Code of Judicial Conduct applies to all judges appointed in Hungary and it also provides guidelines for lay judges and judicial employees. It defines the expected code of conduct regarding office activities as well as activities outside the office.

*a) Independence:*

A judge shall exercise the judicial duties free from any influences, as to validate the principle of equal treatment among the parties involved. In the line of work even the appearance of favouring someone should be avoided, not to suggest that the procedure or the decision is based on bias or prejudice. The judge has the freedom to decide within the framework of substantive and procedural requirements, in accordance with their own conscience. A judge shall avoid unnecessary relations to the legislative and executive power in a way that is obvious to outsiders.

[3] https://birosag.hu/en/appointment-court-executives

*b) Impartiality:*
A judge shall

- not be involved in political activity, or take part in political gatherings and shall refrain from political expressions in public;
- not be part of nor have relations to an organisation, a permanent or temporary gathering the aim or activity of which is either in violation of the law, discriminative or is in breach of the public trust regarding the judicial profession;
- not pursue a task or activity, which by nature or origin would affect his or her impartiality, or prevent the fulfilment of judicial duties;
- not support any enterprise, charitable or civil organisation which can be linked to political activity.

*c) Dignity:*
Public trust and respect is strengthened by showing law-abiding behaviour both in and outside the office. A judge shall

- refrain from extremities in behaviour as well as in appearance, which is suitable to the occasion and worthy of the profession at all times;
- avoid public situations which are undeserving of the judicial profession;
- be patient and courteous with the parties involved in the procedure - besides the necessary firmness – and refrain from remarks that are uncalled for, hurtful labelling and arrogant;
- demand that the parties involved give each other and the court the proper respect;
- shape private relations and leisure time activities in a way that it does not endanger the dignity and impartiality of the judicial profession, not even by appearance (private difficulties shall be handled in a calm, discreet and proper manner);
- use the World Wide Web with due foresight.

Information, sound and video recordings about themselves and their relatives shall only be shared in case it does not impair judicial dignity. Opinions can be shared as long as they do not undermine the dignity of the court or the judicial profession and the regulations in relation to press statements.

*d) Diligence:*
A judge shall

- perform the delivery of decisions in the cases allocated to him efficiently, in a timely manner; he shall be prepared, diligent and humble;
- pay attention to the proper and economical use of the equipment and sources of the court;
- develop his or her general and professional knowledge through self-education and in organised courses.

*e) Propriety:*
A judge shall not use the prestige of the judicial office to advance the private interests of the judge. While exercising his or her rights he or she shall obey the rules of exercising law in a proper way. While adjudicating in a case a judge shall avoid the contact with the parties which might give rise to the suspicion or appearance of favouritism or partiality. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge to anyone else; he or she shall not provide or ask for confidential information. A judge shall avoid any communication that may influence the process or the result of a case. A judge shall voluntarily comply with the enforceable or provisionally enforceable obligations settled against him.

*f) Respect, cooperation:*
A judge shall carry out judicial duties with appropriate consideration for all persons without prejudice or discrimination and requires the same from the parties and their representatives. While carrying out judicial duties a judge shall try to cooperate with his or her colleagues and the members of organisations or authorities; he or she shall express polite and mutually respectful behaviour.

A judge shall

- not criticise the guidelines of a higher level court in front of the parties; he or she shall not express his or her different point of view;
- avoid the humiliation of the lower level court in his decisions; he or she shall not destroy the prestige of the judicial profession;
- not criticise the decisions made by his or her colleagues in any other way (a judge may evaluate or give a constructive opinion on these in scientific, educational or other professional activities);
- refrain from manifesting by words any differentiation among the parties, sympathy or condescension;
- refrain from comments that would suggest failure to fulfil obligation, decisions made to serve political or other interests on his or her colleagues' side.

*g) A judge in leading position:*
A judge in leading position shall refrain from any behaviour, comments or acts that may offend the human dignity of subordinates. He or she performs tasks as required from his or her colleagues complying with legal and moral obligations, setting an example. Carrying out managerial duties a judge shall be reasonable, fair and consistent with his or her colleagues. In his supervising role he or she shall set the same requirements for all his subordinates.

A judge shall ensure that the behaviour of his or her judge colleagues live up to their judicial profession.

Besides the assertion of the interests and aims of the court, a judge shall aim to establish successful cooperation with the other organisational units and to facilitate fast and precise information exchange.[4]

### 1.4. Procedures for adjudging offences

Act II of 2012 on minor offences, offence procedures and the registration system of offence (hereinafter: the Offences Act) provides for sanctioning criminal action that violates or jeopardises generally accepted rules of cohabitation within society, without however the level or risk or extent of danger that would consitute a crime and which would necessitate sanctions accordingly. The range of action deemed as offence is defined by the Offences Act.

Anyone subjected to investigation for having committed an offence will participate in the procedure as a person subjected to procedure, and will be named as wrongdoer once the court finds him/her culpable for the offence.

Offences are adjudged by the authorities prosecuting offences or courts. as defined by the Offences Act.

Court will adjudge

[4] The Code of Judicial Conduct was adopted on 10 November 2014 in the meeting of the National Judicial Council based on the mandate regulated by law and with an attention to the opinion of the judicial organisation. https://birosag.hu/en/code-judicial-conduct (03.03.2024.)

- offences sanctionable by confinement, and its scope of competence also covers the offence of obstructing fact-finding inspections by the permanent committee of the Hungarian Parliament dealing with national security;
- petitions challenging the resolution of the authority prosecuting offences, and furthermore decides on;
- transforming unpaid fines or on-site fines – or undelivered community work – into confinement.

As a general rule, the court will adjudge the case without holding a hearing. In cases falling within the jurisdiction of district courts, the judge or an appointed court secretary may proceed. Laws also allows court clerks to proceed without holding a hearing, under the control and supervisions of a judge or court secretary.[5]

### 1.5. The competence, the jurisdiction and the composition of the court

In the course of the pre-trial the court with the same competence and jurisdiction shall proceed as the one which later makes a decision on the merits of the case. The court entitled to proceed is defined in three aspects:

- legal authority: the Hungarian courts can proceed in cases falling under Hungarian authority which rules are determined by § 3 of the CC;
- competence: subsequently to legal authority (that is, if a Hungarian court may proceed in the case), it needs to be clarified what organisationally structured court should proceed (local court, tribunal court, high court of appeal or the Supreme Court);
- jurisdiction (territorial competence): finally, if the question of competence has been clarified, the last question is that out of the courts with the same organisational structure (that is, more than 100 local courts, exactly 20 tribunal courts and 5 high courts of appeal) which should proceed.

The court always examines the competence and the jurisdiction ex officio.[6]

*a) The competence:*

The task of the court shall be to administer justice. The court shall adjudicate and carry out the tasks relating to the criminal proceeding as specified in CPC. The court of first instance shall be a district court or a regional court. The court of second instance shall be a) a regional court in cases falling within the subject-matter jurisdiction of district courts, b) a regional court of appeal in cases falling within the subject-matter jurisdiction of regional courts, c) the Curia in cases falling within the subject-matter jurisdiction of regional courts of appeal.

The court of third instance shall be a) the regional court of appeal in cases where a district court proceeded as the court of first instance, b) the Curia in cases where a regional court proceeded as the court of first instance.

The local court disposes of the general competence of first instance.[7] The tribunal court proceeds in the first instance in outstanding cases.The definition of the court of first instance appoints the court proceeding in the second, and contingently, in the third instance, and there is no departure from that (prohibition against secession).

The criminal acts subject to the first instance competence of the tribunal court can be classified into several groups:

- the most serious crimes: crimes punishable by imprisonment for a term up to 15 years or life imprisonment by the law;

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[5] https://birosag.hu/en/procedures-adjudging-offences (03.03.2024.)
[6] Csongor HERKE: *Criminal Procedure Law.* University of Pécs, Faculty of Law, 2018. 82 – 83.
[7] CPC 19. §

- outstanding criminal acts: crimes against humanity, war crimes, crimes against the state etc., (negligence of reporting) kidnapping, trafficking of people, terrorist acts and related crimes, money-laundering;
- crime threatening life or causing death: preparations for murder, negligent homicide, murder committed in the heat of passion, physical injury creating a substantial risk of death or causing death;
- crime related to corruption;
- violent cases of crime against property (e.g., gravely classified case of plundering) or non-violent crime against property classified the most gravely (e.g., theft of especially high value);
- certain crimes with international element: e.g. criminal offence against the administration of justice at an international court, breach of international embargo etc.;
- crime related to public administration: e.g., criminal offences against the order of elections or referenda, crime against the order of European civil initiative, crime against classified data and national data stock;
- criminal offences subjected to military law: in such a case one of the military councils of the 5 appointed tribunal courts (Budapest, Győr, Debrecen, Szeged, Kaposvár) shall proceed (in the second instance the military council of the Metropolitan High Court of Appeal shall proceed);
- other cases: some healthcare crimes, prison riots, infringement of certain rights related to copyright and economic and business related offenses.

If the defendant committed crimes subject to the competent of different courts, the tribunal court shall proceed as court of first instance.[8]

*b) The jurisdiction:*

Out of the court procedural degrees, the jurisdiction in the second and third instance is simpler, since that court of second or third instance shall proceed, the lower court in the territory of which passed the decision of first or second instance.

In comparison with the remedial procedures the jurisdiction of the court of first instance shall be established in a more complex manner, which can be a) general, b) exclusive and c) special.

ad a) As indicated by general jurisdiction, the court of jurisdiction shall be the court having exclusive control over the geographical area where the criminal offence was committed.[9] Besides, the CPC stipulates so-called dispositive rules:

- Precedence: if the crime was committed in the territory of several courts or the scene of commission cannot be identified, out of the courts with the same jurisdiction that one shall proceed, which took measures for the first time. An exception to that is, if the scene of commission becomes known before setting the trial and the prosecutor's office (defendant, defense counsel, substitute private prosecutor, private prosecutor) motions for the procedure according to the scene of commission, in that case the court shall proceed where the criminal offence was committed.
- Actual residence: the court may proceed in the territory of which the address or the actual residence of the defendant or victim obtains, if the prosecutor's office raises charge there

[8] A snapshot from the US: „There has been a startling increase in the number of problem-solving courts across the country. As of the spring of 2012, there were throughout New York State alone, 179 drug treatment, 21 mental health, 83 domestic violence and integrated domestic violence courts (which consolidate criminal and family domestic matters), seven sex offense, and three youthful offender domestic violence courts.33 There has been uncertainty and controversy amongst the criminal defense bar regarding these new courts; there seems to be greater acceptance of mental health courts than there is of the drug courts." Nat'l Ass'n of Criminal Def. Lawyers, America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 51 (2009). In: Richard KLEIN: The Role of Defense Counsel in Ensuring a Fair Justice System. *The Champion,* 2012. 8.

[9] CPC 21. §

(this is not applicable in private prosecution procedure, substitute private prosecution procedure or in military criminal procedure).

- Several accused: the court with jurisdiction in re one of the accused may proceed versus the other accused persons, if this does not surpass its competence (if the procedure was initiated before several courts, the principle of precedence applies).

ad b) The so-called seat courts (local courts located in the seat of the tribunal court or in The Central District Court of Pest) in their exclusive jurisdiction shall proceed with jurisdiction pertaining to the county (the capital) in case of the following crimes:

- certain endangering crimes or crimes causing danger (certain cases of public endangerment and interference with works of public concern);
- certain crimes related to the utilisation of nuclear energy (misappropriation of radioactive materials, illegal operation of nuclear installation, crimes in connection with nuclear energy);
- economic crimes (economic fraud, certain cases of information system fraud, economic and business related offenses etc.);
- certain crimes damaging the budget; certain cases of counterfeiting currency and forgery of stamps;
- procedures for crime in connection with the border barrier;[10]
- other crimes (e.g., failure to comply with the reporting obligation related to money laundering, illicit access to data etc.)

If the defendant committed crimes subject to the jurisdiction of different courts, the court with exclusive jurisdiction shall proceed.

ad c) Finally, grounds for special jurisdiction exist in cases of culpable acts subject to Hungarian legal authority, when the crime was committed by the defendant beyond the borders of Hungary. For the adjudication of this crime the court shall have jurisdiction, to the area of which the address or the actual residence of the defendant belongs (in case of a procedure in absentia the last address or actual residence shall ground jurisdiction). In a military criminal procedure the military council of the Metropolitan Tribunal Court shall have jurisdiction in case of a crime committed abroad.[11]

If the jurisdiction cannot be established in a case subject to the competence of a local court, the Central District Court of Pest shall proceed. In a cases subject to the competence of a tribunal court, the Metropolitan Court of Justice shall proceed. The territorial competence of the military council of the court of justice appointed for military criminal procedure is stipulated under a separate law.

If the jurisdiction of a court cannot be established in a procedure for deprival of property, the court shall proceed, in the jurisdiction of which the authority discerned the circumstance substantiating the institution of the procedure for deprival of property.[12]

The court shall examine its competence and jurisdiction: 1. before the commencement of the trial ex officio[13]; 2. after the commencement of the trial only in the case if the adjudication of the case overreaches the competence of the court, or the case is subject to military criminal procedure or exclusive jurisdiction.[14]

*c) The composition:*

[10] CPC 828. §
[11] CPC 699. §
[12] CPC 823. §
[13] CPC 23. §
[14] CPC 536. §

The court adjudicates in the first instance on the merits as a single judge or in council, while in a legal remedy procedure always in council:[15]

In the first instance:

- single judge (generally);
- three professional judges (if the single judge remitted the case to the council of the court);
- special council (economic and business case, criminal procedure against juvenile offenders, military criminal procedure).

In the second and third instance

- small council (3 professional judges);
- large council (5 professional judges).

So, the court of first instance proceeds in a specially composed council in three cases:

- In case of an outstanding crime related to economic and business, one of three professional judges in a council shall be the appointed judge of the council of economic and business (in lieu of that civil) law of the tribunal court;
- In a criminal procedure against juvenile offenders[16] the council consists of one professional judge (appointed by the President of the National Administrative Office of the Courts) and two associate judges (this is possible not only in case the single judge remitted the case to the council, and but this is mandatory in all cases (except for a procedure for crime in connection with the border barrier), if the law stipulates the imposition of a penalty ranging to eight or more years' imprisonment for the crime).
- In the same cases the military council of the tribunal court proceeds in the first instance and in the majority of the cases subject to the first instance competence of the tribunal court.[17] This council may consist of one military judge and two military associate judges (not only of three professional judges). The military associate judges cannot be of lower rank than the accused (except if the accused is a general).

In the criminal procedure against juvenile offenders exclusively a teacher, psychologist or a person working (formerly) in a position requiring a university or college degree in family protection or guardianship administration etc. may work as associate judge.

The courts of second or third instance may remit the case by reason of outstanding crime related to economic and business to a large council (the council of the court consisting of five professional judges), if that is necessitated by: 1. the complexity of the case, 2. the breadth of the documents of the procedure, 3. the number of the persons participating in the criminal procedure, 4. any other reason.

In cases subject to the competence of the courts of first instance, instead of the single judge (the presiding judge) the court secretary may also proceed in cases stipulated under the CPC (§ 426., e.g. related to the appointment of the defence counsel or the expert, the correction or supplementation of its decision, measure related to cost of criminal proceedings or reduced costs etc.) and in cases determined by statute, out of trial the court administrator may proceed under the direction and the supervision of the judge.

### 1.6. The investigative judge

According to CPC it is the main task of the court to provide justice (i.e. ruling in criminal cases and decisions on the criminal liability). At the same time the court also carries out other tasks determined in the CPC in connection with criminal proceedings. During investigation (before indictment) the investigating judge decides in questions that were referred into the jurisdiction

[15] CPC 13. §
[16] CPC 680. §
[17] CPC 698. §

of the court. This is the local court judge that is appointed by the head of the tribunal court.[18] In case of military criminal procedures, this is the military judge of the tribunal court.[19]

The investigating judge's decision can have two forms:[20]

a) Session for priority questions:

- ordainment of coercive measures bound to judicial consent concerning personal freedom (except if a milder measure than the earlier one is motioned);
- prolonging detention (based on new circumstances or following 6 months);
- ordainment of monitoring of mental state;
- ordainment of continuation of procedure due to breach of cooperation (except if theperson breaching cooperation resides in an unknown place or if the prosecutor does not motion for a session);

b) Passes decision based on the documents in the all other questions referred to its jurisdiction:

- excluding the defence counsel;
- special protection of witness;
- obliging the person that denies testimony to disclose the identity of the person providing information;
- issue and recall of European and international arrest warrants;
- judging motions of revision;
- changing a fine into incarceration;
- ordainment of the continuation of a terminated procedure (except if a session is to be held);
- tasks regarding the application of covert instruments which are bound to judicial permissions.

The investigating judge proceeds in prosecutor's procedures under the area of competence of the court of justice (in case more local courts have been appointed, they determine the competence of each and every one of them).

If the court session, the time for the session is determined with consideration for the termination time of the incidental arrest (detention) of the defendant. If the motion is submitted by the prosecutor's office, the prosecutor shall hand over the investigative brief together with the submittance of the motion and the prosecutor shall send its motion to the defendant and the defence counsel. In this case the defence can look over the documents that form the base of the motion (up until at least one hour before the session).

In case the motion was put forward by the prosecutor, it shall ensure the presence of the defendatnt at the sitting and subpoenas or notices the defence counsel (depending whether his presence is mandatory), and ensures the presence of an interpreter or other persons.

The legal representative and of-age guardians of juveniles shall be informed about session concerning procedures for coercive measures with judicial consent which touch upon personal freedom. They have the right to speak and the decision will be communicated to them.[21]

The presence of the following is mandatory at the session:

- prosecutor (junior prosecutor);
- defendant: at the mandatory sessions (except in case of breach of cooperation, if residing at an unknown location);
- defence counsel: monitoring of mental state, when ordering preliminary involuntary treatment in a mental institution, and in case of the absent defendant that breached cooperation;

[18] CPC 463. §
[19] CPC 713. §
[20] CPC 464. § – 467. §
[21] CPC 689. §

- the motioner (if he/she does not appear, it shall be considered as a withdrawal of the motion).

At the session the motioner presents the motion verbally and delineates the evidences that form the base for those present. The investigating judge investigates whether

- the legal preconditions of the motion and the session are present,
- there is no obstacles for the criminal procedure, and
- there have been no rational doubts for the grounds of the motion.

In case there are no obstacles for the judging of the motion the court decides by non-conclusive order in which it sustains, partially sustains or rejects the motion. The decree has to be made public by way of announcement (if the investigating judge decided based on the documents, this shall take place within 8 days).[22]

### 1.7. The independence of judges (ECrHR)

*a) General principles:*

Article 6. of the Convention requires independence from the other branches of power – that is, the executive and the legislature – and also from the parties.[23]

Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met.[24]

*b) Criteria for assessing independence:*

Compliance with the requirement of independence is assessed, in particular, on the basis of statutory criteria.[25] In determining whether a body can be considered to be "independent" the Court has had regard to the following criteria:[26] (1) the manner of appointment of its members (2) the duration of their term of office; (3) the existence of guarantees against outside pressures; (4) whether the body presents an appearance of independence.[27]

- *Manner of appointment of a body's members:* The mere appointment of judges by Parliament cannot be seen to cast doubt on their independence. Similarly, appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.[28] Although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality.[29]
- *Duration of appointment of a body's members:* No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of

[22] HERKE, ibid. 10.
[23] „Ninn-Hansen v. Denmark" (1999)
[24] „Henryk Urban and Ryszard Urban v. Poland" (2010)
[25] „Mustafa Tunç and Fecire Tunç v. Turkey" (2015)
[26] „Findlay v. the United Kingdom" (1997)
[27] „Filippini v. San Marino" (2003)
[28] „Henryk Urban and Ryszard Urban v. Poland" (2010); „Campbell and Fell v. the United Kingdom" (1984); „Maktouf and Damjanović v. Bosnia and Herzegovina" (2013)
[29] „Moiseyev v. Russia" (2008)

independence provided that it is recognised in fact and that other necessary guarantees are present.[30] The presence of seconded international judges for a renewable two year term of office on the bench of a court ruling on war crimes was considered understandable given the provisional nature of the international presence in the country and the mechanics of international secondments.[31]

- *Guarantees against outside pressure:* Judicial independence demands that individual judges be free from undue influences outside the judiciary, and from within. Internal judicial independence requires that they be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified.[32]
- *Appearance of independence:* In order to determine whether a tribunal can be considered to be "independent" as required by Article 6., appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.[33] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether his doubts can be held to be objectively justified.[34] No problem arises as regards independence when the Court is of the view that an „objective observer" would have no cause for concern about this matter in the circumstances of the case at hand.[35] Where a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, the accused may entertain a legitimate doubt about those persons' independence.[36] In „Thiam v. France" (2018), the Court did not consider that the applicant's fear of a lack of independence and impartiality of a tribunal called upon to examine a criminal charge against him for an offence committed to the detriment of the President of the Republic, who joined the proceedings as a civil party, was justified due to the very fact that the President was involved in the appointment and promotion of judges. The Court noted that the independence of the judges' tenure was constitutionally guaranteed and it protected them from possible attacks on their independence. Moreover, judges were not subordinate to the Ministry of Justice and were not subject to any pressure or instructions in the exercise of their judicial functions, including instructions by the President. Further, the Court had regard to the fact that decisions affecting the appointment of members of the judiciary and their career progress, transfer and promotions were taken following the intervention of the National Legal Service Commission (Conseil supérieur de la magistrature) and after adversarial proceedings. Moreover, the nomination of judges was not a discretionary matter and was subject to control by the Council of State. The Court also noted that the applicant had not submitted any concrete evidence capable of showing that he could objectively have feared that the judges in his case were under the President's influence. In particular, the case bore no connection with the President's political functions and he had neither instituted the proceedings nor provided evidence intended to establish

[30] „Campbell and Fell v. the United Kingdom" (1984)
[31] „Maktouf and Damjanović v. Bosnia and Herzegovina" (2013)
[32] „Parlov-Tkalčić v. Croatia" (2009); „Daktaras v. Lithuania" (2000); „Moiseyev v. Russia (2008)
[33] „Şahiner v. Turkey" (2001)
[34] „Incal v. Turkey" (1998)
[35] „Clarke v. the United Kingdom (2005)
[36] „Şahiner v. Turkey" (2001)

the applicant's guilt; the domestic courts had duly examined all the applicant's arguments; and the subsequent constitutional amendments had excluded the President's involvement in the appointment of judges to their posts.

### 1.8. The impartiality of judges

The presumption of innocence is necessarily linked to the requirement of impartiality on the part of the judiciary. The objective criterion is the conviction of the subjects of the proceedings that this is necessary, and the subjective criterion is the perception of this conviction, directly or indirectly, towards the outside world. According to a case-law of the ECrHR, it is not enough to do justice; the appearance of doing justice must also be preserved.[37]

In the case of judicial attitudes, impartiality is a particularly sensitive issue. Courts in a democratic society must inspire confidence in society, the primary „marker" of which is the conduct of the accused in criminal proceedings.[38] „The judge must not forget for a moment that the presumption of innocence is not a mere theoretical constraint during the trial, but a practice of conduct which must be enforced minute by minute and which must be expressed in words and gestures."[39] Thus, even indirectly, he may not make expressions that could lead to the presumption of the guilt of the accused, otherwise the defence must make a mandatory motion of bias against the single judge (jury).

FENYVESI draws attention to the following in relation to this problem: The document, which contains mostly incriminating data generated during the thorough investigation, is given to the impartial examiner (judge) together with the accusation. Above all, an effective defence, including a professional, skilled defence, can weaken the presumption of guilt from the file and strengthen the presumption of not guilty."[40] This does not, of course, exclude the possibility of the person being prosecuted defending himself. The rules of criminal procedure are in conformity with the Constitution if they provide the accused with the means of defence which he may lawfully use and with the right to choose freely the means of defence. The accused may not be restricted in this even by his defence counsel, or, where appropriate, by an ex officio appointed defence counsel.

No dislike, no sympathy, no previous acquaintance with a colleague, nor any judgement on any personal characteristic of the offender should play any part in the judge's work. „This is a difficult test of moral fibre. It is even more so if we add that it is not enough to clarify these matters internally, but the judge must also ensure that those present in the courtroom {...} see and perceive this impartiality {...}."[41]

Judicial impartiality must be fully respected not only in the interpretation of substantive criminal law, but also in the exercise of procedural rights, in particular in the conduct of trials and the maintenance of order. As regards the conduct of the trial (maintenance of order), the court is empowered by the CPC to apply the sanctions provided for therein, including, where appropriate, those imposed on the prosecutor and the defence.[42] This is on the basis of the

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[37] „Delcourt v. Belgium" (1970)

[38] 1993/7. 553; 1995/8. 637.

[39] Csaba KABÓDI: Justice - a service? In: Mihály TÓTH (ed.): *Criminal Procedural Law Reader.* Budapest, Osiris, 2003. 366.

[40] Csaba FENYVESI: The constitutional and principled aspects of defender activity. In Mihály TÓTH (ed.): *Criminal Procedural Law Reader*, ibid. 168.

[41] KABÓDI, ibid. 367.

[42] In this area, there are generally two models of regulation in the field of substantive law: if the chairman of the board not only directs or supervises the taking of evidence but also carries it out himself, then this is the continental model; if the interrogations are not within his powers because they are carried out by the parties, then this is the

reasonable grounds that no one's actions should knowingly obstruct the proceedings or lead to an abuse of rights.[43] GYÜRKY writes: „The proper conduct of a trial is of paramount importance because it promotes a prompt and correct decision on the merits, enhances the authority of the court and strengthens confidence in the administration of justice." [44]

I should note that the prohibition of abuse of rights also applies to the courts. There are also written and unwritten ethical rules for the judiciary, under which forcefulness must not lead to arbitrariness. „The conduct of a vigorous trial should be a listening style that gets to the heart of the matter, humanly inquisitive, which can create an atmosphere of trust that participants to genuinely tell the story of what happened. What is needed is not professionalism, but a high level of people skills, a way of dealing with people and a method of making the necessary contacts."[45]

As regards the examination of judicial impartiality, I would like to draw attention to the following hungarian decisions:

- first of all, the internal convictions of the judges must be examined, followed by all the guarantees which exclude any legitimate doubt as to impartiality;[46]
- it is not only the personal convictions and conduct of the judges as subjects that must be taken into account, but also whether the court in question objectively provides the guarantees that are capable of eliminating all legitimate doubt as to this requirement;[47]
- the accused's point of view is also important, but not decisive, in assessing the appearance of bias; the decisive criterion is whether this fear of incrimination can be considered objectively justified;[48]
- the requirement of impartiality is not in itself violated if the same judge is sitting in different cases of the accused at the same time;[49]
- it is also possible that the investigating judge may become aware of data of which the sentencing judge is not aware, because the data cannot, for whatever reason, be used as evidence in the trial at a later stage; however, there is no concern about this, as prior knowledge of this additional data would potentially put the impartiality of the sentencing judge at risk, and the judgement of the criminal case free from bias. [50]

According to the case-law of the ECrHR, if the independence and impartiality of the court of first instance can be established, these circumstances cannot be remedied ex post facto as procedural irregularities,[51] and the question of judicial impartiality must be assessed primarily from the point of view of the accused[52] (the existence of this circumstance must, however, be presumed until the contrary is proved.[53] ) It is also a fundamental rule that an application in which the applicant cannot provide concrete evidence to support the possible bias of the national court cannot be successful.[54]

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Anglo-Saxon system of trial. In: Ervin CSÉKA: The criminal trial system. In Mihály TÓTH (ed.): *Criminal Procedural Law Reader,* ibid. 349.

[43] FENYVESI: The constitutional and principled aspects of defender activity, ibid. 165.

[44] István GYÜRKY:Negotiation conduct through the eyes of the judge. *Hungarian Law,* 1975/3-4. 193.

[45] The author adds: „Serious consideration must be given to the fact that many people are first-time visitors to court, do not and cannot know the required forms of behaviour, behave inappropriately in their embarrassment {...}, or are primitive persons whose daily manner of interacting may be disrespectful in court. It is for the judge to choose the correct conduct which will dissolve these inhibitions." In GYÜRKY, ibid. 193.

[46] BH 2000/10 No 798.

[47] BH 1993/8 No 639.

[48] BH 1997/12 No 157.

[49] RO 1993/8, p. 637.

[50] Decision No 34/2013 (XI.22.) AB.

[51] „Smith and Ford v. United Kingdom" (1999)

[52] „Remli v. France" (1996)

[53] „Piersack v. Belgium" (1982)

[54] „Debled v. Belgium" (1994)

The Court found a breach of the Convention when it

- a member of the jury was not disqualified on the basis of the accused's application for disqualification, despite the fact that the accused had brought a personal lawsuit against him in parallel with the criminal proceedings; the duration of the latter proceedings, which lasted almost 7 months, had given rise to the accused's fear that the judge would regard him as his "personal opponent" in the criminal proceedings; [55]
- members of a Cypriot court confronted the defender by making statements questioning his impartiality and later judged him for alleged contempt of court;[56]
- the judges in the case against the accused's accomplice had made statements in the judgment indicating the accused's guilt in an earlier case, and subsequently the same judges had also ruled in a separate case against the accused and had again given a judgment of conviction for the reasons already explained;[57]
- at the jury trial, the court did not attach any significance to - did not investigate - the racist statements made by one of the jurors at the trial;[58]
- judges who had previously ruled on the same case had to decide whether their own earlier decision was legally correct;[59]
- all three members of the Board of Appeal were involved in the first instance proceedings;[60] it should be noted that even in the case of one member of the Board, a conflict of interest could be established[61] , and in the case of two, this was obvious to the Court;[62]
- at second instance, a judge who has already ruled on the merits of a particular question at a lower instance;[63]
- in both places, the same judge, who was also the "rapporteur" in one of the cases, was the judge who heard the related cases in different courts;[64]
- the presiding judge was a former head of the prosecution service who, in principle, could have dealt with the applicant's case in that capacity;[65]
- the judge presiding over the merits of the case has previously acted as an examining magistrate, drafting the charge or participating extensively in the investigation of the case;[66]
- a significant proportion of the members of the jury belonged to the party involved in the criminal case.[67]

The Court held that there was no breach of the Convention when

- during the trial, the judge made statements that could be used to infer his or her preconceptions about the outcome of the case or the defendant's chances at trial;[68]
- in a jury trial of a black defendant, following racist remarks, the presiding judge did not acquit the jury, but merely gave them new instructions;[69]

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[55] „Chmelir v. Czech Republic” (2005)
[56] „Kyprianou v. Cyprus” (2004)
[57] „Rojas Morales v. Italy” (2000)
[58] „Remli v. France” (1996)
[59] „San Leonard Band Club v. Malta” (2004)
[60] „Oberschilk v. Austria” (1991)
[61] „Pfeifer and Plankl v. Austria” (1992)
[62] „Castillo Algar v. Spain” (1998)
[63] „Haan v. the Netherlands” (1997)
[64] „Ferrantelli and Sanangelo v. Italy” (1996)
[65] „Piersack v. Belgium” (1982)
[66] „De Cubber v. Belgium” (1984)
[67] „Holm v. Sweden” (1993)
[68] „Buscemi v. Italy” (1999)
[69] „Gregory v. United Kingdom” (1997)

- the court has previously dealt with the accused's case on other grounds[70] , or the same judges of the same court have heard two different cases of the same accused;[71]
- the accused was tried in absentia for the first time and, after his appearance, sentenced a second time by the same Chamber, as the case was retried in its entirety;[72]
- the Supreme Court also dealt with the case first in the ordinary procedure and then in the annulment procedure (see the latter procedure, which was limited to the determination of points of law);
- the same judge heard the case at first and second instance, but made only minor decisions in the first instance proceedings (see postponement of the trial), but did not hold a hearing on the merits;[73]
- the same judge had previously rejected other applications for release of the accused on the basis of a presumption of his guilt; it was noted, however, that the imposition of these coercive measures was based on the accused's status as a recidivist, and therefore did not constitute a decision on the question of criminal responsibility;[74]
- one of the members of the jury was the head of the public administration body that had previously tried the case (see no evidence that he had actually dealt with it personally);[75]
- the judge hearing the case had previously acted as an examining magistrate, but the case was of minor importance or his role was not significant in terms of the individual decisions;[76]
- the judge who heard the case of the juvenile defendant had previously decided - as investigating judge - to remand the defendant in custody or to investigate the case (see no circumstances that would have called into question the judge's impartiality);[77]
- the trial judge had previously decided whether the case was admissible for trial (see in this case, he did not consider the merits of the suspicion, but the amount of evidence);[78]
- a member of the jury was an employee of a prosecution witness[79]

Based *on Guide on Article 6 of the European Convention on Human Rights,* Article 6. of the Convention requires a tribunal falling within its scope to be „impartial". Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways.[80]

*a) Criteria for assessing impartiality:*

The Court has distinguished between: (1) a subjective approach, that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case; (2) an objective approach, that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect.[81]

However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal

[70] „Ettl and Others v. Austria" (1987)
[71] „Sainte-Marie v. France" (1992)
[72] „Thomann v. Switzerland" (1996)
[73] „Gillow v. the United Kingdom" (1986)
[74] „Jasinski v. Poland" (2005)
[75] „Gillow v. the United Kingdom" (1986)
[76] „Fey v. Austria" (1993)
[77] „Nortier v. the Netherlands" (1993)
[78] „Saraiva de Carvalho v. Portugal" (1994)
[79] „Pullar v. the United Kingdom" (1996)
[80] „Kyprianou v. Cyprus" (2005)
[81] „Grieves v. the United Kingdom" (2003); „Morice v. France" (2015)

conviction (subjective test). Therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.

*Subjective approach:* In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary.[82]

As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons.[83] However, the mere fact that the judge might have adopted procedural decisions unfavourable to the defence is not indicative of a lack of impartiality.[84]

Although in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. The Court has indeed recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and has therefore in the vast majority of cases focused on the objective test.

*Objective approach:* Under the objective test, when applied to a body sitting as a bench, it must be determined whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality.[85]

In deciding whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified.[86]

The objective test mostly concerns hierarchical or other links between the judge and other persons involved in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test.[87] It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.[88]

In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.[89] Specifically, it is the responsibility of the individual judge to identify any impediments to his or her participation and either to withdraw or, when faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties in order to allow them to challenge the participation of the judge.[90]

Account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public.[91]

The Court will take such rules ensuring impartiality into account when making its own assessment as to whether a „tribunal" was impartial and, in particular, whether the applicant's

[82] „Hauschildt v. Denmark" (1989)
[83] „De Cubber v. Belgium" (1984)
[84] „Khodorkovskiy and Lebedev v. Russia" (2020)
[85] „Castillo Algar v. Spain" (1998)
[86] „Padovani v. Italy" (1993)
[87] „Micallef v. Malta" (2009)
[88] „Pullar v. the United Kingdom" (1996)
[89] „Škrlj v. Croatia" (2019)
[90] „Sigríður Elín Sigfúsdóttir v. Iceland" (2020)
[91] „Mežnarić v. Croatia" (2005)

fears can be held to be objectively justified.[92] Thus, applicants are expected to avail themselves of those rules existing in the relevant domestic law.[93]

As regards the procedure to decide upon challenges for bias, the Court examines the nature of the grounds on which the challenge for bias was based. If an applicant based his challenge for bias on general and abstract grounds, without making reference to specific and/or material facts which could have raised reasonable doubts as to the judge's impartiality, his challenge could be classified as abusive. In such circumstances, the fact that the judge who had been challenged on such grounds decided on that applicant's challenge does not raise legitimate doubts as to his impartiality. Moreover, other elements should be taken into account, in particular, whether the grounds for dismissing the applicant's challenge for bias were adequate and whether the procedural defect was remedied by a higher court.[94]

The Court has found, in particular, that the participation of judges in a decision concerning challenges against one of their colleagues can affect the impartiality of each of the challenged members if identical challenges have been directed against them. However, the Court has considered that such a procedure did not affect the impartiality of the judges concerned in the specific circumstances of a case in which the applicant had based his motions for bias on general and abstract, almost identical grounds, without making any reference to specific, material facts that could have revealed personal animosity or hostility towards him. It noted in that context that the exclusion of all challenged judges from the decisions concerning those challenges would have paralysed the whole judicial system at issue.[95]

On the other hand, a failure of the national courts to examine a complaint of a lack of impartiality, which does not immediately appear to be manifestly devoid of merit, may lead to a breach of Article 6. of the Convention, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction.[96] Thus, for instance, in „Danilov v. Russia" (2020), the Court found a violation of Article 6 on the grounds that the domestic courts failed to take sufficient steps to check that the trial court had been established as an impartial tribunal in relation to the applicant's complaint of a lack of impartiality of jurors with security clearances, which were accorded and controlled by the relevant security service that had instituted the criminal proceedings against the applicant.

Moreover, it is possible that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings. However, when the higher court declines to quash the decision of a lower court lacking impartiality and upholds the conviction and sentence, it cannot be said that it cured the failing in question.[97]

Lastly, the Court takes the view that when an issue of impartiality of a tribunal arises with regard to a judge's participation in the proceedings, the fact that he or she was part of an enlarged bench is not in itself decisive for the objective impartiality issue under Article 6. of the Convention. Considering the secrecy of the deliberations, it may be impossible to ascertain a judge's actual influence in the decision-making and the impartiality of the court could be open to genuine doubt.[98]

*b) Situations in which the question of a lack of judicial impartiality may arise:*

There are two possible situations in which the question of a lack of judicial impartiality arises: (1) the first is functional in nature and concerns, for instance, the exercise of different functions

[92] „Pfeifer and Plankl v. Austria" (1992); „Oberschlick v. Austria" (1991); „Pescador Valero v. Spain" (2003)
[93] „Zahirović v. Croatia" (2013)
[94] „Pastörs v. Germany" (2019)
[95] „A.K. v. Liechtenstein" (2015); see „Kolesnikova v. Russia" (2021), where there was no risk that the system might be paralysed.
[96] „Remli v. France" (1996)
[97] „Findlay v. the United Kingdom" (1997)
[98] „Otegi Mondragon and Others v. Spain" (2018); „Karrar v. Belgium" (2021)

within the judicial process by the same person, or hierarchical or other links with another person involved in the proceedings; (2) the second is of a personal character and derives from the conduct of the judges in a given case.

Moreover, there may be instances of a structural lack of impartiality of a particular court as a whole. This was the case in „Boyan Gospodinov v. Bulgaria" (2018), where the criminal court trying the applicant in criminal proceedings was at the same time defendant in a separate set of civil proceedings for damages instituted by the applicant.

*c) The exercise of different judicial functions:*

The mere fact that a judge in a criminal court has also made pre-trial decisions in the case, including decisions concerning detention on remand, cannot be taken in itself as justifying fears as to his lack of impartiality; what matters is the extent and nature of these decisions.[99] When decisions extending detention on remand required „a very high degree of clarity" as to the question of guilt, the Court found that the impartiality of the tribunals concerned was capable of appearing open to doubt and that the applicant's fears in this regard could be considered objectively justified.[100] In each case, the relevant question is the extent to which the judge assessed the circumstances of the case and the applicant's responsibility when ordering his or her detention on remand.[101]

When an issue of bias arises with regard to a judge's previous participation in the proceedings, a time-lapse of nearly two years since the earlier involvement in the same proceedings is not in itself a sufficient safeguard against partiality.[102]

The fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality.[103] Nevertheless, if an individual, after holding in that department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

The successive exercise of the functions of investigating judge and trial judge by one and the same person in the same case has also led the Court to find that the impartiality of the trial court was capable of appearing to the applicant to be open to doubt.[104]

However, where the trial judge's participation in the investigation had been limited in time and consisted in questioning two witnesses and had not entailed any assessment of the evidence or required him to reach a conclusion, the Court found that the applicant's fear that the competent national court lacked impartiality could not be regarded as objectively justified.[105] Thus, assessment of the individual circumstances of each case is always needed in order to ascertain the extent to which an investigating judge dealt with the case.[106]

The absence of a prosecutor during the criminal trial, which may put the judge in the position of the prosecuting authority while conducting the questioning and adducing evidence against an applicant, raises another issue concerning impartiality. In this regard, the Court has explained that the judge is the ultimate guardian of the proceedings and that it is normally the task of a public authority in case of public prosecution to present and substantiate the criminal charge with a view to adversarial argument with the other parties. Therefore, confusing the two roles

[99] „Nortier v. the Netherlands" (1993)
[100] „Hauschildt v. Denmark" (1989)
[101] „Jasiński v. Poland" (2005)
[102] „Dāvidsons and Savins v. Latvia" (2016)
[103] „Paunović v. Serbia" (2019)
[104] „De Cubber v. Belgium" (1984)
[105] „Bulut v. Austria" (1996)
[106] „Borg v. Malta" (2016)

in the proceedings is a potential breach of the requirement of impartiality under Article 6. the Convention.[107]

Similarly, the Court has examined the question of compliance with the principle of impartiality in a number of cases concerning alleged contempt by the applicant in court, where the same judge then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction. The Court has emphasised that, in such a situation, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.[108]

No question of a lack of judicial impartiality arises when a judge has already delivered formal and procedural decisions in other stages of the proceedings.[109] However, problems with impartiality may emerge if, in other phases of the proceedings, a judge has already expressed an opinion on the guilt of the accused.[110]

The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not in itself sufficient to cast doubt on that judge's impartiality in a subsequent case.[111] It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings.[112]

Moreover, an issue may arise from the perspective of general fairness where the trial court has reached certain findings by relying on evidence that was examined in different proceedings in which the applicant did not participate.

When the presiding judge of a tribunal had been previously declared biased against the applicant in a previous set of criminal proceedings concerning similar charges against him, an objective and justified fear of a lack of impartiality may arise both with regard to the applicant and his co-accused.[113]

The obligation to be impartial cannot be construed so as to impose an obligation on a superior court which sets aside an administrative or judicial decision to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.[114] In other words, the mere fact that the same judge twice exercised the same function in the same set of criminal proceedings is insufficient to show objective lack of impartiality.[115] However, if an obligation on a superior court which sets aside a judicial decision to send the case back to different judges is provided for under the relevant domestic law, the question of whether a tribunal has been established by law arises.

The fact that an applicant was tried by a judge who herself raised doubts about her impartiality in the case may raise an issue from the perspective of the appearance of a fair trial. This, however, will not be sufficient to find a violation of Article 6. of the Convention. In each case, the applicant's misgivings about the impartiality of the judge must be objectively justified.[116]

*d) Hierarchical or other links with another participant in the proceedings:*

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[107] „Karelin v. Russia" (2016)
[108] „Słomka v. Poland" (2018); „Deli v. the Republic of Moldova" (2019)
[109] „George-Laviniu Ghiurău v. Romania" (2020)
[110] „Gómez de Liaño y Botella v. Spain" (2008)
[111] „Kriegisch v. Germany" (2010)
[112] „Poppe v. the Netherlands" (2009); „Schwarzenberger v. Germany" (2006)
[113] „Otegi Mondragon and Others v. Spain" (2018); contrast, „Alexandru Marian Iancu v. Romania" (2020)
[114] „Marguš v. Croatia" (2014); „Thomann v. Switzerland" (1996); „Stow and Gai v. Portugal" (2005)
[115] „Teslya v. Ukraine" (2020)
[116] „Dragojević v. Croatia" (2015)

The determination by military service tribunals of criminal charges against military service personnel is not in principle incompatible with the provisions of Article 6.[117] However, where all the members of the court martial were subordinate in rank to the convening officer and fell within his chain of command, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified.[118] Similarly, when a military court has in its composition a military officer in the service of the army and subject to military discipline and who is appointed by his or her hierarchical superior and does not enjoy the same constitutional safeguards provided to judges, it cannot be considered that such a court is independent and impartial within the meaning of Article 6 of the Convention.

The trial of civilians by a court composed in part of members of the armed forces can give rise to a legitimate fear that the court might allow itself to be unduly influenced by partial considerations.[119] Even when a military judge has participated only in an interlocutory decision in proceedings against a civilian that continues to remain in effect, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.[120]

Situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.[121]

The determination of criminal charges against civilians in military courts could be held to be compatible with Article 6 only in very exceptional circumstances.[122]

Objectively justified doubts as to the impartiality of the trial court presiding judge were found to exist when her husband was the head of the team of investigators dealing with the applicants'case.[123] Similarly, an issue of objective impartiality arose where the trial judge's son was a member of the investigative team dealing with the applicant's case.[124]

Family affiliation between judges deciding on a case at different levels of jurisdiction may give rise to doubts as to the lack of impartiality. However, in „Pastörs v. Germany" ( 2019), where two judges who dealt with the applicant's case at the first and third level of jurisdiction were married, the Court found no violation of Article 6. of the Convention on the grounds that the applicant's complaint of bias had been submitted to a subsequent control of a judicial body with sufficient jurisdiction and offering the guarantees of Article 6 of the Convention. The Court also noted that the applicant had not given any concrete arguments why a professional judge – being married to another professional judge – should be biased when deciding on the same case at a different level of jurisdiction which did not, moreover, entail direct review of the spouse's decision.

Further, family affiliation with one of the parties could give rise to misgivings about the judge's impartiality. The Court has held that such misgivings must nonetheless be objectively justified. Whether they are objectively justified would very much depend on the circumstances of the specific case, and a number of factors are taken into account in this regard. These include, inter alia, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the

[117] „Cooper v. the United Kingdom"
[118] „Findlay v. the United Kingdom" (1997)
[119] „Incal v. Turkey" (1998)
[120] „Öcalan v. Turkey" (2005)
[121] „Ergin v. Turkey" (2006)
[122] „Martin v. the United Kingdom" (2006); „Mustafa v. Bulgaria" (2019)
[123] „Dorozhko and Pozharskiy v. Estonia" (2008)
[124] „Jhangiryan v. Armenia" (2020)

financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) to be conferred on the relative.[125] In small jurisdictions, where an issue of family affiliation may often arise, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case.

The fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case does not necessarily mean that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.[126]

A criminal trial against an applicant in a court where the victim's mother worked as a judge was found to be in breach of the requirement of impartiality under Article 6.[127]

*e) Situations of a personal nature:*

The judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.[128]

Thus, where a court president publicly used expressions implying that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements objectively justified the accused's fears as to his impartiality.

No violation of Article 6. was found in relation to statements made to the press by a number of members of the national legal service and a paper published by the National Association of judges and prosecutors criticising the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the defence strategy, but not making any pronouncement as to the applicant's guilt. Moreover, the court hearing the applicant's case had been made up entirely of professional judges whose experience and training enabled them to rise above external influence.[129]

The Court also did not find lack of impartiality in a case in which a juror had made comments about the case in a newspaper interview after sentencing.[130] Conversely, in „Kristiansen v. Norway" (2015), the presence on the jury of a juror who knew the victim and commented on her character in circumstances which could be perceived as a comment or reaction to her oral evidence led to a breach of the principle of impartiality under Article 6.

Publicly expressed support of a judge who brought the criminal case against the applicant by a judge sitting in a cassation court's panel in the case amounted to a violation of Article 6 § 1 of the Convention.[131]

The fact of having previously belonged to a political party is not enough to cast doubt on the impartiality of a judge, particularly when there is no indication that the judge's membership of the political party had any connection or link with the substance of the case.[132]

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[125] „Nicholas v. Cyprus" (2018)

[126] „Pullar v. the United Kingdom" (1996), concerning the presence in the jury of an employee of one of the two key prosecution witnesses; „Hanif and Khan v. the United Kingdom" (2011), concerning the presence of a police officer in the jury, and contrast, „Peter Armstrong v. the United Kingdom" (2014)

[127] „Mitrov v. the former Yugoslav Republic of Macedonia" (2016)

[128] „Lavents v. Latvia" (2002); „Buscemi v. Italy" (1999)

[129] „Previti v. Italy" (2009)

[130] „Bodet v. Belgium" (2017); „Haarde v. Iceland" (2017)

[131] „Morice v. France" (2015)

[132] „Otegi Mondragon and Others v. Spain" (2015)

# CHAPTER II

# PRINCIPLES OF CRIMINAL PROCEDURE

## 2.1. The presumption of innocence

No one shall be considered guilty until the court finds him guilty by a final and binding conclusive decision.[133] The presumption of innocence is a „conditio sine qua non" of civil legal certainty, writes ANGYAL.[134] According to KIRÁLY, this determines the relationship between the parties to the proceedings, which in fact is not a presumption but a „provisional truth": „{...} there is no presumption of innocence (no fact indicating innocence is required for the presumption of innocence to exist)."[135]

As pointed out by the Hungarian Constitutional Court in its decision,[136] „the risk of failure of law enforcement is borne by the state. The constitutional guarantee of the presumption of innocence {...} expresses this risk-sharing as a specific rule." It should be noted that the presumption of innocence in criminal proceedings should also imply that the accused will be acquitted for lack of a criminal offence as a result of his unrefuted confession. However, judicial practice is different, because acquittals are made in the absence of evidence, thus maintaining the appearance of guilt. [137]

Evidence is the part of the procedure where the presumption of innocence is most „at risk". However, the presumption of innocence is not only binding on the courts, but also on the investigating authorities and the prosecuting authorities. Examples from domestic practice:

a) does not infringe this presumption

- blood tests for suspected drink-driving offenders; [138]
- psychiatric forensic practice, which is based on the assumption that the accused has committed the offence charged.[139]

b) violates this presumption,

- making statements at a press conference about the guilt of a person in custody;[140]
- if the accused is sanctioned for not answering certain questions during the proceedings.[141]

Following the decisions of the ECrHR, this presumption is not infringed by the court's reasoning that the income of persons convicted of drug trafficking offences in the six years preceding their conviction must be considered to be the proceeds of the offence.[142] However, the ECrHR found a violation of the Convention where

- after the acquittal of the accused on the basis of the principle of in dubio pro reo, they made findings that the suspicion against the applicant still existed;[143]
- the Belgian examining magistrate, at the end of the investigative phase of the proceedings, compared the accused to notorious serial killers in response to his provocation, a statement

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[133] Convention, Article 6. point 2.
[134] Pál ANGYAL: The principle of guaranteeing individual rights. In TÓTH M. (ed.): *Criminal Procedural Law Reader*, ibid. 44.
[135] Tibor KIRÁLY: *Criminal Procedure Law.* Budapest, Osiris, 2003. 125.
[136] 9/1992 (I. 30.) AB
[137] Krisztina KARSAI - Tibor KATONA: The presumption of innocence and the unrebutted defence of the accused. *Law Gazette*, 2010/4. 179.
[138] BH 1996/5 No 394.
[139] BH 1993/3 No 233.
[140] EFJ 1997/3 No 54.
[141] BH 2002/4. no. 317.
[142] „Phillips v. United Kingdom" (2001)
[143] „Lamanna v. Austria" (2001)

which was essentially intended to create the impression of guilt in the public mind and to anticipate the decision of the court hearing the case;[144]

- in the decision to terminate the proceedings, partly for lack of evidence and partly because of the statute of limitations for negligence, the court used expressions which clearly indicated that the accused was presumed guilty.[145]

In Hungarian jurisprudence, the practice of imposing and maintaining coercive measures restricting personal liberty is particularly problematic in principle, since these procedural acts are carried out without the accused's criminal liability having been established.[146] The use of arrest seems to be the most worrying of these,[147] but in many cases there is no alternative, particularly in the interests of the investigation. At most, legal limits can be set as to the scope of application, but the possibility of ordering it cannot be excluded for offences (e.g. participation in a criminal organisation) where effective investigation cannot be ensured otherwise.

There is also a view that the burden of proof is in fact reversed in the case of the imposition of various coercive measures, and that the burden of proof is squarely on the defender or defendant to prove that there are no grounds for the imposition. However, I consider this view to be erroneous in the light of current judicial practice in Hungary, since, unfortunately, the courts do not conduct any substantive evidentiary proceedings in the case of decisions on such matters, so that the arguments relating to the 'burden of proof' are also irrelevant.

On the whole, I believe that the existence of coercive measures does not stem from the presumed guilt of the accused, but from the requirement of the success of the proceedings. And if this requires deprivation of liberty or restriction of liberty, this can be done in exceptional cases, as defined by law.[148]

There is also widespread criticism of the application of the law in Hungary, where courts - especially the courts of appeal - are „reluctant" to grant acquittals and necessarily presume the guilt of the accused in their decision-making. Of course, clear and far-reaching conclusions can never be drawn on this issue. However, a number of empirical studies have been carried out recently, which have revealed judicial opinions that the low number of acquittals can be explained by the necessarily more detailed obligation to state reasons. The results of a court study carried out in 2006 confirmed this assertion, finding that courts of appeal overturn acquittals at first instance at a much higher rate than convictions at second instance (presumably this trend is the reason why the prosecution efficiency rate in Hungary is around 95%).

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[144] „Pándy vs. Belgium" (2006)

[145] „Grabschuk v. Ukraine" (2005)

[146] It is reasonable to assume that the validity of the principle is questionable in criminal proceedings, since the treatment of suspects, the use of coercive measures against a person „presumed innocent" would hardly be permissible. However, it must be stressed that these measures do not affect the presumption of innocence, do not weaken it and cannot encourage the prosecuting authority to assume guilt at all costs. In fact, the principle would in itself be little more than a mere dictum, and its real content would be given by the additional principles concerning the evidence. In: KARSAI - KATONA, ibid. 174.

[147] See the ECrHR judgment in „Peers vs Greece" (2001), which found that the conditions of the pre-trial detention violated the applicant's human dignity, since they created a sense of hopelessness and inferiority which broke the physical and psychological resistance of the accused and placed him in a humiliating situation. The Court held that the Greek authorities had thus violated Article 3 of the Convention (prohibition of torture). ECrHR, 2002/1 No 26.

[148] Recommendation No R (80) 11 of the Committee of Ministers of the Council of Europe, adopted in 1980, draws attention to the requirements of necessity and proportionality: even a person accused of a crime presumed innocent until proven guilty may be detained pending trial only if the circumstances make it absolutely necessary. Pre-conviction detention should therefore be considered an exceptional measure, should never be mandatory and should not be used for punitive purposes.

However, the prosecution efficiency rate is explained by the prosecution authority as a result of the fact that it only prosecutes cases where the evidence is beyond doubt. [149]

### 2.1.1. Judgments of the ECrHR

Paragraph 2 of Article 6 embodies the principle of the presumption of innocence. It requires, inter alia, that: (1) when carrying out their duties, the members of a court should not start withthe preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused.[150]

Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, amongst others, the burden of proof;[151] legal presumptions of fact and law;[152] the privilege against self-incrimination;[153] pre-trial publicity;[154] and premature expressions, by the trial court or by other public officials, of a defendant's guilt.[155]

Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge.[156] Consequently, the presumption of innocence applies to the reasons given in a judgment acquitting the accused in its operative provisions, from which the reasoning cannot be dissociated. It may be breached if the reasoning reflects an opinion that the accused is in fact guilty.[157]

However, the presumption of innocence does not normally apply in the absence of a criminal charge against an individual, such as, for instance, concerning the application of measures against an applicant preceding the initiation of a criminal charge against him or her.[158]

Once applicable, the presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant's conviction when the proceedings are continuing on appeal.[159]

Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process,[160] unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning.[161]

Nevertheless, a person's right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention which applies to a sentencing procedure.[162]

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[149] *The right to an effective defence and access to justice in the European Union*. Country Report- Hungary. https://www.helsinki.hu/a-hatekony-vedelemhez-valo-jog-es-a-kirendelt-vedoi-rendszer-reformja-2007-2009/ (09.03.2024.)

[150] „Barberà, Messegué and Jabardov v. Spain" (1988)

[151] „Telfner v. Austria" (2001)

[152] „Salabiaku v. France" (1988)

[153] „Saunders v. the United Kingdom" (1996)

[154] „G.C.P. v. Romania" (2011)

[155] „Nešťák v. Slovakia" (2007)

[156] „Poncelet v. Belgium" (2010)

[157] „Cleve v. Germany" (2015)

[158] „Gogitidze and Others v. Georgia" (2015); „Larrañaga Arando and Others v. Spain (2019); „Khodorkovskiy and Lebedev v. Russia" (2020); „Batiashvili v. Georgia" (2019), where Article 6 § 2 exceptionally applied to an instance of a purported manipulation of evidence, in order to insinuate the existence of a crime, before charges had been formally brought, which charges were then laid against the applicant very close in time to this noted manipulation.

[159] „Konstas v. Greece" (2011)

[160] „Bikas v. Germany" (2018)

[161] „Böhmer v. Germany" (2002)

[162] „Grayson and Barnham v. the United Kingdom" (2008)

The fundamental rule of criminal law, to the effect that criminal liability does not survive the person who committed the criminal acts, is a guarantee of the presumption of innocence enshrined in Article 6 § 2 of the Convention. Accordingly, Article 6 § 2 will be breached if an applicant did not stand trial and was convicted posthumously.[163]

*a) Parallel proceedings:*

Article 6 § 2 may apply to court decisions rendered in proceedings that were not directed against an applicant as "accused" but nevertheless concerned and had a link with criminal proceedings simultaneously pending against him or her, when they imply a premature assessment of his or her guilt.[164] Thus, for instance, the presumption of innocence may apply with regard to the court decisions in the extradition proceedings against an applicant if there was a close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicant in the requesting State.[165]

Moreover, the Court has considered Article 6 § 2 to apply with regard to the statements made in parallel criminal proceedings against co-suspects that are not binding with respect to the applicant, insofar as there was a direct link between the proceedings against the applicant with those parallel proceedings. The Court explained that even though statements made in the parallel proceedings were not binding with respect to the applicant, they may nonetheless have a prejudicial effect on the proceedings pending against him or her in the same way as a premature expression of a suspect's guilt made by any other public authority in close connection with pending criminal proceedings.[166]

In all such parallel proceedings, courts are obliged to refrain from any statements that may have a prejudicial effect on the pending proceedings, even if they are not binding. In this connection, the Court has held that if the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings, and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as a serious obstacle for disjoining the cases. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated.[167]

The Court has further found Article 6 § 2 to be applicable in the proceedings for revoking a decision on the suspension of prison sentence on probation in which reference was made to the fresh criminal investigation proceedings pending against the applicant.[168]

The Court also considered that Article 6 § 2 applied with regard to the statements made in the parallel disciplinary proceedings against an applicant when both criminal and disciplinary proceedings against him had been initiated on suspicion that he had committed criminal offences and where the disciplinary sanction gave substantial consideration to whether the applicant had in fact committed the offences he was charged with in the criminal proceedings.[169]

Similarly, Article 6 § 2 applies where two sets of criminal proceedings are in parallel pending against the applicant. In such cases, the presumption of innocence precludes a finding of guilt for a particular offence outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in the parallel proceedings and notwithstanding

[163] „Magnitskiy and Others v. Russia" (2019)
[164] „Diamantides v. Greece" (2005)
[165] „Eshonkulov v. Russia" (2015)
[166] „Karaman v. Germany" (2014)
[167] „Navalnyy and Ofitserov v. Russia" (2016)
[168] „El Kaada v. Germany" (2015)
[169] „Kemal Coşkun v. Turkey" (2017)

general considerations of expediency. Thus, considering in one set of proceedings concerning a particular offence that an applicant has committed another offence which is subject to a trial in a parallel set of proceedings, is contrary to the applicant's right to be presumed innocent with respect to that other offence.[170]

Lastly, the Court found Article 6 to apply to the parliamentary inquiry proceedings conducted in parallel to the criminal proceedings against the applicant. In such circumstances, the Court stressed that the authorities responsible for setting up and deciding in the parliamentary inquiry proceedings were bound by the obligation to respect the principle of the presumption of innocence.[171]

*b) Subsequent proceedings:*

The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[172]

Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require an examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.[173]

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

- a former accused's obligation to bear court costs and prosecution costs;
- a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings, it being understood that Article 6 § 2 does not guarantee the right to compensation for pre-trial detention in the case of dismissal of charges or acquittal, and thus the mere refusal of compensation does not in itself raise an issue from the perspective of the presumption of innocence;[174]
- a former accused's request for defence costs;[175]
- a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution;
- imposition of civil liability to pay compensation to the victim;
- refusal of civil claims lodged by the applicant against insurers;
- maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse;

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[170] „Kangers v. Latvia" (2019)
[171] „Rywin v. Poland" (2016)
[172] „Allen v. the United Kingdom" (2013)
[173] „Martínez Agirre and Others v. Spain" (2019), where no link was established between the subsequent compensation proceedings and the earlier criminal investigations.
[174] „Cheema v. Belgium" (2016)
[175] „Lutz v. Germany" (1987), where the Court held that neither Article 6 § 2 nor any other provision of the Convention gives a person charged with a criminal offence a right to reimbursement of his costs where proceedings taken against him are discontinued.

- disciplinary or dismissal issues;[176]
- revocation of the applicant's right to social housing;
- request for conditional release from prison;[177]
- proceedings for reopening of criminal proceedings, following the Court's finding of a violation of the Convention in an earlier case, where the applicants were treated as convicted persons and their criminal record for the initial conviction was kept;[178]
- confiscation of an applicant's land even though the criminal case against him had been dismissed as statute-barred;[179]
- conviction in the subsequent administrative proceedings (qualified as "criminal" within the autonomous meaning of the Convention) following an applicant's acquittal on the same charges in the criminal proceedings;[180]
- dismissal by domestic courts of an applicant's appeal against the prosecutor's decision considering that he was guilty of the offences for which he had been indicted even though the criminal proceedings initiated against him had been discontinued as time-barred.[181]

The Court has also found Article 6 § 2 to be applicable in relation to the doubt casted on the applicants' innocence by the adoption of an Amnesty Act and discontinuation of the criminal proceedings against the applicants under that Act. However, on the facts of the case, the Court found no violation of Article 6 § 2 on the grounds that no wording in the Amnesty Act had linked the applicants themselves by name to the crime described therein and that no other circumstances allowed doubt to be cast on the applicants' innocence.[182]

*c) Prejudicial statements:*

Article 6 § 2 is not only a procedural guarantee. It is also aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings.[183]

However, where no criminal proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 of the Convention.[184] Moreover, the prejudicial statements must concern the same criminal offence in respect of which the protection of the presumption of innocence in the context of the latter proceedings is claimed.

When the impugned statements are made by private entities (such as newspapers), and do not constitute a verbatim reproduction of (or an otherwise direct quotation from) any part of official information provided by the authorities, an issue does not arise under Article 6 § 2 but may arise under Article 8 of the Convention.[185]

A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question.[186] The latter infringes the

[176] „Teodor v. Romania" (2013)
[177] „Müller v. Germany" (2014)
[178] „Dicle and Sadak v. Turkey" (2015)
[179] „G.I.E.M. S.R.L. and Others v. Italy" (2018)
[180] „Kapetanios and Others v. Greece" (2015)
[181] „Caraian v. Romania" (2015)
[182] „Béres and Others v. Hungary" (2017)
[183] See: „Kasatkin v. Russia" (2021), concerning an issue of remedies in relation to the prejudicial statements.
[184] „Zollmann v. the United Kingdom" (2003); „Ismoilov and Others v. Russia" (2008); „Mikolajová v. Slovakia" (2011); „Larrañaga Arando and Others v. Spain" (2019)
[185] „Mityanin and Leonov v. Russia" (2019)
[186] „Ismoilov and Others v. Russia" (2008)

presumption of innocence, whereas the former has been regarded as unobjectionable in various situations examined by the Court.[187]

Whether a statement by a judge or other public authority is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made.[188]

Statements by judges are subject to stricter scrutiny than those by investigative authorities With regard to such statements made by investigative authorities, it is open to the applicant to raise his or her complaint during the proceedings or appeal against a judgment of the trial court insofar as he or she believes that the statement had a negative impact on the fairness of the trial.[189]

The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.[190] However, once an acquittal has become final, the voicing of any suspicions of guilt is incompatible with the presumption of innocence.[191]

Nevertheless, in this context, in cases of unfortunate language the Court has considered it necessary to look at the context of the proceedings as a whole and their special features. These features became decisive factors in the assessment of whether that statement gave rise to a violation of Article 6 § 2 of the Convention. The Court considered that these features were also applicable where the language of a judgment might be misunderstood but can, on the basis of a correct assessment of the domestic law context, not be qualified as a statement of criminal guilt.[192]

*d) Statements by public officials:*

The presumption of innocence may be infringed not only by a judge or court but also by other public authorities.[193] This applies, for instance,

- to the police officials;[194]
- President of the Republic;[195]
- the Prime Minister or the Minister of the Interior;[196]
- Minister of Justice;[197]
- President of the Parliament;[198]
- prosecutor[199] and
- other prosecution officials, such as an investigator.[200]

On the other hand, statements made by the chairman of a political party which was legally and financially independent from the State in the context of a heated political climate could not

[187] „Garycki v. Poland" (2007)
[188] „Daktaras v. Lithuania" (2000); „A.L. v. Germany" (2005)
[189] „Czajkowski v. Poland" (2007)
[190] „Sekanina v. Austria" (1993)
[191] „Rushiti v. Austria" (2000); „O. v. Norway" (2003); „Geerings v. the Netherlands" (2007); „Paraponiaris v. Greece" (2008); „Marinoni v. Italy" (2021)
[192] „Fleischner v. Germany" (2019); „Milachikj v. North Macedonia" (2021); by contrast, „Pasquini v. San Marino" (2020), where the impugned statements amounted to an unequivocal imputation of criminal liability that could not be explained by the particular domestic context.
[193] „Allenet de Ribemont v. France" (1995)
[194] „Allenet de Ribemont v. France" (1995)
[195] „Peša v. Croatia" (2010)
[196] „Gutsanovi v. Bulgaria" (2013)
[197] „Konstas v. Greece" (2011)
[198] „Butkevičius v. Lithuania" (2002)
[199] „Daktaras v. Lithuania" (2000)
[200] „Khuzhin and Others v. Russia" (2008)

be considered as statements of a public official acting in the public interest under Article 6 § 2.[201]

Article 6 § 2 prohibits statements by public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority.[202]

However, the principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.[203]

The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.[204]

For instance, in „Gutsanovi v. Bulgaria" (2013), the Court found that statements of the Minister of the Interior following the applicant's arrest, but before his appearance before a judge, published in a journal in which he stressed that what the applicant had done represented an elaborate system of machination over a number of years, violated the presumption of innocence under Article 6 § 2. On the other hand, spontaneous statements of the Prime Minister in a television show related to the applicant's placement in pre-trial detention did not cast into doubt the applicant's presumption of innocence. Similarly, in „Filat v. the Republic of Moldova" (2021), the Court did not consider that, in the context of the parliamentary proceedings for the waiver of immunity, the statements of the Prosecutor General and of the President of Parliament, referring to the evidence supporting the request for the waiver of the applicant's immunity, breached Article 6 § 2 of the Convention.

Prejudicial comments made by a prosecutor themselves raise an issue under Article 6 § 2 irrespective of other considerations under Article 6 § 1, such as those related to adverse pretrial publicity.[205]

*e) Adverse press campaign:*

In a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest.[206] A virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and affect an applicant's presumption of innocence. In this connection, the Court has held that the press must not overstep certain bounds, regarding in particular the protection of the right to privacy of accused persons in criminal proceedings and the presumption of innocence.[207] The fact that everyone charged with a criminal offence has the right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty is of relevance for the balancing of competing interests which the Court must carry out from the perspective of Article 10.[208] In this context, the fact that the accused had confessed to the crime does not in itself remove the protection of the presumption of innocence.

The publication of photographs of suspects does not in itself breach the presumption of innocence[209] nor does the taking of photographs by the police raise an issue in this respect.[210]

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[201] „Mulosmani v. Albania" (2013)
[202] „Butkevičius v. Lithuania" (2002)
[203] „Fatullayev v. Azerbaijan" (2010)
[204] „Khuzhin and Others v. Russia" (2008)
[205] „Turyev v. Russia" (2016)
[206] „Viorel Burzo v. Romania" (2009)
[207] „Bédat v. Switzerland" (2016)
[208] „Axel Springer SE and RTL Television GmbH v. Germany" (2017)
[209] „Y.B. and Others v. Turkey" (2004)
[210] „Mergen and Others v. Turkey" (2016)

However, broadcasting of the suspect's images on television may in certain circumstances raise an issue under Article 6 § 2.[211]

f) *Sanctions for failure to provide information*:
The presumption of innocence is closely linked to the right not to incriminate oneself.[212] The requirement for car owners to identify the driver at the time of a suspected traffic offence is not incompatible with Article 6 of the Convention.[213] Obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence.[214]

## 2.2. The principle of officiality

The most important aspect of the principle of accusation is that it places the burden of proving guilt entirely on the accuser, so the accused is not required to prove his or her innocence.[215] This principle is not, of course, intended to supersede the function of the defence, but the defence must be an active participant in the evidentiary process - all the more so since it is obliged to do so by the CPC itself. However, the defense counsel and the accused are often in a more difficult position than the prosecutor's office, since they have to prove not the occurrence of an event (positive proof) but its untruthfulness (negative proof). In most cases, this is not even possible with concrete evidence, so the defence is most often limited to challenging the results of the positive evidence, e.g. by questioning the credibility of the testimony.

There are two exceptions to the principle of incrimination, in which cases - according to the rules of the CC - the burden of proof is reversed and falls on the accused. 1. if the accused fails to prove that the property acquired during the period specified in the Act did not result from a criminal offence, confiscation must be ordered in respect of that property,[216] or 2. if the accused does not prove the truth of the facts alleged by him, he shall be criminally liable for the allegation in the case of defamation, making a false statement or false photograph capable of defamation, publishing a false statement or false photograph capable of defamation, libel and slander.[217]

The importance of the enforcement of the principle of officiality has been stressed in a number of domestic case law decisions, for example in the investigation phase, it is always necessary to investigate ex officio whether the prison staff tortured the prisoners.[218]

In relation to the principle of officiality, the ECrHR found a violation of the Convention when the Bulgarian authorities failed to carry out an effective investigation into the death of the applicant's partner, thereby depriving him of an effective remedy.[219] Other Strasbourg rulings:

- in „Kaya v. Turkey" (2001), the Court ruled that when persons acting on behalf of state bodies cause the death of any person in the course of the use of arms, an effective investigation is ex officio mandatory;

[211] „Rupa v. Romania" (2008)
[212] „Heaney and McGuinness v. Ireland" (2000)
[213] „O'Halloran and Francis v. the United Kingdom" (2007)
[214] „Tirado Ortiz and Lozano Martin v. Spain" (1999)
[215] Thus, for example, the burden of proving the existence of a ground excluding criminal liability or limiting criminal liability cannot be shifted to the accused (BH 1981.317.).
[216] CC 74/A. §
[217] CC 229. §
[218] BH 2001/11 No 877.
[219] „Velikova v. Bulgaria" (2001)

- if a person in good health dies in custody, it is the responsibility of the state to investigate the circumstances at the appropriate level.[220]

Based on CPC, the prosecution service or investigating authority shall launch a criminal proceeding ex officio if it becomes aware of a criminal offence subject to public prosecution. Unless otherwise provided in this Act, the court shall proceed on the basis of a motion. A criminal proceeding may not be launched, or a criminal proceeding already launched shall be terminated if the act of the perpetrator has already been adjudicated with final and binding effect, except for extraordinary legal remedy proceedings and certain special procedures. This rule shall also apply where an act of the perpetrator constitutes more than one criminal offence, but the court, pursuant to the qualification offered in the indictment, does not find the defendant guilty in all criminal offences that can be established based on the facts presented in the indictment document.

If the liability of a person was established in an infraction procedure, a criminal proceeding may not be launched against him on the basis of the same facts without issuing a prosecutorial compliance reminder, or conducting a review or retrial procedure, pursuant to the Act on infractions.

All other circumstances preventing the launch of a criminal proceeding, necessitating the termination of any criminal proceeding already launched, or requiring the delivery of a judgment of acquittal shall be specified in an Act.

A criminal proceeding may not be launched or a criminal proceeding already launched shall be terminated, if the act of the perpetrator has already been adjudicated with final and binding effect in a Member State of the European Union (hereinafter: "Member State"); or if a decision was adopted in a Member State regarding the merits of the act which prevents the launch of a new criminal proceeding regarding the same act, pursuant to the laws of the country where the decision was adopted, or the continuation of the criminal proceeding ex officio or based on any ordinary legal remedy.[221]

### 2.2.1. The ground for sentencing, the binding nature of the indictment (CPC)

Based on CPC, the court shall (1) deliver its judgment on the basis of the indictment, and (2) decide on, and may not exceed the scope of, the indictment. The court may decide on the criminal liability of the indicted person only, and it may adjudicate only acts that are specified in the indictment.[222]

*Legal case 1. (Hungary):* Criminal proceedings should be terminated due to the lack of lawful indictment, if the bill of indictment does not contain the precise description of the criminal offences on the basis of which prosecution took place.

The court of first instance found the accused guilty of the criminal offences of continuous embezzlement committed in the pattern of a business operation in respect of particularly substantial value [section 317, subsection (1) and subsection (7), point b) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code)] and forgery of private documents [section 276 of the Criminal Code], therefore sentenced the accused to three years and six months' imprisonment, four years' prohibition from public affairs and five years' prohibition from any profession related to the financial sector.

The court of second instance quashed the first instance judgement and terminated the criminal proceedings due to the lack of lawful indictment.

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[220] EJF 2001/2 No 21.
[221] CPC 4. § (1) – (7)
[222] CPC 6. § (1) – (3)

The appellate prosecution service submitted an appeal against the decision of the court of second instance to the Curia.

In its third instance proceedings, the Curia held that the court of second instance had lawfully decided to quash the first instance judgement and to terminate the criminal proceedings against the accused. The Curia agreed with the position of the court of second instance in that the bill of indictment filed by the county prosecution service had not been in conformity with the relevant procedural provisions on lawful indictment contained in section 2, subsections (1) and (2) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) with regard to the fact that the bill of indictment had failed to precisely describe the criminal offences for which the accused had been charged with.

The Curia reasoned that, according to the principle of lawful indictment, only a bill of indictment that clearly defines the person against whom charges were pressed and precisely describes the criminal offences for which the person was charged with can serve as a legal basis for a criminal court to proceed to establish one's criminal liability. Consequently, no criminal court proceedings can be launched or continued without a lawful bill of indictment.

The Curia found that the court of second instance had been right in referring to the fact that the bill of indictment had not been specific about the description of the accused person's act of embezzlement (an act of dishonestly withholding assets for the purpose of conversion of such assets, by a person to whom the assets were entrusted, either to be held or to be used for specific purposes) in respect of the assets of a financial institution and its clients and the value of the embezzled property. The bill of indictment did not include either whether there had been any change of data in the financial institution's information system or whether there had been any recording of false data, and if so, who had committed it and how it had been carried out. In addition, the bill of indictment did not refer to any fact that would serve as a legal basis for establishing that the criminal offence of embezzlement had been committed in the pattern of a business operation for illegal financial gains.

The bill of indictment was confined to stating that the accused person had opened a bank account by means of using the names and personal data of fictional persons, persons not belonging to the financial institution's clientele and the financial institution's clients without their consent or knowledge, he had conducted financial transactions involving their assets by way of disposing of those assets as of his own property, and he had forged private documents for the above purposes.

The aforementioned formulation does not meet the statutory requirements of lawful indictment as laid down in the Code of Criminal Procedure. With regard to the above, the Curia upheld the decision of the court of second instance.[223]

*Legal case 2. (Hungary):* By its decision rendered at a panel meeting held on 19 January 2015, the Curia – proceeding upon a petition for judicial review submitted by the defence attorney of the first and second accused – quashed the first and second instance judgements in respect of the first and second accused, and terminated court proceedings in connection with all criminal charges brought against them due to the lack of lawful indictment.

The municipal prosecution service brought charges against the accused persons before the first instance court. The bill of indictment was done on 4 June 2003 and was filed with the court on 1 July 2003. During the proceedings of the first instance court, criminal charges were put forward by the municipal prosecution service. The second instance court noticed that one of the victims had been represented by the sibling of the former head of the county prosecution service in the course of the criminal investigation and during the first instance proceedings, but his representative status ended by the time of the delivery of the second instance decision.

[223] Budapest, the 16th of October 2015. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bhar.I.987/2015.*

With regard to the above and by virtue of section 373, subsection (1), point II/d) of the Code of Criminal Procedure, the competent regional court of appeal quashed the first instance judgement and – having regard to the changes to the rules on the courts' competence that took place in the meantime – ordered the first instance court to reopen its proceedings.

In their judgements rendered in the reopened proceedings, the lower instance courts found the first and second accused guilty of fraud and other criminal offences, therefore sentenced the first accused to three years' imprisonment, three years' prohibition from public affairs and the payment of an ancillary fine of 500 000,- HUF, while imposed a fine of 250 000,- HUF on the second accused.

In his petition for judicial review, the defence attorney of the first and second accused argued that the date of indictment should be the date on which the bill of indictment was filed with the court (opinion no. 1/2007. BK of the Criminal Department of the Curia). The requirements for indictment should be met on the date of indictment. Under the provisions of section 32, subsection (4) of the Code of Criminal Procedure and regardless of who puts forward the criminal charges, a prosecutor that has been excluded from proceedings on grounds of a conflict of interests is explicitly prohibited from pressing charges. Such procedural infringement cannot be remedied by a lawful bill of indictment filed belatedly in the reopened proceedings.

The Curia agreed with the arguments explained in the petition for judicial review. The date of indictment shall be the date on which the bill of indictment is filed with the court. In the present case, Act no. XIX of 1998 on the Code of Criminal Procedure entered into force on the date on which the bill of indictment was filed against the accused persons. Section 31, subsection (5) of the Code of Criminal Procedure extends the scope of application of the exclusion criteria regulated in section 31, subsection (1), point b) of the Code of Criminal Procedure and in the previous legal regime to the prosecutors of the municipal prosecution services. It is true that none of the parties to the proceedings has referred to the above exclusion criteria. However, as to the invoked ground of exclusion, due to its nature, the competent judicial authority could have passed only one type of decision, namely it should have excluded the municipal prosecution service from the proceedings. Therefore, a kind of pending situation arose in which the applicable legal provisions explicitly prohibited the competent prosecution service from pressing charges pending the adjudication of the motion for exclusion.

Hence, the municipal prosecution service pressed charges contrary to the legal prohibition, and its unauthorised indictment constituted a serious violation of law (more severe than a procedural infringement such as the violation of the rules on the courts' competence and territorial jurisdiction). Such indictment is formally illegitimate and unlawful. Given that, in their reopened proceedings, the lower instance courts continued to act upon the same unlawful indictment, the reopening of the court proceedings could not remedy this serious irregularity.

For these reasons, the Curia, proceeding upon a petition for judicial review, decided on the merits of the case by quashing the final and conclusive judgement and – with regard to section 373, subsection (1), point I/c) of the Code of Criminal Procedure – terminating court proceedings in connection with all criminal charges brought against the first and second accused, as well as ruling on other legal issues detailed above.[224]

### 2.3. The principle of „in dubio pro reo"

A fact not proven beyond a reasonable doubt shall not be held against the defendant.[225] This principle sets out the requirement to prove guilt beyond reasonable doubt, which creates

[224] Budapest, the 10th of February 2015. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.III.1020/2014.*

[225] CPC 7. § (4)

obligations - direct and indirect - for the investigating authority, the public prosecutor (private prosecutor) and the court. It should be noted that the assessment of the minimum level of proof is a highly subjective matter. Nevertheless, there are some decision-making principles, mainly developed in judicial practice, which serve as a „lifeline" for the legal practitioner in doubtful situations, such as: 1. „We do not disagree with the expert opinion!"; 2. „Witness testimony is the queen of evidence!", etc.

However, certain criteria are given, which the court will use as a basis for its judgement, such as „common sense", documentary evidence, logic, life experience or the relevance of the facts. It is important, however, that these factors should only play a subsidiary role and should never hinder the development of legal reasoning (adversarial procedure).

*Case law:*
The court can take a position on the question of the accused's mental state only in favour of the accused, if a scientifically determination of the accused's sanity is not possible on the basis of forensic medical expert opinions.[226]

If there is no direct evidence pointing to guilt in the case, and the available circumstantial incriminating evidence gives no doubt only that the accused could have committed the offence, but the incriminating evidence does not refute the accused's denial and no further evidence can be obtained: the accused must be acquitted of the charges against them for lack of evidence.[227]

If the circumstantial evidence clearly does not provide a basis for a factual conclusion that the accused was the perpetrator of the offence: in the absence of proof, an acquittal order may be made.[228]

The principle of „in dubio pro reo" does not simplify the proof, but only determines its direction. Its flexibility, however, gives the defence a wide field of argument, which lawyers very often use, from their remarks at the first questioning of the suspect, through defence speeches, to appeals on the grounds that the conviction is unfounded.

According to TRSTENJAK (former member of ECrHR) this principle does not tell the judge when he should have doubts, but only how he should decide when he has doubts. „If in a criminal trial it is not possible to ascertain with the requisite certainty whether the accused has committed a particular offence, his innocence must be presumed in his favour."[229]

According to TREMMEL, the principle of in dubio pro reo can only be invoked immediately before the court decision, after the defence has exhausted all its possibilities of proof.[230] In my view, however, the defence counsel must constantly indicate to the competent authority (the court) which facts he considers to be in doubt. The best means of doing so is constant, objective commentary of the case. This practice is particularly justified when the defence has no means of proof at all and the only way to defend itself is for the lawyer to constantly question the credibility of the evidence presented by the prosecution.

### 2.4. The principle of „fair trial"

The general content of this principle is that public authorities must decide on individual cases concerning citizens' rights in a fair and equitable manner. The essential elements of the guarantee of Anglo-Saxon origin were first set out in Article 6 of the Convention, which was

[226] EBH 2002.793., BH 2003.393.
[227] BH2003. 145.
[228] BH 1977.484.
[229] C-62/06 Fazenda Pública
[230] TREMMEL (2001), ibid. 87.

promulgated in Hungary by Act XXXI of 1993 and as a result of which certain of its legal provisions appeared in the domestic constitutional legislation. However, the Hungarian Constitutional Court still does not refer to the concept of „fair trial", despite the fact that numerous petitions are nowadays submitted to the ECrHR by Member States alleging violation of this principle. However, Strasbourg case-law considers the concept of „due process" as a subsidiary clause. This means that if there is any other violation of a fundamental (procedural) right under the Convention, it is no longer necessary to find that this fundamental right has been infringed.[231]

A „fair trial" is a basic requirement not only in the relationship between the accused and the authority (court), but also in the relationship between the defence counsel and the authority (court). This is not primarily a legal but an ethical norm, which creates different obligations and expectations on the part of the authority (court) and the defence counsel.

The ECrHR accepts the right of national criminal courts to impose disciplinary sanctions on participants in proceedings. The classic form of sanction is the disciplinary sanction, which may, however, be imposed only in justified cases. In one case, the judge, in a decision rejecting a request for exclusion, imposed the maximum fine on a defendant who had claimed to have had an intimate relationship with him, on the grounds that he had libeled the court by making false statements, the sole purpose of which was to delay the proceedings. In the present case, therefore, the reason for the sanction was not directly the conduct of the defendant, but the fact of defamation of the court as a legal person.[232]

Moreover, „ethical conduct" relates not only to the conduct of the proceedings but also to the professional approach to the criminal case in question. This means in particular that

- the defence counsel must keep the defendant informed of the current status of the case (evidence) and its expected outcome;
- must be familiar with the most important aspects of the case file.

However, this expectation does not mean that the defence counsel has to play the role of „big brother". Even if the defendant is a close friend of the accused, he must bear in mind that the courtroom is not a world of emotions, there is no room for sentimentality, or impulsiveness. A defence counsel with such a temperament will sooner or later become antipathetic to the court, and such behaviour is therefore more harmful than likely to elicit any sympathy from the judge. From the point of view of general ethics of the defence, I also consider it essential that, when arguing in court, the defence lawyer should refer primarily to the concrete facts that arise, rather than to his personal experience and to the theoretical propositions that come from everyday routine.

The following case law decisions on the Convention have shown an important direction in the interpretation of the principle of „fairness":

a) The fairness or unfairness of a procedure can usually only be judged on the basis of the procedure as a whole:

- this does not mean, however, that a particular factor cannot be so decisive for the case as a whole as to give rise to a breach of the Convention in itself; [233]
- it may be the case that only a cumulative assessment of all the circumstances can establish the „unfairness" of the procedure.

b) The ECrHR never examines possible defects in the national legal system or infringements committed by the law enforcers, but whether the authorities of the Member State concerned have infringed the provisions of the Convention.[234]

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[231] „Pakelli v. Germany" (1983)
[232] „Chmelir v. Czech Republic" (2005)
[233] „Miailhe v. France" (1996)
[234] „Perez v. France" (2004)

c) The admissibility of evidence must be governed by national (Member State) law and it is for the national authorities alone to consider the evidence submitted to them; the Court's task, by its own definition, is therefore only to determine whether the proceedings as a whole are fair or unfair.[235] The Court's jurisdiction, by its own definition, does not extend to examining either the defects in the national legal systems or the infringements committed by the Member States' law enforcement authorities,[236] but only to examining whether all these factors taken together are capable of establishing a violation of the Convention.[237]

d) The burden of proving the alleged unfairness of the procedures lies essentially with the applicant.[238]

The ECrHR found a breach of the Convention when

- in the pending case, written evidence was not communicated to the applicant;[239]
- the 24-day detention was carried out without an official decision, no criminal proceedings were initiated before the detention and the suspected offender was not reported;[240]
- the applicant had only a short time-limit to appeal against the judgment, whereas the prosecutor was not bound by any time-limit in this respect; the Court also criticised in the same case the fact that the prosecution, contrary to the defence, had been informed in advance of the composition of the court; [241]
- the lawyer present could not represent the accused because his unlawful absence was sanctioned by national law;[242]
- the court deprived the accused of the opportunity to be represented by a lawyer because he stayed away from the trial (he feared that he would be arrested);[243]
- the accused was deprived of the possibility of lodging an appeal on the grounds that he had previously withdrawn from detention.[244]

However, the Court held that there was no breach of the Convention when

- the prosecution had a longer time to appeal than the defence;[245]
- the applicant was acquitted by the courts, but the Supreme Court ordered a retrial, which resulted in the applicant being retried.[246]

The prosecution and the defence must have an equal opportunity to express their views on questions of fact and law. It should be noted that this does not necessarily imply that the prosecution and the defence have the same legal powers, but it does require that the defence has powers of comparable weight to those of the prosecution.

At the level of evidence, this expresses the requirement that the accuser, the accused and his or her defence must be given the same opportunity to prove their case. Therefore, each of these procedural subjects has the right to be present, to ask questions, to comment, to make submissions and to seek redress.

This principle is, of course, far from being fully respected in practice. It can only be applied with restrictions during the investigation phase, in order to ensure the efectiveness of

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[235] See: „Ferrantelli and Santangelo v. Italy” (1996), where the ECrHR did not find any evidence to that effect.
[236] „Perez v. France” (2004)
[237] The Court did not find a breach of the Convention where the national court presumed, in an ambiguous situation, that the prosecutor had lodged his appeal within the time limit. This is essentially a matter for the national courts to decide. „Tejedor Garcia judgment” of 16 December 1997, Reports 1997-VIII, p. 2782.
[238] „Göktan v. France” (2002)
[239] „Koupila v. Finland” (2001)
[240] „Bitieva v. Russia” (2007)
[241] „Kremzow v. Austria” (1993)
[242] „Van Geyseghem v. Belgium” (1999)
[243] „Eliazer v. the Netherlands” (2001)
[244] „Khalfaoui v. France” (1999)
[245] This will only result in a breach of the Convention if an analysis of the procedure as a whole leads to the conclusion that it was unfair. See: „Ben Naceur v. France” (2006)
[246] „Nikitin v. Russia” (2004)

investigation. So, „fair trial" is not „numerical equality", but rather emphasises the right of access to information (documents) and thus the right to meaningful participation in procedural acts and the importance of meaningful preparation of the accused and the defence.

Of course, there have also been other decisions that have emphasised the importance of the principle under discussion. In one such decision, the „bench" ruled that if the public defender is not notified of the place and time of the hearing in a verifiable manner and in a timely manner, so as to enable him to participate in the hearing and exercise his rights under the law, this is not in accordance with the Fundamental Law, and the statement thus taken cannot be evaluated as evidence.

The principle of „fair trial" is applied in a rather deceptive way in the majority of procedural rights, since it can only be literally discussed in the evidentiary part of the trial or in the exercise of the right of appeal. This is also a natural state of affairs, since full equality cannot be expected either in the investigative or in the prosecution phase (after all, the latter is precisely the function of bringing a case to court with the minimisation of the possibilities of defence on the merits). In Hungary, too, the investigative phase is dominated by elements of inquisitorialism, two examples of which are the time limitations on the exercise of the right to be present at procedural acts and the possibility of access to documents.

In relation to the irregularities of certain procedural stages, the ECrHR found a violation of the Convention as fallows:

- the detained suspect was not allowed to have a defence lawyer present during his initial interview and was not warned by the authorities that he was not obliged to charge himself with a crime;[247]
- in a case for damages before the Finnish Supreme Court, the applicant, acting without a lawyer, was not allowed to examine the file; the decision was that the main rules of due process apply not only in criminal proceedings, fundamental human rights are „independent of the proceedings"; and that this principle applies before any level of court - whether it be a court of first instance, second instance or third instance;[248]
- denied access to the criminal file, refusing to disclose documents relating to the applicant in the summary proceedings before the police court;[249]
- the prosecution did not provide important evidence to the defence on the grounds of public interest without the knowledge and consent of the trial judge; [250]
- at the hearing before the Constitutional Court, the applicants were not given the opportunity to acquaint themselves with the written evidence on which the decision on the merits was based and to submit their observations on its content, relevance and credibility;[251]
- the proceedings before the court were unexpected, before a new authority and away from the place where the evidence was located;[252]
- the accused or his or her defence counsel were not allowed to inspect certain documents forming part of the prosecution case file or to obtain copies of certain essential documents;[253]
- the prosecutor made a submission to the court in such a way that the defence was not aware of it and therefore had no opportunity to react;[254]

[247] „Göcmen vs. Turkey" (2006)
[248] „Kerojärvi vs Finland" (1996)
[249] „Foucher vs. France" (1997)
[250] „Arowe and Da Vis vs. United Kingdom" (2000)
[251] „Krcmár and others vs Czech Republic" (2000)
[252] „Barberá, Meggegué and Jabardo vs. Spain" (1988)
[253] „Öcalan v. Turkey" (2003)
[254] „Bulut v. Austria" (1996)

- the report of the prosecutor's rapporteur reached the representative of the prosecution, but the defence was not informed of its contents;[255]
- the accused could not have been aware of the prosecutor's submission and could not react to its findings;[256]
- the determining authorities did not provide the person in pre-trial detention and his lawyer with the possibility to consult the documents for prolonging the detention;[257]
- the court only notified certain material circumstances to the defendants with legal representation.[258]

The ECrHR did not find a breach of the Convention when

- the person concerned was unable to respond to the prosecutor's oral argument;[259]
- certain relevant documents were only made available to the parties concerned during the appeal procedure.[260]

*Recommendation No R (95) 13 of the Committee of Ministers of the Council of Europe*, adopted on 11 September 1995, states that the rights of the defence must be guaranteed throughout the criminal proceedings, including the use of special means.[261] This legislation also emphasises as a matter of principle the need to strike a balance between the rights of the defence and the interests of the State in the administration of justice.

It should be noted that the requirements of a „fair trial" are not always met in the court proceedings. There are a number of cases where the rights of the defence are restricted, such as (1) the court accepts only the motions of the prosecutor's office; (2) the defendant and the defence counsel are prevented from communicating; (3) unjustified interruption of the plea of defense counsel, etc.

However, it is also noticeable that the inquisitorial features of the investigative phase are inadvertently reflected in the trial phase, as the investigative acts are often carried out without the involvement of the defence, so that the court often receives cases „presented with complete clarity". The consequence of this is that a judge who spends maximum effort studying the case file in detail can easily become a „puppet of the prosecution" and any motion of defence is unlikely to be successful at trial.[262] At the same time, no dislike, no sympathy, no previous acquaintance with a colleague, no judgement on any personal characteristic of the offender, can play any part in the judge's work.

*Legal case 1. (Hungary):* In its final judgement, the court imposed fines on legal persons as a result of criminal proceedings for tax fraud and other criminal offences. Two legal persons – via their common representative – lodged a petition for judicial review before the Curia by arguing that their representative had not been summoned by the court of second instance to attend the court's public session which had constituted an unconditional procedural infringement.

The Curia esteemed that the petition for judicial review was ill-founded.

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[255] „Reinhardt and Slimane-Kaid v. France" (1998)
[256] „Meftah and Others v. France" (2002)
[257] EFJ 2002/1. 15.
[258] „Meftah v. France" (2001)
[259] „Stepinska v. France" (2004)
[260] „Miailhe v. France" (1996)
[261] However, in all cases where the subject of criminal proceedings is a crime committed by an organised criminal group and the life and liberty of the witness may be at risk, a balance must be struck between the rights of the defence, the rights of the witness and the State's duty to provide justice.
[262] „Statistics show that it takes more time for a trial to end with an acquittal than a conviction. This may be because it is more difficult for the defence to convince the court of the innocence of the accused or the lack of sufficient evidence to support the accusation than it is for the prosecution to convince the court of guilt." In: Ede THEISS (ed.): *Statistics.* Budapest, University note, 1959. 146.

1. The Curia primarily examined whether the legal persons and their representative had been entitled to submit a petition for judicial review. Act no. CIV of 2001 on Criminal Sanctions for Legal Persons (hereinafter referred to as the CSLP Act) stipulates that if criminal sanctions were to be imposed on a legal person in a criminal proceeding, the provisions of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) shall be applied save as otherwise provided for in the present act of law [section 7, subsection (2) of the CSLP Act]. It provides that, in addition to the case referred to in section 416, subsection (1), point c) of the Code of Criminal Procedure, a petition for judicial review may be submitted by a legal person against the relevant parts of the impugned judgement if the imposition or non-imposition of a criminal sanction on the legal person concerned is the result of the violation of substantive criminal law or of the provisions of the present act of law [section 24, subsection (1) of the CSLP Act]. Thus, legal persons are clearly entitled to lodge a petition for judicial review through their representatives.

2. The legal persons' common representative had already been given a mandate in the lower instance court proceedings, therefore there was no need for a renewed mandate for the judicial review proceedings before the Curia. In principle, the rules on defence attorneys shall be applied to the representative of a legal person [section 9, subsection (4) of the CSLP Act]. In the absence of specific provisions, section 47, subsection (1) of the Code of Criminal Procedure – according to which the temporal scope of the official appointment of a legal aid lawyer or the temporal scope of a power of attorney (unless otherwise stipulated by the parties) shall last until the delivery of a final criminal court decision in the case concerned and, moreover, shall extend to retrials, judicial review proceedings and other special court proceedings beyond such delivery – shall also apply to the representative of a legal person.

3. Pursuant to section 416, subsection (1), point c) and section 373, subsection (1), phrase II, point d) of the Code of Criminal Procedure, a petition for judicial review may be submitted against the court's final on-the-merits decision if the court hearing was held in the absence of a person whose presence would have been compulsory by law. For the purposes of the above provisions, court hearings also include public sessions [section 234, subsection (3) of the Code of Criminal Procedure].

Upon proceeding to draft the petition for judicial review, the legal persons' common representative assumed that he had a procedural position quasi identical to that of a defence attorney. On these grounds, since legal persons are obliged to be represented by a natural person, the latter has to be present at the court's hearing or public session.

The Curia agreed with the impeccable arguments put forward by the Office of the Prosecutor General and considered the petition for judicial review to be ill-founded. By virtue of the specific provisions of section 9, subsection (5), point c) of the CSLP Act that deviate from the general rules of the Code of Criminal Procedure, the representative of a legal person "may be present at the court's hearing", which means that his presence is not compulsory by law, however, he should not be excluded from participating in such hearings.

The court of second instance undoubtedly violated the procedural rule according to which the court should have informed the legal persons' legal representative about his right to be present at the court's public session, irrespective of the fact that the legal representative had given a mandate to a substitute representative during the lower instance proceedings. On the other hand, the provisions of section 9, subsection (5), point c) of the CSLP Act had not been violated. The court of second instance duly summoned the substitute representative to attend the court's public session and the summoned person participated in all rounds of the session and rightfully represented both legal persons before the court.

For the sake of exhaustiveness, the Curia noted that the substitute representative had a fundamental duty to inform his principal (the legal representative) about each and every detail

of the exercise of his mandate – in particular, about notices and decisions sent to him by the court, as well as about the exercise of his rights as a substitute representative at the court's public session – without any delay. The data examined in the proceedings disclosed nothing capable of proving that the substitute representative had not fulfilled the above duties, and in the petition for judicial review the legal persons' legal representative did not refer to such breach of duty.

Therefore, the fact that the court of second instance had not summoned the duly authorised representative was considered by the Curia to be a so-called relative procedural infringement, which did not breach the requirement of the professional representation of legal persons. The reference of the legal persons' common representative to the rules on lead defence attorneys [section 44, subsection (3) of the Code of Criminal Procedure] was completely erroneous. These rules arrange the procedural position of several defence attorneys who are all mandated by the same accused, but a legal representative does not qualify as a defence attorney. With regard to the specific provisions of the CSLP Act, the rules on defence attorneys cannot be applied in the present case.

In conclusion, the Curia upheld the impugned court decision in respect of the legal persons concerned.[263]

*Legal case 2. (Hungary):* In its judgement delivered at a public hearing, the court of first instance found the second accused guilty of the crime of theft [section 316, subsection (1), subsection (2), second phrase, point d) and subsection (4), point b/1) of Act no. IV of 1978 on the Criminal Code] and sentenced him, as a recidivist for the same category of criminal offences, to two years and eight months' imprisonment and to three years' ban on participating in public affairs. In addition, the court declared that the second accused could not be granted conditional release and terminated his previously authorised conditional release as well.

Proceeding upon appeals submitted by the accused persons, the court of second instance upheld the first instance judgement. The second instance decision was delivered at a panel session.

The second accused lodged a petition for judicial review with the Curia against the second instance court decision. The petitioner argued that no summons had been served on him by the court of second instance and he had been imprisoned in a penitentiary facility during the second instance proceedings for a criminal offence committed earlier.

The Curia found the petition for judicial review well-founded. Based on the documents available to it, the court of second instance concluded that the second accused had been released from prison and could be summoned from his place of residence to attend the court's panel session. However, the court of second instance unlawfully sought to summon him from his place of residence, since the penitentiary facility later informed the court that the second accused was imprisoned both at the time of the service of summons and at the date of the panel session.

According to section 360, subsection (4) of the Code of Criminal Procedure, an appeal may be dealt with at a panel session only if the head of panel informs – among others – the accused person of the panel's composition and of the opportunity to request, within eight days, the judicial panel to hold a public session or a public hearing.

Court papers should be served on imprisoned accused persons, however, at their place of detention with acknowledgement of the service of summons. The court of second instance acted unlawfully by failing to duly summon the second accused to attend the court's panel session

[263] Budapest, the 11th of April 2017. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.II.1278/2016.*

and by delivering a decision in the absence of a person whose presence would have been compulsory.

The Curia therefore quashed the second instance decision and ordered the court of second instance to reopen its proceedings in respect of the second accused.[264]

### 2.4.1. „Equality of arms" (ECrHR)

Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.

The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[265] As a rule, from the perspective of the adversarial trial principle, the Court does not need to determine whether the failure to communicate the relevant document caused the applicant any prejudice: the existence of a violation is conceivable even in the absence of prejudice. Indeed, it is for the applicant to judge whether or not a document calls for a comment on his part.[266] The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6. looking at the two concepts together.

There has been a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.[267]

A restriction on the rights of the defence was found in „Borgers v. Belgium" (1991), where the applicant was prevented from replying to submissions made by the avocat général before the Court of Cassation and had not been given a copy of the submissions beforehand. The inequality was exacerbated by the avocat général's participation, in an advisory capacity, in the court's deliberations. Similar circumstances have led to the finding of a violation of Article 6 § 1 concerning the failure to communicate the higher prosecutor's observations on appeal to the defence.[268]

The Court has found a violation of Article 6. in criminal proceedings where a defence lawyer was made to wait for fifteen hours before finally being given a chance to plead his case in the early hours of the morning. Equally, the Court found a violation of the principle of equality of arms in connection with a Supreme Court ruling in a criminal case. The applicant, who had been convicted on appeal and had requested to be present, had been excluded from a preliminary hearing held in camera.[269] The same is true for instances in which an applicant is not allowed to be present at a hearing before the appeal court while the representative of the prosecution is present.[270]

In contrast, a complaint concerning equality of arms was declared inadmissible as being manifestly ill-founded where the applicant complained that the prosecutor had stood on a raised

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[264] Budapest, the 19th of October 2016. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.178/2016.*

[265] „Brandstetter v. Austria" (1991)

[266] „Bajić v. North Macedonia" (2021)

[267] „Borgers v. Belgium" (1991)

[268] „Zahirović v. Croatia" (2013)

[269] „Zhuk v. Ukraine" (2010)

[270] „Eftimov v. the former Yugoslav Republic of Macedonia" (2015)

platform in relation to the parties. The accused had not been placed at a disadvantage regarding the defence of his interests.[271]

The failure to lay down rules of criminal procedure in legislation may breach equality of arms, since their purpose is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.[272]

Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role. In „Thiam v. France" (2018), the Court did not consider that the participation of the President of the Republic as a victim and civil party in the proceedings disturbed the principle of equality of arms although he could not be questioned as a witness in the proceedings due to a constitutional prohibition. The Court stressed that such a constitutional prohibition did not in itself contravene Article 6. It also noted, in particular, that in convicting the applicant, the national courts had not referred to any evidence against him adduced by the civil party that required them to test its credibility and reliability by hearing the President. The Court also noted that the nature of the case, the evidence available and the non-conflicting versions of the applicant and the civil party did not in any event require that the latter party be questioned. In addition, the Court had regard to the fact there was no indication in the case file that the President's involvement had encouraged the public prosecutor's office to act in a way that would have unduly influenced the criminal court or prevented the applicant from bringing an effective defence.

Refusal to hear any witnesses or examine evidence for the defence but examining the witnesses and evidence for the prosecution may raise an issue from the perspective of equality of arms. The same is true if the trial court refuses to call defence witnesses to clarify an uncertain situation which constituted the basis of charges.[273]

The principle of equality of arms is also relevant in the matters related to the appointment of experts in the proceedings. The mere fact that the experts in question are employed by one of the parties does not suffice to render the proceedings unfair. The Court has explained that although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion. In ascertaining the experts' procedural position and their role in the proceedings, the Court takes into account the fact that the opinion given by any court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence.[274]

The Court has found that if a bill of indictment is based on the report of an expert who was appointed in the preliminary investigations by the public prosecutor, the appointment of the same person as expert by the trial court entails the risk of a breach of the principle of equality of arms, which however can be counterbalanced by specific procedural safeguards.[275]

In this regard, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence.[276]

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[271] „Diriöz v. Turkey" (2012)
[272] „Coëme and Others v. Belgium" (2000)
[273] „Kasparov and Others v. Russia" (2013)
[274] „Shulepova v. Russia" (2008)
[275] „J.M. and Others v. Austria" (2017)
[276] „Huseyn and Others v. Azerbaijan" (2011)

Similarly, under Article 6 it is normally not the Court's role to determine whether a particular expert report available to the domestic judge was reliable or not. The domestic judge normally has wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence must not deprive the defence of the opportunity to challenge the findings of an expert effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances, the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6. § as it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Moreover, a failure of the prosecution to disclose the technical details on which an expert report is based may impede the possibility for the defence to challenge the expert report and thus raise an issue of equality of arms under Article 6.[277]

Equality of arms may also be breached when the accused has limited access to his case file or other documents on public-interest grounds.[278]

The Court has found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed in favour of finding that the principle of equality of arms had been breached. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial and the accused from being given an opportunity to comment on it through his lawyer in oral submissions. In some instances, however, an accused may be expected to give specific reasons for his request to access a particular document in the file.[279]

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

### 2.5. Obligation to complete the taking of evidence within a reasonable time

Based on Article 6 § 1 of the Convention „1. In the determination of {...} any criminal charge against him, everyone is entitled to a {...} hearing within a reasonable time." I would note, there are many reasons why procedures may be delayed, for example: non-appearance of the accused, witness, expert or defence counsel; shortcomings of the penitentiary system; reasons related to exclusion of procedural participiants, other technical difficulties, etc.[280] According to the interpretation of the ECrHR, the interval of reasonable time for the examination runs from the first communication of the suspicion until the date of the final judicial decision. It is clear, however, that the most time-consuming procedural steps in criminal proceedings are those related to the taking of evidence (e.g. witness hearings, confrontations).

The enforcement of this principle is a particularly delicate issue in the case of coercive measures, since these coercive acts are subject to fundamental rights restrictions without the issue of the criminal liability of the accused having been finally decided.[281]

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[277] „Kartoyev and Others v. Russia" (2021)
[278] „Matyjek v. Poland" (2007)
[279] „Matanović v. Croatia" (2017)
[280] Anna KISS - Ádám MÉSZÁROS: *Timeliness of investigations, speeding up investigations.* https://www.bm-tt.hu/assets/letolt/rendtudtar/be_gyorsitas_kutjel_meszaros_kiss_2011%20doc.pdf (10.03.2024.)
[281] See: Exceptionally prolonged pre-trial detention on the basis of the applicant's arbitrary and violent behaviour does not violate the Convention. „Léger v. France" case

Of course, in the context of determining whether the duration of proceedings is justified or unjustified, the complexity of the case in question and its factual characteristics must always be taken into account and it must be examined in relation to this whether the parties to the proceedings have not deliberately (in bad faith) contributed to delaying the proceedings, for example by means of unnecessary motions to adduce evidence; by means of continually submitted requests for postponement of the hearing; by means of unjustified omissions, etc. [282]

In „Csanádi v. Hungary" (2004), the ECrHR found a violation of Article 6 (1) of the Convention (the right to a fair trial) on the basis that the Hungarian courts had infringed the fundamental right to a fair hearing within a reasonable time. The decision stated in principle that the reasonableness of the length of the proceedings must be assessed in the light of the specific circumstances of the case, i.e. the complexity of the facts of the case and the „procedural conduct" of the accused. In the Court's view, the case in question was not particularly complex in such a way as to give rise to a prolongation of the proceedings. Although the accused exercised his rights under the CPC in force (see submission of a motion, comments, notification of a bias objection), this cannot be held against him and he is not obliged to cooperate with the authorities. Moreover, in this case, the Hungarian court had a period of inactivity of 1 year, during which it did not hold any hearings, even though there would have been no reason not to do so.

There is an interesting study by Ervin BELOVICS on the specifics of the domestic procedures. The author points out that prior to the 1980s „the court trial was concentrated on one day in the majority of cases and only in cases with multiple defendants or multiple offences were two or possibly more days of trial held. From the early 1980s, however, this changed, with longer criminal trials, which also meant that more and more time elapsed between the suspected offender being brought to trial and the final determination of criminal responsibility. From the early 1990s, the situation became even worse, and sometimes the pre-trial or even trial stage of criminal proceedings alone took several years. The main reasons for this are seen by theorists and practitioners as being the quantitative increase in crime, the growing number of complex cases with difficult legal judgments and the increasing complexity of the rules of criminal procedure, which have led to increasing delays in the application of the timeliness requirement by the judicial authorities, sometimes resulting in criminal proceedings taking 8-10 years."[283]

Problems with the application of the principle take different forms in continental and Anglo-Saxon systems. This is because, while the criminal proceedings in continental states seek to establish the material truth, i.e. the historical facts as fully as possible and as close to the truth as possible, in Anglo-Saxon proceedings the courts are content to judge the case on the basis of the evidence presented by the parties and to compare it (formal truth). It is then obvious that, the evidentiary acts are much more detailed and lengthy in processes based on continental traditions.

According to Hungarian case law, the decisive factor for the unreasonableness of the duration of the proceedings is whether there is a period of time during which the authorities are inactive.[284] It is also consistent to hold that the workload of the authorities is not in itself a sufficient explanation for the length of the proceedings, because the States are obliged to organise judicial activity in such a way as to enable them to fulfil all their obligations.[285] The ECrHR has, however, laid down as a rule that the „procedural conduct" of the applicant in the course of the proceedings, the delay in taking procedural steps, cannot be imputed to the public

[282] „Péissier and Sassi v France" case (no. 25444/94.)
[283] Ervin BELOVICS: *The timeliness of criminal proceedings.* Szeged, Iurisperitus, 2016. 35.
[284] See: BH 1993/1. 77., 1994/1. 78., 1995/5. 399., 1995/7. 556.
[285] BH 1995/6. 478.

authorities when assessing whether the proceedings comply with the requirement of „a reasonable time".[286]

### 2.5.1. Determination of the length of proceedings (ECrHR)

In criminal matters, the aim of Article 6 § 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined.[287]

*a) Starting-point of the period to be taken into consideration:*
The period to be taken into consideration begins on the day on which a person is charged.[288] The "reasonable time" may begin to run prior to the case coming before the trial court,[289] for example from the time of arrest, the time at which a person is charged, the institution of the preliminary investigation,[290] or the questioning of an applicant as a witness suspected of commission of an offence.[291] However, in any event, the relevant moment is when the applicant became aware of the charge or when he or she was substantially affected by the measures taken in the context of criminal investigation or proceedings.[292] „Charge", in this context, has to be understood within the autonomous meaning of Article 6 § 1.[293]

*b) End of the period:*
The Court has held that in criminal matters the period to which Article 6 is applicable covers the whole of the proceedings in question,[294] including appeal proceedings.[295] Article 6 § 1, furthermore, indicates as the final point the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge.

The period to be taken into consideration lasts at least until acquittal or conviction, even if that decision is reached on appeal. There is furthermore no reason why the protection afforded to those concerned against delays in judicial proceedings should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared.[296]

In the event of conviction, there is no „determination {…} of any criminal charge", within the meaning of Article 6 § 1, as long as the sentence is not definitively fixed.[297]

The execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6.[298] The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does

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[286] „Ecke v. Germany" (1982)
[287] „Wemhoff v. Germany" (1968)
[288] „Neumeister v. Austria" (1968)
[289] „Deweer v. Belgium" (1980)
[290] „Ringeisen v. Austria" (1971)
[291] „Kalēja v. Latvia" (2017)
[292] „Mamič v. Slovenia" (2006)
[293] „McFarlane v. Ireland" (2010)
[294] „König v. Germany" (1978)
[295] „Delcourt v. Belgium (1970); „König v. Germany" (1978); „V. v. the United Kingdom" (1999); see, however, „Nechay v. Ukraine" (2021), where an intervening period relating to the procedure for the applicant's psychiatric internment was discounted from the overall period of the criminal proceedings against the applicant.
[296] „Wemhoff v. Germany" (1968)
[297] „Ringeisen v. Austria" (1971)
[298] „Assanidze v. Georgia" (2004)

not cease with the decision to acquit. If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory.

Lastly, decisions to discontinue criminal proceedings, even with the possibility of resuming them at a later stage, mean that the subsequent period is not taken into consideration when calculating the length of the criminal proceedings if a decision to discontinue criminal enquiries is made, the person ceases to be affected and is no longer suffering from the uncertainty which the respective guarantee seeks to limit.[299] The person ceases to be so affected only, however, from the moment that decision is communicated to him or her[300] or the uncertainty as to his or her status is removed by other means.[301]

### 2.5.2. Assessment of a reasonable time (ECrHR)

*a) Principles:*

The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment.[302] Where certain stages of the proceedings are in themselves conducted at an acceptable speed, the total length of the proceedings may nevertheless exceed a „reasonable time".[303]

Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between *the various aspects of this fundamental requirement.*[304]

*b) Criteria:*

When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.[305]

The complexity of a case: it may stem, for example, from the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, or the international dimension of the case.[306] A case may also be extremely complex where the suspicions relate to „white-collar" crime, that is to say, large-scale fraud involving several companies and complex transactions designed to escape the scrutiny of the investigative authorities, and requiring substantial accounting and financial expertise.[307] Similarly, a case concerning the charges of international money laundering, which involved investigations in several countries, was considered to be particularly complex.[308]

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[299] „Nakhmanovich v. Russia" (2006)
[300] „Borzhonov v. Russia" (2009)
[301] „Gröning v. Germany" (2020)
[302] „Boddaert v. Belgium" (1992)
[303] „Dobbertin v. France" (1993)
[304] „Boddaert v. Belgium" (1922)
[305] „König v. Germany" (1978); „Ringeisen v. Austria" (1971); „Pedersen and Baadsgaard v. Denmark" (2004); „Chiarello v. Germany" (2019); „Liblik and Others v. Estonia" (2019)
[306] „Neumeister v. Austria" (1968), where the transactions in issue had ramifications in various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and 22 persons were concerned, some of whom were based abroad.
[307] „C.P. and Others v. France" (2000)
[308] „Arewa v. Lithuania" (2021)

Even though a case may be of some complexity, the Court cannot regard lengthy periods of unexplained inactivity as „reasonable".[309] Moreover, although the complexity of the case could justify a certain lapse of time, it may be insufficient, in itself, to justify the entire length of the proceedings.[310]

The applicant's conduct: Article 6 does not require applicants to cooperate actively with the judicial authorities. Nor can they be blamed for making full use of the remedies available to them under domestic law. However, their conduct constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the length of the proceedings exceeds what is reasonable.[311]

One example of conduct that must be taken into account is the applicant's intention to delay the investigation, where this is evident from the case file.[312]

An applicant cannot rely on a period spent as a fugitive, during which he sought to avoid being brought to justice in his own country. When an accused person flees from a State which adheres to the principle of the rule of law, it may be presumed that he is not entitled to complain of the unreasonable duration of proceedings after he has fled, unless he can provide sufficient reasons to rebut this presumption.[313]

The conduct of the relevant authorities: Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements.[314] This general principle applies even in the context of the far-reaching justice system reforms and the understandable delay that might stem therefrom.[315]

Although a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take remedial action, with the requisite promptness, to deal with an exceptional situation of this kind,[316] the heavy workload referred to by the authorities and the various measures taken to redress matters are rarely accorded decisive weight by the Court.[317]

Similarly, domestic courts bear responsibility for the non-attendance of the relevant participants (such as witnesses, co-accused, and representatives), as a result of which the proceedings had to be postponed.[318] On the other hand, domestic courts cannot be faulted for a substantial delay in the proceeding caused by an applicant's state of health.[319]

What is at stake for the applicant must be taken into account in assessing the reasonableness of the length of proceedings. For example, where a person is held in pre-trial detention, this is a factor to be considered in assessing whether the charge has been determined within a reasonable time.[320] However, the very fact that the applicant is a public figure and that the case

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[309] „Adiletta and Others v. Italy" (1991), where there was an overall period of thirteen years and five months, including a delay of five years between the referral of the case to the investigating judge and the questioning of the accused and witnesses, and a delay of one year and nine months between the time at which the case was returned to the investigating judge and the fresh committal of the applicants for trial.

[310] „Rutkowski and Others v. Poland" (2015)

[311] „Eckle v. Germany" (1982), where the applicants increasingly resorted to actions likely to delay the proceedings, such as systematically challenging judges; some of these actions could even suggest deliberate obstruction; „Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal" (2014)

[312] „I.A. v. France" (1998), where the applicant, among other things, waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures.

[313] „Vayiç v. Turkey" (2006)

[314] „Abdoella v. the Netherlands" (1992)

[315] „Bara and Kola v. Albania" (2021)

[316] „Milasi v. Italy" (1987)

[317] „Eckle v. Germany" (1982)

[318] „Tychko v. Russia" (2015)

[319] „Yaikov v. Russia" (2015)

[320] „Abdoella v. the Netherlands" (1992), where, the time required to forward documents to the Supreme Court on two occasions amounted to more than 21 months of the 52 months taken to deal with the case

attracted significant media attention does not, in itself, warrant a ruling that the case merited priority treatment.[321]

### 2.5.3. Several examples

*a) Reasonable time exceeded:*

- 9 years and 7 months, without any particular complexity other than the number of people involved (35), despite the measures taken by the authorities to deal with the court's exceptional workload following a period of rioting.[322]
- 13 years and 4 months, political troubles in the region and excessive workload for the courts, efforts by the State to improve the courts' working conditions not having begun until years later.[323]
- 5 years, 5 months and 18 days, including 33 months between delivery of the judgment and production of the full written version by the judge responsible, without any adequate disciplinary measures being taken.[324]
- 5 years and 11 months, complexity of case on account of the number of people to be questioned and the technical nature of the documents for examination in a case of aggravated misappropriation, although this could not justify an investigation that had taken five years and two months; also, a number of periods of inactivity attributable to the authorities. Thus, while the length of the trial phase appeared reasonable, the investigation could not be said to have been conducted diligently.[325]
- 12 years, 7 months and 10 days, without any particular complexity or any tactics by the applicant to delay the proceedings, but including a period of two years and more than nine months between the lodging of the application with the administrative court and the receipt of the tax authorities' initial pleadings.[326]

*b) Reasonable time not exceeded:*

- 5 years and 2 months, complexity of connected cases of fraud and fraudulent bankruptcy, with innumerable requests and appeals by the applicant not merely for his release, but also challenging most of the judges concerned and seeking the transfer of the proceedings to different jurisdictions.[327]
- 7 years and 4 months: the fact that more than seven years had already elapsed since the laying of charges without their having been determined in a judgment convicting or acquitting the accused certainly indicated an exceptionally long period which in most cases should be regarded as in excess of what was reasonable; moreover, for 15 months the judge had not questioned any of the numerous co-accused or any witnesses or carried out any other duties; however, the case had been especially complex (number of charges and persons involved, international dimension entailing particular difficulties in enforcing requests for judicial assistance abroad etc.).[328]

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[321] „Liblik and Others v. Estonia" (2019)
[322] „Milasi v. Italy" (1987)
[323] „Baggetta v. Italy" (1987)
[324] „B. v. Austria" (1990)
[325] „Rouille v. France" (2004)
[326] „Clinique Mozart SARL v. France" (2004)
[327] „Ringeisen v. Austria" (1971)
[328] „Neumeister v. Austria" (1968)

- Little less than four years and ten months at two levels of jurisdiction concerning the constitutional redress proceedings involving complex and novel issues of law with an international element.[329]

## 2.6. Legality of evidence

The legality of evidence includes the following requirements: (1) The discovery, collection, provision and use of evidence shall not be contrary to the provisions of the law; if it is, the result of the evidence shall not be used in further proceedings. (2) Restrictions on fundamental rights are only possible in exceptional cases and in a way specified by law. (3) The principle of publicity as a general rule should ensure social control of the „purity" of evidence. (4) Based on the indirectness of the evidence, the court's decision may be based on data and information directly disclosed at the trial.

### 2.6.1. Prohibitions on evidence

Prohibitions of evidence are norms defined by law or judicial practice, according to which a given act of evidence cannot be performed or can only be performed in compliance with certain rules. It is a basic requirement that prohibitions of evidence are defined not only in the interest of the protection of the burden of proof, but also in the interest of the effectiveness of the evidence and the most accurate as possible detection of the facts.

According to BÁRD, „the purpose of prohibitions on evidence is to ensure the reliability of knowledge and, above all, to prevent the conviction of an innocent person."[330] The author adds, however, that these rules are also intended to protect other „substantive values" whose function is primarily to protect the fundamental rights of the person charged. In my opinion, the prohibition of evidence is in fact a specific case of procedural sanctions.

The purpose of procedural sanctions is to enforce the procedural conduct of the persons subject to the proceedings, that is to say, to enforce the conduct of the subjects of the proceedings in accordance with the rules of procedural law. But how far should we go and how far can we go with prohibitions on evidence to protect the rights of the accused but not to make prosecution impossible?

The ECrHR has consistently held that it is for the Member States to define these standards, and this forum has in several cases pointed to its lack of competence to decide on the admissibility of illegally obtained evidence in court. Accordingly, the use of illegally obtained evidence cannot, in principle, be excluded.[331] Possible infringements can only be covered by the Convention if the evidence is also unlawful under national law, and question the fairness of the procedure as a whole. If such evidence has only minimal relevance in this respect, no violation of the Convention may be established.[332]

The prohibitions on obtaining evidence are primarily rules of conduct for investigating authorities and prosecutors (regardless of the nature of the legal system). Most of the issues relate to their admissibility in court. According to some authors, the most important task of procedural law is precisely to develop and establish rules to ensure that the methods of taking evidence are as pure and ethical as possible and that the evidence used to ensure the objectivity

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[329] „Shorazova v. Malta" (2022)
[330] Károly BÁRD: *Evidence systems and the establishment of the truth in criminal cases*. Budapest, Hungarian Criminal Law Association, 2011. 31.
[331] „KHAN v. United Kingdom" (2000)
[332] „Schenk v. Switzerland" (1988)

and impartiality of the judicial decision is as reliable and free from error as possible. The regulation of these limitations, based in particular on the principle of the rule of law, has thus become a fundamental requirement of all modern procedural codes.

As a general principle, it can be established that facts derived from an instrument of evidence obtained by the proceeding authority (court) by means of a criminal offence, other prohibited means or by substantially limiting the procedural rights of the participants cannot be admissible as evidence.

Question: what criteria should be used to determine these prohibition rules? I consider the primary guiding principle to be that these rules must be precisely defined in the relevant procedural code so that the possibility of „judicial arbitrariness" is not even minimally taken into account in the case of decisions on evidentiary acts and motions. The discretionary power of the public (judicial) authorities may at most be limited to preventing the proof of facts which are manifestly impossible, absurd or cannot be proved by empirical-scientific methods.

According to KIRÁLY, the procedural law should define directly and precisely the acts that are prohibited. "It seems better and more appropriate for the procedural code to contain specific prohibitions on some methods of proof (e.g. torture, exhaustion, hypnosis, stunning, illicit coercion), even if the Criminal Code includes such offences as coercive interrogation and others. The CPC should decide on this issue independently. In this context, the norms of the acts of proof and the consequences of their violation should be formulated in the act in a regulated manner.[333]

Some views, however, argue that it would be sufficient to prohibit only those acts of proof which are also criminal offences or contrary to the principles of the CPC. Such considerations, however, carry many dangers, since they only provide a „broad framework" for the prohibition, which could lead to serious abuses and errors of law enforcement.[334]

I would also note here, that „tactical bluffing" cannot be banned. As the ECrHR has pointed out in an earlier decision, it is not necessarily illegal in itself for the police to resort to various tricks to prevent crime more effectively.[335] Of course, the principles established by law and judicial practice also apply to such cases, but the mental exhaustion of witnesses, the „exaggeration" of the professional responsibility of an expert in public by defence counsel, etc., can hardly fall into this category.

As regards the method of detecting procedural irregularities, there are two basic models:

- in jury systems, a professional judge may instruct the jury to disregard evidence obtained illegally;
- in systems following the ordinary (continental) procedural model, the court must „ex officio" disregard such evidence.

Some authors treat the categories of prohibitions on evidence and prohibitions on investigation separately. In TREMMEL's view, the latter circumstances should apply only to cases of proceedings by investigating authorities and should be regulated in the procedural law as separate categories of prohibition.[336]

Based on the CPC illegally obtained evidence cannot be evaluated as such, but the information derived from it can be used in the further part of the proceedings. Following the example of HÁGER, „{…} if a confession is extorted from an accused person by threat, his confession

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[333] Tibor KIRÁLY: Evidence in the forthcoming Code of Criminal Procedure. In Mihály TÓTH (ed.): *Criminal Procedural Law Reader*, ibid. 213-214.

[334] KIRÁLY (2013), ibid. 213.

[335] „Conka v. Belgium" (2002)

[336] Flórián TREMMEL: Can the basic concepts of the theory of proof be further developed? In: Mihály TÓTH (ed.): *Criminal Procedural Law Reader*, ibid. 198.

cannot be incriminating, but there is no obstacle to the inclusion of the material evidence obtained from the confession in the scope of evaluation."[337]

Apart from the fact that I consider this domestic practice - from a constitutional point of view - to be a matter of concern, I would like to point out that in Anglo-Saxon legal systems, neither illegal evidence nor other evidence derived from it can be used in subsequent stages of criminal proceedings, according to the „fruit of the poisonous tree principle".

The ECrHR found a violation of the Convention when the criminal liability of a person accused of drug trafficking was established solely on the basis of evidence obtained illegally by the police with the help of secret listening devices. The British courts rejected the defendant's appeal on this point, on the ground that, in the present case, the State's criminal claim was based on an interest greater than respect for the right to privacy. Nevertheless, the ECrHR found a violation of Article 8 of the Convention, since it found that the domestic legislation on the use of secret service agents was inadequate, and, since the right to an effective remedy was also restricted, it also found a violation of Article 13. In the ECrHR's view, the accused would have had several opportunities to object to the evidence in the main case, but his complaints related only to the fact of its use.[338]

The Court did not find a breach of the Convention when it

- evidence found during a search that was not entirely lawful was used in the proceedings, because (1) the accused did not contest the fact in the main proceedings; (2) the evidence was credible and accurate; (3) the search did not concern the applicant's private residence or the place of his business;[339]
- the applicant's secretly recorded statements were not made under duress and were not directly used by the court, but rather relied on the expert opinion based on the audio recording, and the prosecution was supported by other material evidence.[340]

The consequence of a breach of the prohibitions on evidence is, of course, the nullity of the evidence. This means that it is - in principle - not even at the time of its creation suitable for being taken into evidence by the competent authorities (courts). Nevertheless, many decisions by the authorities (courts) can be based on such evidence, but there are nevertheless a number of procedural remedies which can be used to remedy the situation, usually by invoking a procedural irregularity.

### 2.6.2. The obligation to respect fundamental rights

This principle is intended to protect the rights not only of the accused, but also of all the subjects of the proceedings, and even of persons who are involved in the proceedings but are not subjects. The CPC declares in its introductory part the following: the human dignity of every person shall be respected in criminal proceedings. The right to liberty and security of the person shall be afforded to every person in criminal proceedings. In a criminal proceeding, a fundamental right may be restricted only in a proceeding under this Act, for a reason, in a manner, and to an extent determined in this Act, provided that the purpose to be achieved may not be guaranteed by any other procedural act or measure involving any lesser restriction.[341]

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[337] Tamás HÁGER: Certain issues of evidence and incriminating testimony. In: Andrea SZILÁGYINÉ KARSAI - Balázs ELEK (eds.): *Studies for the 10th anniversary of the Debrecen Court of Appeal.* Debrecen Court of Appeal, 2016. 163.

[338] „KHAN v. United Kingdom" (2000)

[339] „Lee Davies c. Belgique" arret du 28 juillet 2009, no. 18704/05.

[340] „Bykov v. Russia" (2009)

[341] CPC 2. § (1) - (3)

There are numerous possible cases of violation of this principle,[342] but in practice, problematic situations may arise in relation to the interpretation of the principle of publicity and the imposition or maintenance of coercive measures.

a) The principle of publicity is a basic procedural rule, but in many cases this may affect the personal rights of the accused, in particular his or her human dignity.[343] Nevertheless, there is a tendency for criminal courts to impose fewer restrictions on publicity than civil courts, mainly because of the seriousness of criminal cases and the level of information provided to the public (media). Therefore, it is less common for the court to grant the defendant's requests to exclude the public, merely on the grounds of the defendant's human dignity, personal rights or even on grounds of clemency.

b) In principle, coercive measures may restrict most of the fundamental rights set out in international conventions and the Fundamental Law. The question is, of course, whether it is possible to speak of a violation of rights in cases where the grounds for imposing the coercive measure in question exist and its imposition complies with the procedural rules. In my view, no, since, as I have already pointed out, the interests of proof in many cases necessarily override the fundamental rights of the person subject to the procedure. Without these limitations, criminal proceedings would not be able to fulfil their inherent function. The only problem is that the terminology used in the current CCP does not precisely cover the scope of the fundamental rights that can be restricted by coercive measures, as it only refers to coercive measures affecting 'personal liberty' or 'property'. Thus, for example, it would have been more appropriate to mention separately the category of coercive measures affecting „freedom of movement" in the case of pre-trial detention and „personal integrity" in the case of search. The law could thus have declared the complexity of the legal restrictions imposed by coercive measures and the diversity of the adverse legal consequences they entail.

The ECrHR has explained the proportionality requirements for coercive measures taken in the interest of evidence in almost all fundamental rights. In the context of coercive measures restricting personal liberty, pre-trial detention is an exceptional measure, never mandatory and never applicable for punitive purposes; it may be imposed only if there are reasonable grounds to suspect that the person concerned has committed the offence in question and there are real grounds for believing that one or more of the following grounds apply:

- risk of absconding;
- risk of interference with the course of justice;
- risk of committing a serious crime.

In the case of pre-trial detention, the courts must assess the nature and seriousness of the suspected offence, the probative value of the evidence that the person concerned committed it, the penalty that could be imposed if he or she is found guilty, the personality, criminal record, personal and social circumstances and conduct of the person concerned (in particular as regards the enforcement of any obligations imposed by previous criminal proceedings).[344]

*Legal case (Hungary):* The applicant, Mr Péter Lakatos, is a Hungarian national, who was born in 1986 and lives in Gyál. He is represented before the Court by Mr G.T. Takács, a lawyer practising in Budapest. On 26 February 2011 the Pest Central District Court remanded the applicant in custody under Article 129 § 2 (b) and (c) of the Code of Criminal Procedure on suspicion of aggravated murder within the meaning of Article 166 § 1 of the Criminal Code. It

[342] For example, in „Z. v. Finland" (1997), the ECrHR found a violation of Article 8 of the Convention because of the publication of the judgment of the court of appeal, which included the identity and medical condition of the applicant. This fundamentally affected the right to human dignity of the accused (ECrHR 1998/3.).

[343] In many cases, the full names or photographs of suspects are published in certain reports without a final judgement on criminal liability.

[344] ECrHR 1997/2, 60.

summarized the suspicion against him, referred to the police reports, the autopsy report, the victim's medical documents, examinations of various exhibits and the witness testimonies and concluded that there was a reasonable suspicion that the applicant had poisoned the victim on 8 April 2010. The court found it established that there was a need for the applicant's detention because otherwise he would temper with evidence by exerting pressure on the witnesses, as evidenced by his previous conduct of threatening them. It also held that the applicant's "unclear" financial situation and the severity of the punishment demonstrated the risk of the applicant's absconding. The court gave no consideration to the request of the applicant's lawyer to place the applicant in house arrest.

The appeal against this decision was dismissed on 3 March 2011.

On 21 March 2011 the Buda Central District Court extended the applicant's pre-trial detention until 26 May 2011. It noted again that because of the severity of the punishment and the fact that the applicant had neither a permanent address nor a regular income, there were grounds to believe that the applicant would abscond. The court held that there was a risk of his interfering with the investigation if he were to threaten the witnesses or destroy physical evidence.

The applicant appealed, arguing that the conditions for pre-trial detention had not been fulfilled because there was no risk of his absconding or influencing witnesses. He argued that his settled personal circumstances, that is, the fact that he lived with his common-law wife and two children, his parents, and his brother's family, and the fact that he had no criminal record excluded the risk of his absconding. He further submitted that he had been cooperative with the investigation authorities. Alternatively, the applicant requested his release and that he be placed under house arrest.

The first-instance decision was upheld on appeal by the Budapest Regional Court on 15 April 2011, with the reasoning that the interest of the public in the applicant's detention was more important than his interest in the respect of his right to liberty.

On 23 May 2011 the Buda Central District Court extended the applicant's detention until 26 August 2011. The court maintained its previous reasons justifying the need for his detention. It emphasized that there was a risk of absconding owing the severity of the punishment, the fact that the applicant had no declared employment and had not been reachable at his permanent address. It added that if released the applicant might influence the witnesses or destroy evidence.

On 22 June 2011 the Budapest Regional Court upheld this decision.

On 24 August 2011 the Budapest District Court extended the applicant's detention until 26 November 2011 under Article 129 § 2 (b) (risk of absconding) and (c) (risk of collusion) of the Code of Criminal Procedure. As regards the risk of absconding, the court found that although the applicant had not been reachable at his permanent address and only had temporary jobs, his temporary residence had been known and he had no criminal record. However, given the seriousness of the potential punishment and his "unstable" financial circumstances, his presence at the proceedings could only be ensured through the most restrictive measure. As regards the risk of collusion, the court dismissed the argument of the applicant's lawyer that the prosecution authorities should have questioned all the witnesses at that stage of the proceedings. It held that although the majority of the witnesses had been heard, their further question could have been still necessary.

On 26 August 2011 the Budapest Regional Court upheld the lower court's decision under Article 129 § 2 (b) and (c) of the Code of Criminal Procedure.

Subsequently, the applicant's pre-trial detention was extended at a number of occasions. In particular, on 24 February 2012 the Budapest High Court held that the unclarified financial situation of the applicant and the seriousness of the crime substantiated the risk of absconding. It also found, without further reasoning, that there were grounds to believe that at that stage of the proceedings the applicant would influence the witnesses.

In his appeal the applicant argued that the investigation authorities carried out no procedural measures, the proceedings were unreasonable lengthy and that he had constantly been reachable at this temporary residence.

On 8 March 2012 the Budapest Court of Appeal dismissed the applicant's appeal.

On 25 April 2012 the applicant's pre-trial detention was extended by the Budapest High Court until 26 June 2012. The court maintained that the detention was still necessary because of the risk of the applicant's absconding pursuant to Article 129 § 2 (b) of the Code of Criminal Procedure. It considered that the applicant had no "financial or existential" bounds, counterbalancing the risk of him escaping an eventual serious punishment. Although he had family ties, an under-aged child and a relative who gave assurances to provide for him if released, given the seriousness of the charges, the gravity of the punishment and his unstable financial circumstances, there was a real risk that he absconded. However, the court did not find that the risk of collusion (Article 129 § 2 (c) of the Code of Criminal Procedure) was substantiated, since there was no way to influence any of the investigative measures the prosecution had relied on. It also considered that although there was likelihood that during the two years following the commitment of the crime the acquaintances and relatives of the applicant had tried to influence witnesses, there was no reliable information that this had actually taken place and a hypothetical risk of further attempts to do so could not substantiate the risk of collusion.

This decision was upheld on appeal on 7 May 2012.

On 22 June 2012 the applicant's pre-trial detention was extended until 26 August 2012. The court agreed with the applicant's contestation that his unsettled personal circumstances could not be relied on after the passing of a lengthy period of time following his arrest to justify his detention.

It nonetheless held that in the absence of any financial bounds, his family ties could not counterbalance the risk of his absconding.

This decision was upheld on appeal by the Budapest Court of Appeal on 28 June 2012.

The Budapest High Court extended the applicant's pre-trial detention on 21 August 2012, reiterating the same arguments as before. The second-instance court upheld the decision on 24 August 2012.

On 4 October 2012 the detention was extended until 26 November 2012.

On 24 October 2012 the applicant's pre-trial detention was extended again for a month under Article 129 § 2 (b) of the Code of Criminal Procedure. However, the Budapest High Court expressed doubts whether there was enough evidence to conclude that there was a reasonable suspicion that the applicant had committed the crime. It considered that, irrespective of the seriousness of the charges, the risk of his absconding appeared to diminish, since he was raising two under-aged children and had no criminal record. On appeal the Budapest Court of Appeal upheld the first-instance judgment but extended the applicant's detention for two months.

On 21 December 2012, the applicant's detention was extended; the Budapest High Court again referred to the fact that at the time of his arrest, the applicant was unreachable at his permanent address and lived from temporary jobs, which substantiated the risk of absconding. The decision was upheld on appeal on 10 January 2013.

On 22 February 2013 the Budapest High Court released the applicant from pre-trial detention and placed him in house arrest under bail. According to the decision, besides the suspicion against the applicant, the only ground to restrict his liberty was the risk of absconding given the gravity of the offence, and this in itself could not justify his continued pre-trial detention. On appeal, the Budapest Court of Appeal reversed the first-instance decision and placed the applicant in detention on 28 March 2013. It noted that given the seriousness of the offence there was a danger of his absconding, irrespective of his family ties.

On 23 April 2013 the Budapest High Court released the applicant from detention with an undertaking not to leave his place of residence. Relying on the Court's case-law the High Court found that pre-trial detention could only serve as a measure of last resort and the applicant's continued detention would only serve as an anticipated punishment. The decision was overturned by the Budapest Court of Appeal on 26 April 2016, placing the applicant in detention with the same reasons as before.

On 17 June 2013 the Budapest Chief Public Prosecutor's Office preferred a bill of indictment.

On 25 June 2013 the Budapest High Court extended the applicant's detention until the date of the first-instance court's judgment, under Article 129 § 2 (b) of the Code of Criminal Procedure (risk of absconding), for essentially the same reasons as before.

On 28 January and 18 April 2014 the applicant applied for release, which was dismissed on 18 February and 24 April 2014, respectively.

The applicant's detention was reviewed on 16 July 2014 by the Budapest Court of Appeal. It held that the gravity of the offence, the applicant's lack of financial resources and of existential bounds, and the fact that he only notified the authorities of his place of residence once placed in detention substantiated the risk of his absconding.

This decision was upheld on appeal by the Kúria on the 24 September 2014, endorsing the reasons given by the lower-level court. The Kúria also found that the applicant's pre-trial detention was both necessary and proportionate and no less restrictive measure was sufficient to ensure the purpose of the criminal proceedings.

On 29 October 2014 the applicant was found guilty of aggravated murder and sentenced to eighteen years' imprisonment by the Budapest High Court.

Complaint: The applicant complains under Article 5 § 3 of the Convention that his pre-trial detention has been repeatedly extended without the courts taking into account his personal circumstances and applying only formulaic reasoning. Furthermore, his detention extended the reasonable length since the domestic authorities failed to display diligence in the conduct of the proceedings.

Questions to the parties: 1. Have the repeated extensions of the applicant's pre-trial detention been in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention, given the rather formulaic reasoning provided by the courts and the apparent lack of consideration of alternative measures? 2. Does the present case lend itself to the pilot judgment procedure (Article 46 § 1)? 3. In particular, do the facts of the present application reveal the existence of a structural or systemic problem or other similar dysfunction, which has given rise or may give rise to similar applications (see Rule 61 §§ 1 and 2 of the Rules of Court)?[345]

c) In an era of coercive measures that limit personal integrity, the use of searches and physical coercion in particular can raise the possibility of abuse of rights by the authorities. In one case, the ECrHR found a violation of Article 3 of the Convention (prohibition of inhuman and degrading treatment) when the doctor had started to induce vomiting in the hospital after the victim had swallowed a bag of cocaine, since this was not done to protect the victim's physical and mental integrity, but solely to obtain evidence. This method of execution was in itself capable of creating a feeling of fear and vulnerability in the person being examined, and it also carried risks, since it was not preceded by a thorough medical examination.[346]

d) Among coercive measures restricting the right to respect for private and family life

- a violation of rights occurs when masked police officers break into a person's home at dawn without the consent of the person being prosecuted; [347]

[345] „Lakatos v. Hungary" (2015)
[346] „Jalloh v. Germany" (2006)
[347] „Kucera v. Slovakia" (2007)

- if the investigating authority searches the victim's home without the warrant being produced or without any information being provided about the property to be searched;[348]

Finally, the Court held that this right extends not only to private dwellings, but also to the protection of the registered office, place of business and place of management of companies.[349]

## 2.7. The principle of publicity

An important criterion for the legitimacy of evidence is its verifiability by the public. This is possible through consistent - but not unlimited - enforcement of the principle of publicity. Today, the legal guarantee of publicity is a fundamental principle of modern legislation and law enforcement. However, the classic principle of the public nature of a trial is not the same today as it was in previous centuries, since it is not only the 'audience' that can physically observe the proceedings, but also the written press and the electronic media. All the conditions for informing the public are therefore met, but this can have a profound impact on the adjudicatory (evidentiary) activity. In my opinion, this should not determine the court's conduct of the case, but it should also be borne in mind that public communication can have a significant impact on society's image of the judiciary and on public confidence in general.

I would note that the publicity of the negotiations is also a fundamental requirement for ancillary matters, according to the case law of the ECrHR. Thus, for example, this forum found a violation of the Convention when the application was limited to the compensation proceedings brought against the accused for 48 hours of unlawful detention, where no public hearing had been held previously.[350]

The possible ways of limiting the principle are shaped by the different procedural codes and judicial practice. For example, the Court of Justice has consistently recognised the public security interest as a limitation: in such cases, too, appropriate measures must be taken to ensure that the public is adequately informed of the time and place of the hearing and that the procedural steps are accessible to interested parties. Nevertheless, Member States may, with valid reservations, choose to exclude public access to certain types of cases altogether. If, however, the area of law in question is re-regulated, the public trial will once again become the general rule.

The imposition of publicity as a general rule is crucial for the promotion of active evidence in trials, for the control of the legality of the proceedings and for the proper information of society. The historical legal categories of each regulatory model can be distinguished as follows:

- in the case of procedural systems based on the principle of client access, the law only allows the presence of the persons sued;
- for procedural systems based on the principle of public access, the law allows for the presence of anyone.

The International Covenant on Civil and Political Rights states that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a

[348] „Imakaieva v. Russia” (2006)
[349] BH 2003/10. 796.
[350] „Göc v. Turkey” (2002)

criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.[351]

On the basis of the above, the case-law of the ECrHR has, as a general rule: (1) requires the negotiations to be open to the public by making the definition of the exclusion rules a national competence; (2) in order to be able to lodge a complaint, applicants must exhaust their domestic remedies; (3) the right to a public hearing may be waived, either expressly or impliedly; in which case there is no violation of the Convention even if this is the only judicial forum in which the proceedings are heard in public;[352] (4) the two degrees of publicity (see first and second degree) are not necessary a) if the higher court no longer examines questions of fact; in this case, it is sufficient to create the conditions for „first degree publicity",[353] and b) if the higher court is entitled in principle to review questions of fact, but in the case in question it actually only deals with questions of law.[354]

In the case of judgments, the full operative part of the judgment or the substance of the grounds of appeal must be published (full grounds are not required), but this is not necessary if the court of appeal decides on the admissibility or dismissal of the appeal or sets aside the decision appealed against and orders the lower court to start a new trial.[355]

The ECrHR, following its case-law, has infringed the Convention by

- the court did hold a public hearing, but 1. it notified the party of this at a time when he was unable to attend[356] 2. the applicant was unable to attend in person because the court held it before the scheduled time[357] 3. it was not really public, as it was limited to the personal hearing of the accused;[358]
- the public delivery of the judgment was not carried out in its entirety;[359]
- the case was brought before the court of appeal alone (see previously before administrative bodies), but its proceedings were not public; it is a general requirement that at least one judicial forum must hold a public hearing in a criminal case;[360]
- the Supreme Court, exercising its full review jurisdiction, did not hold a public hearing, despite the fact that the possibility of substantial harm to the interests of the person concerned had been raised and that it had issued a judgment of acquittal reversing the previous acquittal.[361]

The ECrHR, following its case-law, did not infringe the Convention when it

- the applicant would have had a substantive right to request a public hearing, but he did not do so because it was rarely held in cases such as his;[362]
- the written procedure was also fully capable of clarifying the issues to be decided, and therefore no hearing was held;[363]
- the court of appeal did not hold a public hearing in the case in which it convicted the applicant, who had been acquitted of cigarette smuggling at first instance, because the

[351] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (12.03.2024.)
[352] „Hakansson and Sturesson v. Sweden" (1990)
[353] „Sutter v. Switzerland" (1984)
[354] „Schlumpf c. Suisse" arret du 8 janvier 2009, No. 29002/06.
[355] „Pretto v. Italy" (1983)
[356] „Yakovleg v. Russia" (2005)
[357] „Andrejeva v. Latvia" (2009)
[358] „Moser v. Austria" (2006)
[359] „Moser v. Austria" (2006)
[360] „Fredin v. Sweden" (1994)
[361] „Botten v. Norway" (1996)
[362] „Rolf Gustavson v. Sweden" (1997)
[363] „Vilho Eskeleinen and Others v. Finland" (2007)

court merely interpreted differently the law which decriminalised certain conduct, which was not a question of fact;[364]
- only the court of appeal publicly announced its judgment, but the court of first instance failed to do so;[365]
- the review procedure, which was limited to the examination of points of law, was not public; [366]
- the High Court would have held a hearing on request, but no such request was made.[367]

Based on the case law known from Hungarian jurisprudence, taking into account that the trial of a serious offence committed by a minor defendant may be of great public interest may mean that it may be necessary to hold a closed trial in order to reduce as far as possible the intimidation and inhibition of the minor.[368]

I would like to note that the concept of the public has several layers of meaning. On the one hand, it means that anyone can be present in person at a court hearing (subject to some legal restrictions) and demonstrate by their presence "social control" of the functioning of the courts. At the same time, it is the joint responsibility of the court, the prosecutor and the defence to ensure that there are no persons in the audience who, even by their presence, could influence the direction or outcome of the evidence. Therefore, the right to exclude the public from the hearing and the right to make a motion for exclusion should also be a guarantee in the procedural codes.

In cases of greater public interest, it would be a mistake to claim that the high level of publicity does not influence the evidence and the style of statements of the parties. At the same time, I consider it to be of fundamental importance that the procedural acts of the public authorities and the substance of the defence cannot be influenced in any way by the general public perception of the case. Possible media publicity should not, in principle, affect the lawful conduct of the evidentiary procedure or the practice of the authorities.

„High visibility" can cause problems, especially for juvenile offenders. The Court has pointed out in a relevant judgment that it is a violation of the Convention when the presence of members of the press and the sight of a courtroom packed to overflowing with members of the public cause such psychological trauma to the accused that they are unable to give adequate instructions to their defence or are not in a position to make statements of the kind they need.[369]

### 2.7.1. The publicitiy of trial (CPC)

Trials shall be open to the public. With a view to duly conducting a trial, maintaining its dignity and security, or meeting space-related constraints, the proceeding single judge, or the chair of the panel, may limit the number of audience members. A person who has not attained the age of fourteen years may not attend a trial as a member of the audience; a person who has not attained the age of eighteen years may be banned from the audience by the proceeding single judge or chair of the panel. By passing a reasoned decision ex officio or upon a motion by the prosecution service, an accused, a defence counsel, an aggrieved party, or a party with a pecuniary interest, the court may exclude the public from a trial, or any part of a trial, and may order a closed trial for (1) reasons related to morality, (2) protecting a person requiring special

[364] „Bazo Gonzales c. Espagne" arret du 16 decembre 2008, No. 30643/04.
[365] „Lamana v. Austria" (2001)
[366] „Pretto and Others v. Italy" (1983)
[367] „Zumtobel v. Austria" (1993)
[368] BH 2001/4, 315.
[369] „T. v. United Kingdom" (1999)

treatment, or (3) protecting classified data or other protected data (hereinafter „closed trial"). A motion to exclude the public may be submitted at any stage of a proceeding.[370]

A decision passed by a court on ordering a closed trial shall be announced at a public trial. No appeal shall lie against a decision on ordering a closed trial. Even if a closed trial was ordered, the court may permit public officers performing tasks relating to the administration of justice to attend the trial. In a proceeding instituted against a foreign national accused, or for a criminal offence committed against a foreign national aggrieved party, a consular officer of the country of the foreign national or, on the basis of an international treaty promulgated in an Act, a member of an authority of the foreign country shall be permitted to attend the trial. If a closed trial is ordered, an aggrieved party acting without a representative, or an accused acting without a defence counsel, may move that a person present at the place of the trial, identified by him and other than a person to be interrogated at the trial, be allowed to attend the trial. Such a motion may not be submitted if a closed trial was ordered by the court for the protection of classified data. No appeal shall lie against a decision on such a motion. If the court orders a closed trial, it shall advise all persons present that they may not disclose any information heard during the trial; the court shall also advise them of the criminal consequences of the misuse of classified data, if required. Such an advice shall be indicated in the minutes.[371]

A trial shall be continued in public, if the reason for ordering a closed trial has ceased. Even if the public was excluded from a trial, the entire operative part and, with the restriction specified in paragraph (3), the statement of reasons of a decision adopted by a court in a trial shall be announced in public. The court shall not announce in public any data contained in the statement of reasons of a decision that, if published, would harm the interest for the protection of which the closed trial was ordered by the court.[372]

### 2.8. The principle of immediacy

The principle of immediacy is a basic requirement for court hearings and expresses the fact that the examination of evidence must be based on the direct and joint perception of the procedural subjects. There are, of course, exceptions to this rule, which often give rise to some concern among legal practitioners and jurists.

The principle of immediacy requires that all evidence is presented in court in its most original form. All witnesses and the accused have to appear before the judge in person to give testimony.

The court should base its findings only on evidential sources which it had actually heard, and not on inquiries or conclusions drawn from another time, place or person. The principle of immediacy is a principle necessitating that the primary sources of evidence be produced in court, so that the judge will base his judgment solely on evidence he was able to examine independently as to its quality and reliability.

NIJBOER provides a more detailed account on the principle of immediacy. In his endeavour to clarify the meaning of the principle in Dutch criminal procedure, Nijboer distinguishes two perspectives on the meaning of this principle in the academic literature. He describes the first one as the formal view: in this view the format of the investigation at trial forms the basis. This formal view requires that there has to be a direct link between the evidence and the judge, in order that there is an enhanced possibility of verifying information. Thus, the formal principle of immediacy demands that all evidence that could possibly influence the judgment should be subject to challenges during trial. The second view is the substantive view: the principle of

[370] CPC 436. §
[371] CPC 437. §
[372] CPC 438. §

immediacy is a principle that pursues the use of the most immediate evidence. The ratio behind this view is that reproduction of evidence bears the risk of distortion.[373]

Enforcing the principle of impartiality in court proceedings makes the court's work much easier when developing a credible, well-founded case. The purpose of enforcing the principle is therefore to ensure that the original sources of evidence are discovered and used in the proceedings, as far as possible without mediation.[374]

The domestic legislation has already created the possibility for the courts to conduct hearings without the presence of the accused and to make a decision on the case in several constructions. A good example of this is the creation of a separate chapter B on absent defendants, or the option to hold the ordinary second instance proceedings even in the absence of the duly summoned defendant (and to hear the appeal) if no appeal has been filed against the defendant, etc. It should be noted that some jurisdictions also recognise the category of so-called "condamner par contumace" (condamner par contumace), which are passed against defendants who are absent through no fault of their own, without the presence of legal representation at the trial. However, the Court has held that this method of sanctioning is contrary to the provisions of the Convention.[375]

According to the consistent practice of the ECrHR, evidence must be presented in open court in the presence of the accused, in accordance with the requirement of an adversarial procedure.[376] The Court's practice is consistent in ensuring the right of the accused to be present, since, although it allows the use of these constructions, it limits their scope to strictly defined cases. On the basis of its case-law:

a) a trial in absentia is not in principle contrary to the Convention, but only if the person concerned subsequently re-examines the factual and legal basis of the charges against him or her before a court which will hear him or her in person;[377]

b) the right to personal appearance may be restricted only if the accused has waived his or her right to personal appearance and to a personal defence;[378]

c) there is no interest in guaranteeing the personal presence of the accused before the courts of appeal, which only adjudicate on points of law; however, in the case of appeal proceedings, it is sufficient for the procedural law in question to provide for the mere presence of the accused and the defence.[379]

The ECrHR found a breach of the Convention when it

- the Court of Appeal took evidence of alleged procedural errors during the appeal proceedings, but neither the accused nor the defence lawyer were informed of this and could not be present;[380]
- the summons was served 2 days before the day of the trial; [381]
- the accused was not informed at all of the date of the appeal hearing before the Supreme Court.[382]

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[373] J.F. NIJBOER: Enkele opmerkingen over de betekenis van het onmiddellijkheidsbeginsel in het strafprocesrecht. NJB 1979, 821–823. In: M.S. GROENHUIJSEN – Hatice SELCUK: *The principle of immediacy in Dutch criminal procedure in the perspective of European Human Rights Law.* Tiblurg University, 2014. 249.

[374] Csilla HATI: The loss of the principle of immediacy in criminal proceedings. Truth, ideal and reality. In: Balázs ELEK – Tamás HÁGER – Andrea Noémi TÓTH (eds.): *Studies in honour of the 65th birthday of Sándor Kardos*. Debrecen, 2014. 192.

[375] „Krombach v. France" (2001)

[376] „Lüdi vs. Switzerland" (1992)

[377] „Poitrimol v. France" (1993)

[378] „Sejdovic vs. Italy" (2006)

[379] „Kamasinski v. Austria" (1989)

[380] „Komanicky v. Slovakia" (2002)

[381] „Ziliberg v. Moldova" (2005)

[382] „Maksimov v. Azerbaijan" (2009)

However, the Court did not find a violation of the Convention where the accused had voluntarily stayed away from the trial, or where the accused complained about the restriction of his right to comment in the appeal proceedings, despite not appearing at the trial.[383]

The Strasbourg rulings are mainly related to witness evidence. It is a fundamental principle that the accused must be given the opportunity to challenge incriminating testimony, an essential element of which is the provision of conditions for personal questioning of witnesses. However, according to the Court's case-law, it is not necessarily necessary for such persons to be questioned (directly) at trial, and in certain cases it is permissible to allow only the subsequent presentation of investigative statements. However, the testimony of co-accused persons with the right to remain silent can only be decisive evidence if the other accused persons have been granted the conditions of an adversarial procedure.[384]

The Court found a breach of the Convention when it

- the applicant was convicted by a court in his own country on the basis of a complaint in another country and the testimony of witnesses who were heard in his absence;[385]
- the prosecuting authorities did not make every effort to ensure that the accused could attend the trial in person, despite the fact that other procedures would have made it possible to establish his real whereabouts;[386]
- the court of appeal convicted the applicant, who was acquitted at first instance, of defamation on the basis of a new assessment of the facts, without a personal hearing.[387]

However, the Convention is not violated in interrogations using a closed telecommunications network if there are compelling reasons to do so. The Court has held that a case where a witness was examined by the court using such a device was compatible with Article 6. This was justified by legitimate aims, since the subject of the accusation was linked to participation in a criminal organisation, premeditated murder and misuse of firearms.[388]

The possibility of submitting a written witness statement may also cause problems. Such testimony is usually either 1. handwritten or 2. typed (signed by two witnesses or countersigned by a lawyer) and is therefore considered to be of full probative value. However, in KERTÉSZ's opinion, „in the case of written statements, there is no personal contact between the investigator and the person being questioned, no possibility to clarify vague and difficult to understand parts of the statement during the interview {...} the written statement of the interrogated person cannot replace the interrogation, it can only supplement it {...} the written statement must precede the interrogation, the interrogated person must be given the opportunity to write down the statement in his own hand only after the statement has been made and recorded."[389]

The Court has held that an important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Such a principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, normally a change in the composition of the trial court after the hearing of an important witness should lead to the rehearing of that witness.[390]

However, the principle of immediacy cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case. Very clear administrative or

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[383] „K.A. and A.D. v. Belgium" (2005)
[384] EJF 2002/1. 18.
[385] „A. M. v. Italy" (1999)
[386] „Colozza v. Italy" (1985)
[387] „Constantinescu v. Romania" (2000)
[388] „Marcello Viola vs. Italy" (2006)
[389] Imre KERTÉSZ: The *psychological foundations of interrogation tactics.* Budapest, Közgazdasági és Jogi Könyvkiadó, 1965. 286.
[390] „P.K. v. Finland" (2002)

procedural factors may arise, rendering a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available where the credibility of the witness concerned is not at issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court.[391]

In „P.K. v. Finland" (2002), the Court did not consider that non-compliance with the principle of immediacy could in itself lead to a breach of the right to a fair trial. The Court took into account the fact that, although the presiding judge had changed, the three lay judges remained the same throughout the proceedings. It also noted that the credibility of the witness in question had at no stage been challenged, nor was there any indication in the file justifying doubts about her credibility. Under these circumstances, the fact that the new presiding judge had had at his disposal the minutes of the session at which the witness had been heard to a large extent compensated for the lack of immediacy of the proceedings. The Court further noted that the applicant's conviction had not been based solely on the evidence of the witness in question and that there was nothing suggesting that the presiding judge had changed in order to affect the outcome of the case or for any other improper motive. Similar considerations have led the Court to find no violation of Article 6. in „Graviano v. Italy" (2005) and „Škaro v. Croatia" (2016).

Conversely, in „Cutean v. Romania" (2014), the Court found a violation of Article 6 when none of the judges in the initial panel who had heard the applicant and the witnesses at the first level of jurisdiction had stayed on to continue with the examination of the case. It also noted that the applicant's and the witnesses' statements constituted relevant evidence for his conviction which was not directly heard by the judge. In these circumstances, the Court held that the availability of statement transcripts cannot compensate for the lack of immediacy in the proceedings.

In „Cerovšek and Božičnik v. Slovenia" (2017) the Court found a violation of Article 6. because the reasons for the verdicts against the applicants, that is, their conviction and sentence, had not given by the single judge who had pronounced them but by other judges, who had not participated in the trial. Similarly, in Iancu v. Romania (2021) although leaving the question of relevance of the principle of immediacy open, the Court examined under that principle the issue of signing of the judgment by the court's president on behalf of the judge, who had taken part in the examination of the case but then retired before the judgment was delivered. The Court found no violation of Article 6. laying emphasis, in particular, on the following elements: the judgment was adopted by the judicial formation which had examined the case and engaged in direct analysis of the evidence; the judgment was drafted, in accordance with domestic law, by an assistant judge, who had taken part in the hearings and deliberations and who had set out, on behalf of the bench, the grounds for the conviction; the judge who retired had been objectively unable to sign the judgment; the signing of a judgment by all members was not a common standard in all Council of Europe member States; the national legislation limited the admissibility of the signing by the court's president to only those cases where the judge hearing the case was unable to sign the decision; and the president of the court signed the judgment on behalf of the retired judge and not in her (the president's) own name.

An issue related to the principle of immediacy may also arise when the appeal court overturns the decision of a lower court acquitting an applicant of the criminal charges without a fresh examination of the evidence, including the hearing of witnesses.[392] Similarly, the principle of immediacy is relevant in case of a change in the composition of the trial court when the case is remitted for retrial before a different judge. Moreover, in such a situation, the principles of the

[391] „Cutean v. Romania" (2014)
[392] „Hanu v. Romania" (2013)

Court's case-law concerning the right to examine witnesses for the prosecution are of relevance.[393]

*Legal case (Hungary):* Based on the provisions of Chapter XXV of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure), the accused person was tried in absentia and was sentenced to a non-suspended term of imprisonment by the courts of first and second instance.

The accused person submitted a petition for judicial review to the Curia of Hungary against the final judgement of the court of second instance and argued that he had been unable to be present at the courts' proceedings due to serving his prison sentence in Austria at that time.

The Prosecutor General's Office was of the opinion that the courts had not infringed the special procedural rules on in absentia proceedings in respect of the absent accused person. The requirements for the holding of such proceedings have been fully satisfied, therefore, it could be stated that the courts had held their hearings in the absence of a person whose presence had not been required by law.

In its decision, the Curia pointed out that the accused person's culpability in being absent is stipulated by section 529 of the Code of Criminal Procedure as a condition for the holding of in absentia proceedings. Such culpability can be established in a well-founded manner only if the courts concerned are unable, despite having taken all possible measures provided under law, to locate the accused person.

Based on Article 20, paragraph (1) and paragraph (2), point a) of the Treaty on the Functioning of the European Union, Article 8, paragraphs (1)-(4) of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016, and section 25, subsections (1)-(2) of Act no. CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the European Union, the Curia took the position that, in the case of the absence of an accused person with European Union citizenship, the lower instance courts had failed to take all measures to find him by omitting to issue a European arrest warrant in addition to the national one. Although section 529, subsection (1) of the Code of Criminal Procedure only provides for the issuance of "an arrest warrant", the latter has to be issued at both national and European levels if the absent accused person holds the nationality of a European Union Member State, and even if such person has no known domicile in another Member State. It is only in that case that the legal requirements for the holding of in absentia proceedings can be fully met.

With regard to the above, the lower instance courts failed to comply with the procedural rules on in absentia proceedings and to duly summon the accused person to their hearings, which were therefore held in the absence of a person whose presence was required by law. By virtue of section 608, subsection (1), point d) of the Code of Criminal Procedure, the courts' failure constitutes an absolute procedural infringement which has to lead to the unconditional quashing of their decisions. The Curia did not agree with the prosecution services' viewpoint according to which the absolute procedural infringement had already been remedied as a result of the reopening of the courts' proceedings on the basis of section 408, subsection (1), point e) of the Code of Criminal Procedure. Hence, the Curia – having also regard to the provisions of the new Code of Criminal Procedure that had entered into force in the meantime – quashed the second instance decision and ordered the court of second instance to reopen its proceedings.[394]

[393] „Famulyak v. Ukraine" (2019)

[394] Budapest, the 12th of October 2018. In: *Communication concerning the decision of the Curia of Hungary in criminal case no Bfv.II.254/2018.*

## CHAPTER III

## ISSUES RELATING TO CRIMINAL DEFENSE

### 3.1. The rights and obligations of the defendant and the person reasonably suspected of having committed a criminal offence (CPC)

The defendant is a person against whom a criminal proceeding is conducted. The defendant is a suspect during the investigation, an accused after the indictment, or a convict after a penalty, reprimand, release on probation, reparation work, or special education in a juvenile correctional institution is imposed by a final and binding conclusive decision or applied.

The person reasonably suspected of having committed a criminal offence is the person, during the investigation, but before the communication of the suspicion, who was apprehended for the commission of a criminal offence or summoned for an interrogation as a defendant or whose compulsory attendance was ordered or against whom a search warrant for the commission of a criminal offence or an arrest warrant was issued.[395]

The defendant shall be entitled to

- get informed of the subject of the suspicion or the indictment, as well as any change thereto,
- be afforded adequate time and circumstances for preparing the defence by the court, the prosecution service, or the investigating authority,
- be informed by the court, the prosecution service, or the investigating authority about his rights and obligations in the criminal proceeding,
- authorise a defence counsel for his defence, or move for the official appointment of a defence counsel,
- consult his defence counsel without supervision,
- give or refuse to give a testimony,
- present pieces of evidence, file motions and observations, and address the court by exercising his right to the last word,
- attend the trial and the sessions held relating to coercive measures affecting personal freedom subject to judicial permission, and to ask questions as provided for in this Act,
- seek legal remedy,
- inspect the case documents of the proceeding in their entirety, with the exceptions specified in this Act,
- initiate that a plea agreement be concluded or a measure or decision by a prosecutor be offered.

The defendant in detention shall be entitled to (1) get informed of the reason for his detention and any change thereto, (2) have the court, the prosecution service, or the investigating authority inform one person selected by him about his detention, (3) establish, and keep without control, contact in person, via post or by electronic means with his defence counsel and, in case of a foreign national defendant, the consular representative of his state, (4) keep supervised contact in person or controlled contact via post, or by electronic means with the person selected by him, in accordance with the instructions of the prosecution service before the indictment or the court after the indictment, (5) to keep contact with the person or authority specified in an international treaty promulgated by an Act in accordance with the international treaty.

A defendant shall be obliged to (1) attend procedural acts in accordance with the instructions of the court, the prosecution service, or the investigating authority and as specified in this Act,

[395] CPC 38. § (1) – (3)

(2) inform the proceeding court, prosecution office, or investigating authority about his home address, contact address, actual place of residence, and service address, as well as any change thereto within three working days following the change.

The court, the prosecution service, or the investigating authority shall advise the defendant of his rights and obligations at the beginning of his participation in the criminal proceeding. The information shall cover that he may file a request for legal aid, the conditions for such legal aid, and the right to use his mother tongue.

If the defendant is in detention, the proceeding court, prosecution office, or investigating authority shall inform the defendant about his rights also in writing. The information shall cover the period of detention as specified in the decision ordering the detention and the maximum possible period of detention as specified in an Act, the rules of extending, maintaining, and reviewing the detention, and the right to seek legal remedy against these decisions, as well as the right to file a motion for the termination of the detention.

If this Act affords a right for a relative or heir of the defendant to file motions, the provisions pertaining to the rights of defendants shall apply to the rights of the relative or heir.[396]

### 3.1.1. Issues related to effective participation in criminal proceedings (ECrHR)

Article 6., read as a whole, guarantees the right of an accused to participate effectively in a criminal trial.[397] In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article.

The Court also held that an accused's effective participation in his or her criminal trial must equally include the right to compile notes in order to facilitate the conduct of the defence.[398] This is true irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence. The dialogue between the lawyer and his client should not be impaired through divesting the latter of materials which set out his own views on the strengths and weaknesses of the evidence adduced by the prosecution. However, the Court stressed that different considerations may apply to the actual use of notes by an accused during his examination-in-chief or cross-examination. The credibility of an accused may be best tested by how he reacts in the witness box to questioning. A domestic court may therefore be justified in preventing an accused's reliance on written recollections of events or the reading out of notes in a manner which suggests that the evidence given has been rehearsed. Similarly, the Court has held that Article 6 of the Convention does not provide for an unlimited right to use any defence arguments, particularly those amounting to defamation.[399]

An issue concerning lack of effective participation in the proceedings may also arise with regard to a failure of the domestic authorities to accommodate the needs of vulnerable defendants.[400] Thus, as regards the juvenile defendants in trial proceedings, the Court has held that the criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is dealt with in a manner which fully takes into account his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the

[396] CPC 39. § - 40. §
[397] „Murtazaliyeva v. Russia" (2018)
[398] „Pullicino v. Malta (2000); „Moiseyev v. Russia" (2008)
[399] „Miljević v. Croatia" (2020)
[400] „Hasáliková v. Slovakia" (2021), concerning defendants with intellectual impairments

proceedings.[401] The right of a juvenile defendant to effectively participate in his criminal trial requires that the authorities deal with him with due regard to his vulnerability and capacities from the first stage of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible the child's feelings of intimidation and inhibition and to ensure that he has a broad understanding of the nature of the investigation and the stakes, including the significance of any potential penalty as well as his rights of defence and, in particular, his right to remain silent.[402]

A measure of confinement in the courtroom may also affect the fairness of a hearing by impairing an accused's right to participate effectively in the proceedings.[403] The degrading treatment of a defendant during judicial proceedings caused by confinement in an overcrowded glass cabin in breach of Article 3 of the Convention would be difficult to reconcile with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, and above all in the accused.[404]

Nevertheless, security concerns in a criminal court hearing may involve, especially in a large-scale or sensitive case, the use of special arrangements, including glass cabins. However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her relations with lawyers should only be imposed to the extent necessary, and should be proportionate to the risks in a specific case. In a case, the Court declared as violations of Article 6. the applicant's inability to have confidential exchanges with his legal counsel during the trial due to his placement in a glass cabin, and the trial court's failure to recognise the impact of these courtroom arrangements on the applicant's defence rights.

Similarly, as regards the use of a video link in the proceedings, the Court has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for.[405]

### 3.1.2. Right to remain silent and not to incriminate oneself (ECrHR)

On the basis of this principle, in a criminal proceeding, a person shall not be required to give a self-incriminating testimony or provide evidence against himself.[406] If the prosecuting authority (court) commits a serious breach of the rules governing incriminating statements, for example by failing to warn the accused of his right to remain silent, the evidence that has become known is considered to be unlawful and cannot form the basis of the facts. If the court nevertheless uses it in reaching a decision on the merits, this may lead to the decision being unfounded and annulled.

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[401] „V. v. the United Kingdom" (1999)
[402] „Blokhin v. Russia" (2016)
[403] „Svinarenko and Slyadnev v. Russia" (2014)
[404] „Yaroslav Belousov v. Russia" (2016)
[405] „Marcello Viola v. Italy" (2006)
[406] CPC 7. § (3)

In this context, HÁGER points out an interesting practical problem: „If the evidence of a procedural violation is disregarded in the decision making process, the judgment is not unfounded, but the result may be different from the truth." [407]

Judicial practice strictly interprets this principle: according to a 2001 domestic decision, it is also a violation of the prohibition of self-incrimination to read out at trial, without the consent of the accused, previous statements made in connection with the case in other proceedings before the authorities.[408] However, according to the consistent case-law of the ECrHR, the use of information obtained under duress by the authorities but which exists (objectively) independently of the will of the accused is not prohibited: this could include, for example, the results of a smear test, a blood sample or a urine test.

However, the Strasbourg forum found a violation of the Convention when the accused, who had confessed in the absence of his defence lawyer, withdrew his confession during the re-interrogation, now in the presence of his defence lawyer, but the court nevertheless convicted him and did not even examine whether his interrogation in the absence of his defence lawyer was lawful at all. The Court subsequently found that he had the right to remain silent and that he was immune from self-incrimination.[409]

Based on the Convention, anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself. Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.[410]

The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the most simple to the most complex.[411]

The right to remain silent applies from the point at which the suspect is questioned by the police. A person „charged with a criminal offence" for the purposes of Article 6 has the right to be notified of his or her privilege against selfincrimination.[412]

The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. The privilege against self-incrimination does not protect against the making of an incriminating statement per se but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence.

Through its case-law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result or is sanctioned for refusing to testify.[413] The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or

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[407] Andrea Noémi TÓTH – Tamás HÁGER: The testimony of the accused in the court phase of criminal proceedings, the assessment of certain procedural violations. *Miskolc Legal Review*, 2013/2. 79.
[408] BH 1998/3. no. 233.; BH 2001/10.
[409] „Yaremenko v. Ukraine" (2008)
[410] „Bykov v. Russia" (2009)
[411] „Saunders v. the United Kingdom" (1996)
[412] „Ibrahim and Others v. the United Kingdom" (2016)
[413] „Heaney and McGuinness v. Ireland" (2000)

statements.[414] The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning.[415]

Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating.

However, the privilege against self-incrimination does not extend to the use in criminal proceedings of material which may be obtained from the accused through recourse to compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[416] Moreover, the Court held that confronting the accused in criminal proceedings with their statements made during asylum proceedings could not be considered as the use of statements extracted under compulsion in breach of Article 6.

Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In order for the right to a fair trial under Article 6 § 1 to remain sufficiently „practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.[417]

Persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned; that is to say, when there is a „criminal charge" against them. These rights are quite distinct: a waiver of one of them does not entail a waiver of the other. Nevertheless, these rights are complementary, since persons in police custody must a fortiori be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent.[418] The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be regarded as a fully informed choice if he has not been expressly notified of his right to remain silent and if his decision has been taken without the assistance of counsel.[419]

The right to remain silent and the privilege against self-incrimination serve in principle to protect the freedom of a suspect to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which the suspect has elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning (in this particular case, a confession made to a police informer sharing the applicant's cell), and where the confessions or statements thereby obtained are adduced in evidence at trial.[420]

Conversely, in the case of Bykov v. Russia (2009), the applicant had not been placed under any pressure or duress and was not in detention but was free to see a police informer and talk

[414] „Gäfgen v. Germany" (2010)
[415] „Allan v. the United Kingdom" (2002)
[416] „O'Halloran and Francis v. the United Kingdom" (2007)
[417] „Salduz v. Turkey" (2008)
[418] „Navone and Others v. Monaco" (2013)
[419] „Stojkovic v. France and Belgium" (2011)
[420] „Allan v. the United Kingdom" (2002)

to him, or to refuse to do so. Furthermore, at the trial the recording of the conversation had not been treated as a plain confession capable of lying at the core of a finding of guilt; it had played a limited role in a complex body of evidence assessed by the court.

The right to remain silent is not absolute. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: (1) the nature and degree of compulsion; (2) the existence of any relevant safeguards in the procedure; (3) the use to which any material so obtained is put.

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

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to such inferences by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6. In jury trials, the trial judge's direction to the jury on adverse inferences is of particular relevance to this matter.[421]

Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination. The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.[422]

### 3.1.3. The right to defence (ECrHR)

The defendant shall have (1) the right to an effective defence at all phases of a criminal proceeding and (2) the right to defend himself personally and to engage a defence counsel to carry out his defence. The court, prosecution service, or investigating authority shall provide the defendant with a defence counsel as laid down in CPC. The court, prosecution service, or investigating authority shall afford adequate time and circumstances for preparing a defence. The defendant shall have the right to defend himself at liberty. The court, prosecution service, or investigating authority shall take into account ex officio all exculpatory circumstances and circumstances mitigating criminal liability.[423]

Based on European Convention, 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

[421] „O'Donnell v. the United Kingdom" (2015)
[422] „Heaney and McGuinness v. Ireland" (2000)
[423] CPC 3. § (1) – (6)

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.[424]

The requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.[425]

The specific guarantees laid down in Article 6 § 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.[426]

*a) Information about the charge:*

Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the „accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him.[427]

Article 6 § 3 (a) affords the defendant the right to be informed not only of the „cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the „nature" of the accusation, that is, the legal characterisation given to those acts.[428]

The information need not necessarily mention the evidence on which the charge is based.[429]

Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.[430] In this connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her.[431]

The duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defence.[432]

Information must actually be received by the accused; a legal presumption of receipt is not sufficient.[433]

If the situation complained of is attributable to the accused's own conduct, the latter is not in a position to allege a violation of the rights of the defence.[434]

In the case of a person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him.[435]

*b) Reclassification of the charge:*

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[424] Article 6. § (3)
[425] „Gäfgen v. Germany" (2010); 'Sakhnovskiy v. Russia" (2010)
[426] „Ibrahim and Others v. the United Kingdom (2016); „Mayzit v. Russia" (2005); „Can v. Austria (1984)
[427] „Kamasinski v. Austria" (1989)
[428] „Mattoccia v. Italy" (2000)
[429] „Collozza and Rubinat v. Italy" (1983)
[430] „Drassich v. Italy" (2007); „Giosakis v. Greece" (2011)
[431] „Kamasinski v. Austria" (1989)
[432] „Chichlian and Ekindjian v. France" (1989)
[433] „C. v. Italy" (1988)
[434] „Erdogan v. Turkey" (1992); „Campbell and Fell v. the United Kingdom" (1984)
[435] „Vaudelle v. France" (2001)

The accused must be duly and fully informed of any changes in the accusation, including changes in its „cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.[436]

Information concerning the charges made, including the legal characterisation that the court might adopt in the matter, must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion from the prosecution as regards the qualification of an offence is clearly not sufficient.[437]

A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation.[438] Whether the elements of the reclassified offence were debated in the proceedings is a further relevant consideration.[439]

In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time.[440]

Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects.[441]

*c) „In detail":*

The adequacy of the information must be assessed in relation to Article 6 § 3 (b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing enshrined in Article 6 § 1.[442]

While the extent of the "detailed" information varies depending on the particular circumstances of each case, the accused must at least be provided with sufficient information to understand fully the extent of the charges against him, in order to prepare an adequate defence.[443] For instance, detailed information will exist when the offences of which the defendant is accused are sufficiently listed; the place and the date of the offence is stated; there is a reference to the relevant Articles of the Criminal Code, and the name of the victim is mentioned.[444]

Some specific details of the offence may be ascertainable not only from the indictment but also from other documents prepared by the prosecution in the case and from other file materials.[445] Moreover, factual details of the offence may be clarified and specified during the proceedings.[446]

*d) „Promptly":*

The information must be submitted to the accused in good time for the preparation of his defence, which is the principal underlying purpose of Article 6 § 3 (a).[447]

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[436] „Bäckström and Andersson v. Sweden" (2006); „Varela Geis v. Spain" (2013)
[437] „I.H. and Others v. Austria" (2006)
[438] „De Salvador Torres v. Spain" (1996); „Sadak and Others v. Turkey" (2001); „Juha Nuutinen v. Finland" (2007)
[439] „Penev v. Bulgaria" (2010)
[440] „Block v. Hungary" (2011); „Haxhia v. Albania" (2013); „Pereira Cruz and Others v. Portugal" (2018)
[441] „Sipavičius v. Lithuania" (2002); „Zhupnik v. Ukraine" (2010); „I.H. and Others v. Austria" (2006); „Gelenidze v. Georgia" (2019)
[442] „Bäckström and Andersson v. Sweden" (2006)
[443] „Mattoccia v. Italy" (2000)
[444] „Brozicek v. Italy" (1989)
[445] „Previti v. Italy" (2009)
[446] „Sampech v. Italy" (2015); Pereira Cruz and Others v. Portugal (2018)
[447] „C. v. Italy" (1988), where the notification of charges to the applicant four months before his trial was deemed acceptable; see, by contrast, „Borisova v. Bulgaria" (2006), where the applicant had only a couple of hours to prepare her defence without a lawyer.

In examining compliance with Article 6 § 3 (a), the Court has regard to the autonomous meaning of the words "charged" and "criminal charge", which must be interpreted with reference to the objective rather than the formal situation.[448]

*d) Language:*

If it is shown or there are reasons to believe that the accused has insufficient knowledge of the language in which the information is given, the authorities must provide him with a translation.[449] Whilst Article 6 § 3 (a) does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, a defendant not familiar with the language used by the court may be at a practical disadvantage if he is not also provided with a written translation of the indictment into a language which he understands.[450]

However, sufficient information on the charges may also be provided through an oral translation of the indictment if this allows the accused to prepare his defence.[451]

There is no right under this provision for the accused to have a full translation of the court files.[452]

The cost incurred by the interpretation of the accusation must be borne by the State in accordance with Article 6 § 3 (e), which guarantees the right to the free assistance of an interpreter.[453]

*e) Preparation of the defence:*

The „rights of defence", of which Article 6. gives a non-exhaustive list, have been instituted above all to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.[454]

Article 6 § 3 (b) of the Convention concerns two elements of a proper defence, namely the question of facilities and that of time. This provision implies that the substantive defence activity on the accused's behalf may comprise everything which is "necessary" to prepare the trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.[455]

The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.[456]

*Adequate time:* When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings.[457]

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[448] „Padin Gestoso v. Spain" (1999); „Cassev. Luxembourg" (2006)
[449] „Brozicek v. Italy" (1989)
[450] „Hermi v. Italy" (2006)
[451] „Husain v. Italy" (2005)
[452] „X. v. Austria" (1975)
[453] „Luedicke, Belkacem and Koç v. Germany" (1978)
[454] „Mayzit v. Russia" (2005)
[455] „Can v. Austria" (1984); „Gregačević v. Croatia" (2012)
[456] „Iglin v. Ukraine" (2012)
[457] „Gregačević v. Croatia" (2012)

Article 6 § 3 (b) protects the accused against a hasty trial.[458] Although it is important to conduct proceedings at a good speed, this should not be done at the expense of the procedural rights of one of the parties.[459]

In determining whether Article 6 § 3 (b) has been complied with, account must be taken also of the usual workload of legal counsel; however, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case.[460] In this context, in a case in which the applicant and his defence counsel had had five days to study a six-volume case file of about 1,500 pages, the Court did not consider that the time allocated to the defence to study the case file was enough to protect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). The Court took into account the fact that in the appeal the applicant had analysed the case material in detail, that he had been represented before the appeal court by two lawyers, who confirmed that they had had enough time to study the file, and that the applicant had not been limited in the number and duration of his meetings with the lawyers.[461]

Article 6 § 3 (b) of the Convention does not require the preparation of a trial lasting over a certain period of time to be completed before the first hearing. The course of trials cannot be fully charted in advance and may reveal elements which had not hitherto come to light and require further preparation by the parties.[462]

An issue with regard to the requirement of "adequate time" under Article 6 § 3 (b) may arise with regard to the limited time for the inspection of a file,[463] or a short period between the notification of charges and the holding of the hearing.[464] Furthermore, the defence must be given additional time after certain occurrences in the proceedings in order to adjust its position, prepare a request, lodge an appeal, etc.[465] Such „occurrences" may include changes in the indictment,[466] introduction of new evidence by the prosecution,[467] or a sudden and drastic change in the opinion of an expert during the trial.

An accused is expected to seek an adjournment or postponement of a hearing if there is a perceived problem with the time allowed[468], save in exceptional circumstances,[469] or where there is no basis for such a right in domestic law and practice.[470]

In certain circumstances a court may be required to adjourn a hearing of its own motion in order to give the defence sufficient time.[471]

In order for the accused to exercise effectively the right of appeal available to him, the national courts must indicate with sufficient clarity the grounds on which they based their decision.[472] When a fully reasoned judgment is not available before the expiry of the time-limit for lodging

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[458] „Kröcher and Möller v. Switzerland (1981); „Bonzi v. Switzerland" (1978); „Borisova v. Bulgaria" (2006); „Malofeyeva v. Russia" (2013)

[459] „OAO Neftyanaya Kompaniya Yukos v. Russia" (2011)

[460] „Mattick v. Germany" (2005)

[461] „Lambin v. Russia" (2017)

[462] „Mattick v. Germany" (2005)

[463] Huseyn and Others v. Azerbaijan, 2011,

§ „Iglin v. Ukraine" (2012); see: „Nevzlin v. Russia" (2022), where the defence was given two weeks, which included weekends and holidays, to examine a 19,000-page case file involving accusations concerning several episodes of murder and attempted murder.

[464] „Vyerentsovv. Ukraine" (2013)

[465] „Miminoshvili v. Russia" (2011)

[466] „Pélissier and Sassi v. France" (1999)

[467] „G.B.v. France" (2001)

[468] „Campbell and Fell v. the United Kingdom" (1984); „Bäckström and Andersson v. Sweden" (2006); „Craxi v. Italy" (2002)

[469] „Goddi v. Italy" (1984)

[470] „Galstyan v. Armenia" (2007)

[471] „Sadak and Others v. Turkey" (2001); „Sakhnovskiyv. Russia" (2010)

[472] „Hadjianastassiou v. Greece" (1992)

an appeal, the accused must be given sufficient information in order to be able to make an informed appeal.[473]

States must ensure that everyone charged with a criminal offence has the benefit of the safeguards of Article 6 § 3. Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner.[474]

*Adequate facilities:* The „facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings.[475]

The States' duty under Article 6 § 3 (b) to ensure the accused's right to mount a defence in criminal proceedings includes an obligation to organise the proceedings in such a way as not to prejudice the accused's power to concentrate and apply mental dexterity in defending his position. Where the defendants are detained, the conditions of their detention, transport, catering and other similar arrangements are relevant factors to consider in this respect.[476]

In particular, where a person is detained pending trial, the notion of "facilities" may include such conditions of detention that permit the person to read and write with a reasonable degree of concentration.[477] It is crucial that both the accused and his defence counsel should be able to participate in the proceedings and make submissions without suffering from excessive tiredness.[478] Thus, in „Razvozzhayev v. Russia" and „Ukraine and Udaltsov v. Russia" (2019), the Court found that the cumulative effect of exhaustion caused by lengthy prison transfers – in poor conditions and with less than eight hours of rest, repeated for four days a week over a period of more than four months – seriously undermined the applicant's ability to follow the proceedings, make submissions, take notes and instruct his lawyers. In these circumsatnces, and given that insufficient consideration had been given to the applicant's requests for a hearing schedule that might have been less intensive, the Court considered that he had not been afforded adequate facilities for the preparation of his defence, which had undermined the requirements of a fair trial and equality of arms, contrary to the requirements of Article 6 §§ 1 and 3 (b) of the Convention.

The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.[479] In some instances, that may relate to the necessity to ensure the applicant a possibility to obtain evidence in his favour.[480]

Article 6 § 3 (b) guarantees also bear relevance for an accused's access to the file and the disclosure of evidence, and in this context they overlap with the principles of the equality of arms and adversarial trial under Article 6 § 1.[481] An accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives.[482] However, an accused's limited access to the court file must not prevent

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[473] „Zoon v. the Netherlands" (2000)
[474] „Vacher v. France" (1996)
[475] „Huseyn and Others v. Azerbaijan" (2011); „OAO Neftyanaya Kompaniya Yukos v. Russia" (2011)
[476] „Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia" (2019)
[477] „Mayzit v. Russia" (2005)
[478] „Barberà, Messegué and Jabardo v. Spain" (1988); „Makhfi v. France" (2004); „Fakailo (Safoka) and Others v. France" (2014).
[479] „Padin Gestoso v. Spain" (1999)
[480] „Lilian Erhan v. the Republic of Moldova" (2022), where the police refused to accompany the applicant to a hospital to obtain a biological test to challenge the allegations of drunk-driving.
[481] „Rowe and Davis v. the United Kingdom" (2000); „Leas v. Estonia" (2012)
[482] „Kremzow v. Austria" (1993)

the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions.[483]

When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence.[484]

In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken.[485]

„Facilities" provided to an accused include consultation with his lawyer.[486] The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence.[487] Thus, an issue under Article 6 § 3 (b) arises if the placement of an accused in a glass cabin during the hearing prevents his or her effective consultation with a lawyer.[488]

Article 6 § 3 (b) overlaps with a right to legal assistance in Article 6 § 3 (c) of the Convention.[489]

### 3.1.4. Right to defend oneself in person or through legal assistance (ECrHR)

Based on Article 6 § 3 (c) of the Convention, „everyone charged with a criminal offence has the following minimum rights: {…} 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."

Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1.[490] This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence. It comprises three separate rights: to defend oneself in person, to defend oneself through legal assistance of one's own choosing and, subject to certain conditions, to be given legal assistance free.[491]

*a) Scope of application:*

Any person subject to a criminal charge must be protected by Article 6 § 3 (c) at every stage of the proceedings.[492] This protection may thus become relevant even before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6.[493]

While Article 6 § 3 (b) is tied to considerations relating to the preparation of the trial, Article 6 § 3 (c) gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings.[494] Nevertheless, the manner in which Article 6 § 3 (c) is to be applied

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[483] „Öcalan v. Turkey" (2005)
[484] „Foucher v. France" (1997)
[485] „Rasmussen v. Poland" (2009); „Moiseyev v. Russia" (2008); „Matyjek v. Poland" (2007); „Seleznev v. Russia" (2008)
[486] „Campbell and Fellv. the United Kingdom" (1984)
[487] „Bonzi v. Switzerland" (1978)
[488] „Yaroslav Belousov v. Russia" (2016)
[489] „Lanz v. Austria" (2002); „Trepashkin v. Russia" (2010)
[490] „Dvorski v. Croatia" (2015); „Correia de Matos v. Portugal" (2001); „Foucher v. France" (1997)
[491] „Pakelli v. Germany" (1983)
[492] „Imbrioscia v. Switzerland" (1993)
[493] „Öcalan v. Turkey" (2005); „Ibrahim and Others v. the United Kingdom" (2016); „Magee v. the United Kingdom" (2000)
[494] „Can v. Austria" (1984)

in the pre-trial phase (during the preliminary investigation) depends on the special features of the proceedings involved and on the circumstances of the case.[495]

Similarly, the manner in which Article 6 § 3 (c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved.[496] Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein.[497] It is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the court of appeal, and the manner in which the applicant's interests were actually presented and protected before the court of appeal.

*b) Right to defend oneself:*

The object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing.[498] Closely linked with this right Article 6 § 3 (c) offers the accused the possibility of defending himself in person. It will therefore normally not be contrary to the requirements of Article 6 if an accused is self-represented in accordance with his or her own will, unless the interests of justice require otherwise.[499]

Article 6 §§ 1 and 3 (c) do not necessarily give the accused the right to decide the manner in which one's defence is assured. The choice between two alternatives mentioned in Article 6 § 3 (c), namely, the applicant's right to defend oneself in person or to be represented by a lawyer of one's own choosing, or in certain circumstances one appointed by the court, depends in principle upon the applicable domestic law or rules of court. In making this decision, Member States enjoy a margin of appreciation, albeit limited.[500]

In light of these principles, the Court first examines whether relevant and sufficient grounds were provided for the legislative choice applied in the particular case. Second, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient grounds for their decisions. In the latter connection, it will be relevant to assess whether an accused was afforded scope in practice to participate effectively in his or her trial.

In „Correia de Matos v. Portugal" the Court took into account as a whole the procedural context in which the requirement of mandatory representation was applied, including whether the accused remained able to intervene in person in the proceedings. It further took into account the margin of appreciation enjoyed by the State and considered the reasons for the impugned choice of the legislature to be both relevant and sufficient. Since, in addition, there was no basis on which to find that the criminal proceedings against the applicant had been unfair, the Court concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Furthermore, where the accused chooses to defend himself, he deliberately waives his right to be assisted by a lawyer and is considered to be under a duty to show diligence in the manner in which he conducts his defence.[501] In particular, it would overstrain the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally aroused false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal

[495] „Ibrahim and Others v. the United Kingdom" (2016); „Brennan v. the United Kingdom" (2001); „Berliński v. Poland" (2002)
[496] „Meftah and Others v. France" (2002)
[497] „Monnell and Morris v. the United Kingdom" (1985)
[498] „Zana v. Turkey" (1997)
[499] „Galstyan v. Armenia" (2007)
[500] „Correia de Matos v. Portugal" (2018)
[501] „Melin v. France" (1993)

proceedings.[502] The mere possibility of an accused being subsequently prosecuted on account of allegations made in his defence cannot be deemed to infringe his rights under Article 6 § 3 (c). The position might be different if, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising his defence rights.

*c) Legal assistance, access to a lawyer:*

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is

one of the fundamental features of a fair trial.[503] As a rule, a suspect should be granted access to legal assistance from the moment there is a "criminal charge" against him or her within the autonomous meaning of the Convention.[504] In this connection, the Court has stressed that a person acquires the status of a suspect calling for the application of the Article 6 safeguards not when that status is formally assigned to him or her, but when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence.[505]

Thus, for instance, the right of access to a lawyer arises when a person is taken into custody and questioned by the police[506] as well as in instances where a person was not deprived of liberty but is summoned for a questioning by the police concerning the suspicion of his or her involvement in a criminal offence.[507] This right may also be relevant during procedural actions, such as identification procedures or reconstruction of the events and on-site inspections[508] as well as search and seizure operations.[509] Moreover, the right of an accused to participate effectively in a criminal trial includes, in general, not only the right to be present, but also the right to receive legal assistance, if necessary.[510] By the same token, the mere presence of the applicant's lawyer cannot compensate for the absence of the accused.[511]

In „Beuze v. Belgium" (2018), drawing on its previous case-law, the Court explained that the aims pursued by the right of access to a lawyer include the following: prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights. In this connection, immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights.

In „Beuze v. Belgium" (2018) the Court also elaborated on the content of the right of access to a lawyer. It distinguished two minimum requirements as being: (1) the right of contact and consultation with a lawyer prior to the interview, which also includes the right to give confidential instructions to the lawyer, and (2) physical presence of the lawyer at the initial

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[502] „Brandstetter v. Austria" (1991)
[503] „Salduz v. Turkey" (2008); „Simeonovi v. Bulgaria" (2017); „Beuze v. Belgium" (2018)
[504] „Simeonovi v. Bulgaria" (2017)
[505] „Truten v. Ukraine" (2016); „Knox v. Italy" (2019); ‚contrast „Bandaletov v. Ukraine" (2013), concerning voluntary statements made by an applicant as a witness; and „Sršen v. Croatia" (2019), concerning the obtaining of routine information, including the taking of blood samples, from the participants of a road accident.
[506] „Simeonovi v. Bulgaria" (2017)
[507] „Dubois v. France" (2022)
[508] „İbrahim Öztürk v. Turkey" (2009); „Türk v. Turkey" (2017); „Mehmet Duman v. Turkey" (2018)
[509] „Ayetullah Ay v. Turkey" (2020)
[510] „Lagerblom v. Sweden" (2003); „Galstyan v. Armenia" (2007)
[511] „Zana v. Turkey" (1997)

police interview and any further questioning during the pre-trial proceedings. Such presence must ensure legal assistance that is effective and practical.

In connection with the latter minimum requirement, it should be noted that in „Soytemizv. Turkey" (2018), the Court stressed that the right to be assisted by a lawyer requires not only that the lawyer is permitted to be present, but also that he is allowed to actively assist the suspect during, inter alia, the questioning by the police and to intervene to ensure respect for the suspect's rights. The right to be assisted by a lawyer applies throughout and until the end of the questioning by the police, including when the statements taken are read out and the suspect is asked to confirm and sign them, as assistance of a lawyer is equally important at this moment of the questioning. Thus, the police are, in principle, under an obligation to refrain from or to adjourn questioning in the event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect. The same considerations also hold true in case the lawyer has to – or is requested to – leave before the end of the questioning of the police and before the reading out and the signing of the statements taken.

In „Doyle v. Ireland" (2019), the applicant was allowed to be represented by a lawyer but his lawyer was not permitted in the police interview as a result of the relevant police practice applied at the time. The Court found no violation of Article 6 §§ 1 and 3 (c) of the Convention. It considered that, notwithstanding the impugned restriction on the applicant's right of access to a lawyer during the police questioning, the overall fairness of the proceedings had not been irretrievably prejudiced.

In particular, it laid emphasis on the following facts: the applicant had been able to consult his lawyer; he was not particularly vulnerable; he had been able to challenge the admissibility of evidence and to oppose its use; the circumstances of the case had been extensively considered by the domestic courts; the applicant's conviction had been supported by significant independent evidence; the trial judge had given proper instructions to the jury; sound public-interest considerations had justified prosecuting the applicant; and there had been important procedural safeguards, namely all police interviews had been recorded on video and made available to the judges and the jury and, while not physically present, the applicant's lawyer had the possibility, which he used, to interrupt the interview to further consult with his client.

Further in „Beuze v. Belgium" (2018), the Court indicated, by way of example, that depending on the specific circumstances of each case and the legal system concerned, the following restrictions may also undermine the fairness of the proceedings: (1) a refusal or difficulties encountered by a lawyer in seeking access to the case file at the earliest stages of the criminal proceedings or during pre-trial investigation, and (2) the non-participation of the lawyer in investigative actions, such as identity parades or reconstructions.

In addition, the Court has indicated that account must be taken, on a case-by-case basis, in assessing the overall fairness of proceedings, of the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention.

The right to legal representation is not dependent upon the accused's presence.[512] The fact that the defendant, despite having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right to be defended by counsel.[513] Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants

[512] „Van Geyseghem v. Belgium" (1999); „Campbell and Fell v. the United Kingdom" (1984); „Poitrimol v. France" (1993)

[513] „Van Geyseghem v. Belgium" (1999); „Pelladoah v. the Netherlands" (1994); „Krombach v. France" (2001); „Galstyan v. Armenia" (2007)

must attend court hearings can be satisfied by means other than deprivation of the right to be defended.[514] Thus, an issue arises under Article 6 § 3 (c) if an applicant's defence counsel is unable to conduct the defence in the applicant's absence in a hearing before the relevant court, including an appellate court.[515]

For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so.[516]

*Restrictions on early access to a lawyer:* Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.[517]

However, it is possible for access to legal advice to be, exceptionally, delayed. Whether such restriction on access to a lawyer is compatible with the right to a fair trial is assessed in two stages.

In the first stage, the Court evaluates whether there were compelling reasons for the restriction. Then, it weighs the prejudice caused to the rights of the defence by the restriction in the case. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

The Court has explained that the criterion of compelling reasons is a stringent one. Having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. When assessing whether compelling reasons have been demonstrated, it is relevant whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.[518]

Such compelling reasons will exist, for instance, when it has been convincingly demonstrated that there was an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular. On the other hand, a general risk of leaks cannot constitute compelling reasons justifying a restriction on access to a lawyer nor can compelling reasons exist when the restriction on access to a lawyer was the result of an administrative practice of the authorities.[519] The Government have to demonstrate the existence of compelling reasons. It is not for the Court to search, on its own motion, whether the compelling reasons existed in a particular case.[520]

In „Beuze v. Belgium" (2018), the Court explained that a general and mandatory (in that case statutory) restriction on access to a lawyer during the first questioning cannot amount to a compelling reason: such a restriction does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling

[514] „Tolmachev v. Estonia" (2015)
[515] „Lala v. the Netherlands" (1994)
[516] „Van Geyseghem v. Belgium" (1999)
[517] „Salduz v. Turkey" (2008); „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
[518] „Ibrahim and Others v. the United Kingdom" (2016)
[519] „Simeonovi v. Bulgaria" (2017)
[520] „Rodionov v. Russia" (2018)

reasons. In any event, the onus is on the Government to demonstrate the existence of compelling reasons to restrict access to a lawyer.

However, the absence of compelling reasons does not lead in itself to a finding of a violation of Article 6 of the Convention. In assessing whether there has been a breach of the right to a fair trial, it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves.[521]

In particular, where compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were „fair" for the purposes of Article 6 § 1. Where, on the other hand, there are no compelling reasons for restricting access to legal advice, the Court applies a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). In such a case, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.[522]

In this connection, the Court will have particular regard to the existence of an assessment of the restriction on the applicant's access to a lawyer by the domestic courts, or to a lack thereof, and will draw the necessary inferences from it.[523]

In this context, the Court also takes into account the privilege against self-incrimination and the duty of the authorities to inform an applicant of these rights.[524] Where access to a lawyer was delayed, and where the suspect was not notified of the right to legal assistance, the privilege against self-incrimination or the right to remain silent, it will be even more difficult for the Government to show that the proceedings as a whole were fair.[525] It should also be noted that an issue from the perspective of the privilege against self-incrimination arises not only in case of actual confessions or directly incriminating remarks but also with regard to statements which can be considered as „substantially affecting" the accused's position. This is particularly true in the field of complex crime, such as complex financial offences, where the actual incriminating nature of the statements cannot be established so clearly.[526]

In „Beuze v. Belgium" (2018) the Court confirmed that the two-stage, test as elaborated in Ibrahim and Others, applied also to general and mandatory (in that case statutory) restrictions. In such circumstances, however, the Court applies very strict scrutiny to its fairness assessment and the absence of compelling reasons weighs heavily in the balance which may thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c) of the Convention.

When examining the proceedings as a whole, the following non-exhaustive list of factors should, where appropriate, be taken into account:[527]

- Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity;
- The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

[521] „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
[522] „Dimitar Mitev v. Bulgaria" (2018)
[523] „Bjarki H. Diego v. Iceland" (2022)
[524] „Ibrahim and Others v. the United Kingdom" (2016)
[525] „Beuze v. Belgium" (2018)
[526] „Bjarki H. Diego v. Iceland" (2022)
[527] „Sitnevskiy and Chaykovskiy v. Ukraine" (2016)

- The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- In the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;[528]
- Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;
- The weight of the public interest in the investigation and punishment of the particular offence in issue;
- Other relevant procedural safeguards afforded by domestic law and practice.

When conducting its fairness assessment, the Court has regard to the assessment made by the domestic courts, the absence of which is prima facie incompatible with the requirements of a fair trial. However, in the absence of any such assessment, the Court must make its own determination of the overall fairness of the proceedings. Furthermore, in carrying out that task, the Court should not act as a court of fourth instance by calling into question the outcome of the trial or engaging in an assessment of the facts and evidence or the sufficiency of the latter justifying a conviction. These matters, in line with the principle of subsidiarity, are the domain of domestic courts.[529]

*Waiver of the right of access to a lawyer:* Any purported waiver of a right of access to a lawyer must satisfy the „knowing and intelligent waiver" standard in the Court's case-law.[530] In applying this standard, it is implicit that suspects must be aware of their rights, including the right of access to a lawyer.[531]

Additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, there is a diminished chance of being informed of one's rights and, as a consequence, a less chance of having those rights respected.[532]

A suspect cannot be found to have waived one's right to legal assistance if one has not promptly received information about this right after arrest.[533] Similarly, in the context of procedural action taken without relevant procedural safeguards, waiver of the right to a lawyer by signing a pre-printed phrase "No lawyer sought" is of questionable value for the purpose of demonstrating the unequivocal character of the waiver by an applicant.[534]

A possible earlier waiver, even if validly made, will no longer be considered valid if an applicant subsequently made an explicit request to access a lawyer.[535] Moreover, if an applicant

[528] See further: „Brus v. Belgium" (2021), where the Court did not accept that the reliance on the global sufficiency of evidence for the conviction could substitute for the overall fairness assessment relating to an unjustified restriction on the right of early access to a lawyer.
[529] „Kohen and Others v. Turkey" (2022)
[530] „Pishchalnikov v. Russia" (2009)
[531] „Rodionov v. Russia" (2018)
[532] „Pishchalnikov v. Russia" (2009)
[533] „Simeonovi v. Bulgaria" (2017)
[534] „Bozkaya v. Turkey" (2017); „Rodionov v. Russia" (2018); contrast with „Sklyar v. Russia" (2017), where the applicant clearly waived his right to a lawyer on the record.
[535] „Artur Parkhomenko v. Ukraine" (2017)

has been subjected to inhuman and degrading treatment by the police, it cannot be considered that in such circumstances he or she validly waived his right of access to a lawyer.[536]

More generally, the Court explained that it was mindful of the probative value of documents signed while in police custody. However, it stressed that as with many other guarantees under Article 6 of the Convention, those signatures are not an end in themselves and they must be examined in the light of all the circumstances of the case. In addition, the use of a printed waiver formula may represent a challenge in ascertaining whether the text actually expresses an accused's free and informed decision to waive his or her right to be assisted by a lawyer.[537]

In any event, it is in the first place the trial court's duty to establish in a convincing manner whether or not an applicant's confessions and waivers of legal assistance were voluntary. Any flaw in respect of the confessions and waivers should be rectified in order for the proceedings as a whole to be considered fair. A failure to examine the circumstances surrounding an applicant's waiver would be tantamount to depriving the applicant of the possibility of remedying a situation, contrary to the requirements of the Convention.[538]

However, when a waiver of the right of access to a lawyer satisfies the „knowing and intelligent waiver" standard in the Court's case-law, there will be no grounds for doubting the overall fairness of the criminal proceedings against the applicant.[539]

*Right to a lawyer of one's own choosing:*

A person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing from the initial stages of the proceedings. This follows from the very wording of Article 6 § 3 (c), which guarantees that „[e]veryone charged with a criminal offence has the following minimum rights: {...} to defend himself {...} through legal assistance of his own choosing {...}", and is generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused.[540] Moreover, this right also accordingly applies at the trial stage of the proceedings.[541]

However, the right of everyone charged with a criminal offence to be defended by counsel of his own choosing is not absolute.[542] Although, as a general rule, the accused's choice of lawyer should be respected,[543] the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[544] For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations.[545] On the other hand, the fact that the proceedings are held in absentia does not in itself justify the appointment of a legal aid lawyer as opposed to ensuring the right of defence by a lawyer of one's own choosing.[546]

In this context, the Court has held that in contrast to cases involving denial of access to a lawyer, where the test of "compelling reasons" applies, the more lenient requirement of „relevant and sufficient" reasons needs to be applied in situations raising the less serious issue of „denial of choice". In such cases the Court's task will be to assess whether, in light of the

[536] „Turbylev v. Russia" (2015)
[537] „Akdağ v. Turkey" (2019)
[538] „Türk v. Turkey" (2017)
[539] „Šarkienė v. Lithuania" (2017)
[540] „Dvorski v. Croatia" (2015)
[541] „Elif Nazan Şeker v. Turkey" (2022)
[542] „Meftah and Others v. France" (2002)
[543] „Lagerblom v. Sweden" (2003)
[544] „Croissant v. Germany" (1992)
[545] „Meftah and Others v. France" (2002)
[546] „Lobzhanidze and Peradze v. Georgia" (2020)

proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness.[547]

In particular, in the first step the Court assesses whether it has been demonstrated that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court proceeds to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements; the circumstances surrounding the designation of counsel and the existence of opportunities to challenge this; the effectiveness of counsel's assistance; whether the accused's privilege against self-incrimination was respected; the accused's age; the trial court's use of any statements given by the accused at the material time; the opportunity given to the accused to challenge the authenticity of evidence and to oppose its use; whether such statements constituted a significant element on which the conviction was based; and the strength of other evidence in the case.[548]

*d) Legal aid:*

The third and final right encompassed in Article 6 § 3 (c), the right to legal aid, is subject to two conditions, which are to be considered cumulatively.[549]

First, the accused must show that he lacks sufficient means to pay for legal assistance.[550] He need not, however, do so „beyond all doubt"; it is sufficient that there are „some indications" that this is so or, in other words, that a „lack of clear indications to the contrary" can be established.[551] In any event, the Court cannot substitute itself for the domestic courts in order to evaluate the applicant's financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6 § 1.[552]

Second, the Contracting States are under an obligation to provide legal aid only „where the interests of justice so require".[553] This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case.[554]

In determining whether the interests of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation.[555]

As a further condition of the "required by the interests of justice" test the Court considers the complexity of the case[556] as well as the personal situation of the accused.[557] The latter requirement is looked at especially with regard to the capacity of the particular accused to

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[547] „Atristain Gorosabel v. Spain" (2022)

[548] „Dvorski v. Croatia" (2015); see, however, „Stevan Petrović v. Serbia" (2021), where the applicant failed to substantiate his complaint about the manner in which the restriction on access to a lawyer of his own choosing effected the overall fairness of the proceedings.

[549] „Quaranta v. Switzerland" (1991)

[550] „Caresana v. the United Kingdom" (2000)

[551] „Tsonyo Tsonev v. Bulgaria" (2010)

[552] „R.D. v. Poland" (2001)

[553] „Quaranta v. Switzerland" (1991)

[554] „Granger v. the United Kingdom" (1990)

[555] „Benham v. the United Kingdom" (1996); „Quaranta v. Switzerland" (1991); „Zdravko Stanev v. Bulgaria" (2012)

[556] „Quaranta v. Switzerland" (1991); „Pham Hoang v. France" (1992); „Twalib v. Greece" (1998)

[557] „Zdravko Stanev v. Bulgaria" (2012)

present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance.[558]

When applying the „interests of justice" requirement the test is not whether the absence of legal aid has caused „actual damage" to the presentation of the defence but a less stringent one: whether it appears „plausible in the particular circumstances" that the lawyer would be of assistance.[559]

The right to legal aid is also relevant for the appeal proceedings.[560] In this context, in determining whether legal aid is needed, the Court takes into account three factors in particular: (a) the breadth of the appellate courts' power; (b) the seriousness of the charges against applicants; and (c) the severity of the sentence they face.[561]

Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel "of one's own choosing" is necessarily subject to certain limitations where free legal aid is concerned. For example, when appointing defence counsel the courts must have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[562] Similarly, Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced. Furthermore, the interests of justice cannot be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6.[563]

*e) Practical and effective legal assistance. Confidential communication with a lawyer:*

The right to effective legal assistance includes, inter alia, the accused's right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel.[564] If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness.[565] Any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled.[566]

Examples of such limitations include

- the tapping of telephone conversations between an accused and his lawyer;[567]
- obsessive limitation on the number and length of lawyers' visits to the accused;[568]
- lack of privacy in videoconference;[569]
- supervision of interviews by the prosecuting authorities;[570]
- supervision of communication between the accused and the lawyer in the courtroom,[571] and impossibility to communicate freely with a lawyer due to threat of sanction.[572]

Limitations may be imposed on an accused's right to communicate with his or her lawyer out

[558] „Twalib v. Greece" (1998)
[559] „Artico v. Italy" (1980)
[560] „Shekhov v. Russia" (2014)
[561] „Mikhaylova v. Russia" (2015)
[562] „Lagerblom v. Sweden" (2003)
[563] „Monnell and Morris v. the United Kingdom" (1985)
[564] „Sakhnovskiy v. Russia" (2010)
[565] „Brennan v. the United Kingdom" (2001)
[566] „Sakhnovskiy v. Russia" (2010)
[567] „Zagaria v. Italy" (2007)
[568] „Öcalan v. Turkey" (2005)
[569] „Sakhnovskiy v. Russia" (2010)
[570] „Rybacki v. Poland" (2009); surveillance by the investigating judge of detainee's contacts with his defence counse in „Lanz v. Austria" (2002)
[571] „Khodorkovskiy and Lebedev v. Russia" (2013)
[572] „M v. the Netherlands" (2017)

of the hearing of a third person if a good cause exists, but such limitation should not deprive the accused of a fair hearing.[573] A „good cause" in this context is one of „compelling reasons" justifying that limitation.[574] „Compelling reasons" may exist when it has been convincingly demonstrated that the measures limiting the right of confidential communication with a lawyer were aimed at preventing a risk of collusion arising out of the lawyer's contacts with the applicant, or in case of issues related to the lawyer's professional ethics or unlawful conduct,[575] including suspicion of the abuse of confidentiality and risk to safety.[576] As to the effect of such limitations on the overall fairness of the proceedings, the length of time in which they were applied will be a relevant consideration[577] and, where appropriate, the extent to which the statements obtained from an accused, who had not benefited from a confidential communication with a lawyer, were put to use in the proceedings.[578]

*Effectiveness of legal assistance:*
Article 6 § 3 (c) enshrines the right to „practical and effective" legal assistance. Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting, or shirk his duties.[579]

However, a Contracting State cannot be held responsible for every shortcoming on the part of
a lawyer appointed for legal-aid purposes or chosen by the accused.[580] Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention.[581] State liability may arise where a lawyer simply fails to act for the accused or where he fails to comply with a crucial procedural requirement that cannot simply be equated with an injudicious line of defence or a mere defect of argumentation.[582]

The same considerations related to the effectiveness of legal assistance may exceptionally apply in the context of a privately hired lawyer. In Güveç v. Turkey (2009) the Court took into account the applicant's young age (15 years old), the seriousness of the offences with which he was charged (carrying out activities for the purpose of bringing about the secession of national territory, which at the time was punishable by death), the seemingly contradictory allegations levelled against him by the police and a prosecution witness, the manifest failure of his lawyer to represent him properly (failure to attend multiple hearings) and the applicant's many absences from the hearings. In these circumstances, the Court found that the trial court should have urgently reacted to ensure the applicant's effective legal representation.

### 3.1.5. Language of criminal proceedings and the right to language use. Right to interpretation (CPC, ECrHR)

Based on CPC, criminal proceedings shall be conducted in the Hungarian language. Members

[573] „Öcalan v. Turkey" (2005)
[574] „Moroz v. Ukraine" (2017)
[575] „S. v. Switzerland" (1991)
[576] „Khodorkovskiy and Lebedev v. Russia" (2013)
[577] „Rybacki v. Poland" (2009)
[578] „Moroz v. Ukraine" (2017)
[579] „Vamvakas v. Greece" (2015)
[580] „Lagerblom v. Sweden" (2003)
[581] „Imbrioscia v. Switzerland" (1993)
[582] „Czekalla v. Portugal" (2002)

of a national minority living in Hungary and recognised by an Act may use their national minority mother tongue in criminal proceedings. A person shall not suffer any disadvantage because he does not understand the Hungarian language. Everybody shall be entitled to use his mother tongue in a criminal proceeding. A hearing-impaired or deaf-blind person shall be entitled to use sign language in a criminal proceeding.[583]

The requirements of paragraph 3 (e) of Article 6 of the Convention are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1. The Court thus examines complaints regarding effective interpretation under both provisions taken together.[584]

It is important that the suspect be aware of the right to interpretation, which means that one must be notified of such a right when „charged with a criminal offence".[585] This notification should be done in a language the applicant understands.[586]

Like the assistance of a lawyer, that of an interpreter should be provided from the investigation
stage, unless it is demonstrated that there are compelling reasons to restrict this right. In the absence of interpretation, whether an accused was able to make informed choices during the proceedings can be cast into doubt. Therefore, initial defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole.[587]

*a) If the accused "cannot understand or speak the language used in court":*
The right to free assistance of an interpreter applies exclusively in situations where the accused cannot understand or speak the language used in court.[588] An accused who understands that language cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member.[589]

The fact that a defendant has basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence.[590]

Where the accused is represented by a lawyer, it will generally not be sufficient that the accused's lawyer, but not the accused, knows the language used in court. Interpretation of the proceedings is required as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.[591]

Article 6 § 3 (e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge.[592] However, impossibility of an applicant to communicate with his or her lawyer due to linguistic limitations may give rise to an issue under Article 6 §§ 3 (c) and (e) of the Convention.[593]

The right to an interpreter may be waived, but this must be a decision of the accused, not of his lawyer.[594]

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[583] CPC 8. § (1) – (4)
[584] „Baytar v. Turkey" (2014)
[585] „Wang v. France" (2022)
[586] „Vizgirda v. Slovenia" (2018)
[587] „Baytar v. Turkey" (2014)
[588] „K. v. France" (1983)
[589] „Bideault v. France" (1987)
[590] „Vizgirda v. Slovenia" (2018)
[591] „Kamasinski v. Austria" (1989); „Cuscani v. the United Kingdom" (2002)
[592] „X. v. Austria" (1975)
[593] „Lagerblom v. Sweden" (2003)
[594] „Kamasinski v. Austria" (1989)

*b) Protected elements of the criminal proceedings:*

Article 6 § 3 (e) guarantees the right to the free assistance of an interpreter for translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial.[595]

Article 6 § 3 (e) applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.[596]

However, it does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings.[597] For example,the absence of a written translation of a judgment does not in itself entail a violation of Article 6 § 3 (e). The text of Article 6 § 3 (e) refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention.[598]

In sum, the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his or her version of the events.[599]

*c) „Free" assistance:*

The obligation to provide „free" assistance is not dependent upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a State in organising its system of criminal justice. However, an accused may be charged for an interpreter provided for him at a hearing that he fails to attend.[600]

The costs of interpretation cannot be subsequently claimed back from the accused.[601] To read Article 6 § 3 (e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article.[602]

*d) Conditions of interpretation:*

The obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation. Thus, a failure of the domestic courts to examine the allegations of inadequate services of an interpreter may lead to a violation of Article 6 § 3 (e) of the Convention.[603]

Nevertheless, it is not appropriate to lay down any detailed conditions under Article 6 § 3 (e) concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.[604]

*e) Obligation to identify interpretation needs:*

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[595] „Luedicke, Belkacem and Koç v. Germany" (1978); „Ucak v. the United Kingdom" (2002); „Hermi v. Italy" (2006); „Lagerblom v. Sweden" (2003)

[596] „Kamasinski v. Austria" (1989); „Hermi v. Italy" (2006); „Baytar v. Turkey" (2014)

[597] „Kamasinski v. Austria" (1989)

[598] „Hermi v. Italy" (2006); „Husain v. Italy" 2005)

[599] „Hermi v. Italy" (2006); „Kamasinski v. Austria" (1989); „Güngör v. Germany" (2002); „Protopapa v. Turkey" (2009); „Vizgirda v. Slovenia" (2018)

[600] „Fedele v. Germany" (1987)

[601] „Luedicke, Belkacem and Koç v. Germany" (1978)

[602] „Işyar v. Bulgaria" (2008); „Öztürk v. Germany" (1984)

[603] „Knox v. Italy" (2019)

[604] „Ucak v. the United Kingdom" (2002)

The verification of the applicant's need for interpretation facilities is a matter for the judge to determine in consultation with the applicant, especially if he has been alerted to counsel's difficulties in communicating with the applicant. The judge has to reassure himself that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance for him.[605]

While it is true that the conduct of the defence is essentially a matter between the defendant and his counsel,[606] the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts.[607]

The defendant's linguistic knowledge is vital and the court must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.[608]

Specifically, it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether fairness of the trial requires, or required, the appointment of an interpreter to assist the defendant. This duty is not confined to situations where the foreign defendant makes an explicit request for interpretation. The Court has held that in view of the prominent place the right to a fair trial holds in a democratic society, the obligation arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted. It also arises when a third language is envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation is made.[609]

It is not for the Court to set out in any detail the precise measures that should be taken by domestic authorities with a view to verifying the linguistic knowledge of a defendant who is not sufficiently proficient in the language of the proceedings. Depending on different factors, such as the nature of the offence and the communications addressed to the defendant by the domestic authorities, a number of open-ended questions might be sufficient to establish the defendant's language needs. However, the Court attaches importance to noting in the record any procedure used and decision taken with regard to the verification of interpretation needs, notification of the right to an interpreter and the assistance provided by the interpreter, such as oral translation or oral summary of documents, so as to avoid any doubts in this regard raised later in the proceedings.

In view of the need for the right guaranteed by Article 6 § 3(e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.[610]

### 3.2. Statutory rules for defense counsel in the Hungary (CPC)

[605] „Cuscani v. the United Kingdom" (2002)
[606] „Kamasinski v. Austria" (1989)
[607] „Cuscani v. the United Kingdom" (2002); „Hermi v. Italy" (2006); „Katritsch v. France" (2010)
[608] „Hermi v. Italy" (2006); „Katritsch v. France" 2010); „Şaman v. Turkey" (2011); „Güngör v. Germany" (2002)
[609] „Vizgirda v. Slovenia" (2018)
[610] „Kamasinski v. Austria" (1989); „Hermi v. Italy" (2006); „Protopapa v. Turkey" (2009)

The defence lawyer is an independent participant in the criminal proceedings. Issues relating to the legal status of the defence lawyer could have been analysed in the previous chapter, but the relevant legislation is so varied and diverse that it is necessary to deal with this topic in this separate section.

Defense counsel may accurately be considered law enforcers. They are therefore part of the justice system and can often have a decisive influence on the final outcome of a case. Compared to police officers, prosecutors and judges, their activities cover all stages of the procedure. They therefore have an increased responsibility to ensure that the authorities and the courts respect fundamental procedural rules and do not violate the fundamental rights of the accused. As Klein writes: "While representing a lone individual against all the power of the state, counsel must "police the police" to determine if there has been an unconstitutional search, a coerced confession, an unlawfully suggestive lineup, or the fabrication of testimony {…} Perhaps most challenging of all is the need to remind the judge of the constitutional mandate as well as the professional obligation to protect the rights of the defendant rather than treat him as a docket number to be quickly processed and sent to jail." [611]

It is important to point out that the defence lawyer is free to determine the tactics of the defence, and no one (not even the client) can influence him. However, the defence lawyer is also subject to the rules of the Procedural Act, from which he cannot "step outside". He cannot commit a criminal offence (e.g. accessory after the fact, false accusation), but he/she is obliged to do everything in his/her power for his/her client. Mainly also because the accused person does not understand the law and needs effective help. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."[612]

The discrepancy between the resources available to the prosecutor and those for counsel for the indigent is public knowledge (e.g. the prosecutor has not only the tools of an office that is better funded, but typically has police department investigators and laboratory technicians available as well). In these circumstances, the defence is apparently at a disadvantage, but the constitutions of modern European states have nowadays developed principles to counterbalance these situations. It is also the duty of the lawyer to protect his client from unlawful coercive measures, whether it concerns his personal freedom or his property.

Hungarian publications on defence lawyers typically deal with legal, ethical and tactical issues. In the last decade, Hungarian authors have mainly focused on the historical background of the development of the profession of defence lawyer, the obligations of the lawyer and the constitutional context of this profession. It should be noted that in criminal proceedings, not only the lawyer but also the prosecutor has a legal obligation to take into account mitigating circumstances affecting the accused.

An attorney-at-law may act as defence counsel based on an authorisation or official appointment. Provisions laid down in this Act concerning an attorney-as-law acting as defence counsel shall apply also to a junior attorney-at-law, a European Community lawyer, a salaried

[611] KLEIN, ibid. 1-2.
[612] KLEIN, ibid. 1-2.

attorney-at-law and a salaried European Community lawyer, provided that the conditions set out in the Act on the professional activities of attorneys-at-law are met.

A junior attorney-at-law may act as defence counsel when acting with or as a substitute for an attorney-at-law a) before the indictment, b) after the indictment before a district court or a regional court, with the proviso that he may not deliver a closing argument before the regional court.

More than one defence counsel may act for a defendant and a person reasonably suspected of having committed a criminal offence, and a defence counsel may act for more than one defendant and person reasonably suspected of having committed a criminal offence.[613]

### 3.2.1. Rights and obligations

Unless otherwise provided in this Act, the defence counsel may exercise all rights of the defendant that are not by nature related to the person of the defendant exclusively. A defence counsel may exercise these rights independently as rights of thedefence counsel.

A defence counsel shall be entitled to (1)) attend procedural acts the defendant may, or is obliged to, attend, (2) attend, in cases specified in this Act, procedural acts the defendant may not attend or where the attendance of the defendant may be restricted, (3) obtain and collect data for the defence within the framework of statutory possibilities and conditions, and, for this purpose, engage a private investigator under the Act on the rules of personal and property protection and private investigation activities.

A decision communicated to the defendant shall, in all cases, also be communicated to his defence counsel.

A defence counsel shall be obliged to

- contact the defendant without delay,
- use all lawful means and methods of defence in due time and in the interest of the defendant,
- inform the defendant about the lawful means of defence, and advise him of his rights and obligations,
- promote the detection of facts that exculpate or mitigate the liability of the defendant,
- arrange for a substitute if he is prevented from attending to his duties, except for insurmountable and previously unknown obstacles, and notify, at the same time, the proceeding court, prosecution office, or investigating authority about the fact of being prevented,
- exercise his rights and perform his obligations in a manner that does not hinder the timely completion of the criminal proceeding.

If the defendant is in detention, the proceeding court, prosecution office, or investigating authority shall inform the detaining institution about the name and contact details of the defence counsel, as well as any changes thereto, without delay but no later than upon the admission of the defendant or within forty-eight hours of becoming aware of a change.

If more than one defence counsel acts for a defendant, the first defence counsel to file the authorisation shall be considered the leading defence counsel; if more than one authorisation is filed simultaneously, the proceeding investigating authority, prosecution office, or court shall designate the leading defence counsel. Case documents, including summons and notifications, shall be served on the leading defence counsel. The leading defence counsel or the defence counsel designated by the leading defence counsel shall have the right to deliver the closing argument. The leading defence counsel or the defence counsel designated by the leading

[613] CPC 41. §

defence counsel, or in the absence thereof, the defence counsel attending the given procedural act shall have the right to make the legal remedy statement.

Provisions on the rights and obligations of the defence counsel shall also apply accordingly to the defence counsel of the person reasonably suspected of having committed a criminal offence in line with the rights of the person reasonably suspected of having committed a criminal offence.[614]

### 3.2.2. Disqualification of the defence counsel

A person may not serve as defence counsel if

- he is the defendant, an aide to the defendant or a relative of such a person,
- he proceeds or proceeded in the case as a judge, a prosecutor, or a member of the investigating authority, or he is a relative of such a person,
- he acted in a manner that is contrary to the interests of the defendant or the person reasonably suspected of having committed a criminal offence, or his interests are contrary to the interests of the defendant or the person reasonably suspected of having committed a criminal offence,
- he participates or participated in the case as an expert or consultant,
- he participates or participated in the case as an aide to a person, other than the defendant, who participates or participated in the case as a witness,
- he acts or acted in the case as a mediator,
- he participates or participated in the case, or another case related to it, as a defendant.

The same defence counsel may act for more than one defendant or person reasonably suspected of having committed a criminal offence if there is no conflict between the interests of the defendants or persons reasonably suspected of having committed a criminal offence. A defence counsel acting for more than one defendant or person reasonably suspected of having committed a criminal offence shall be disqualified from the proceeding if there is a conflict of interests among the defendants or persons reasonably suspected of having committed a criminal offence.

The matter of disqualification of a defence counsel shall be decided, before the indictment only upon a motion by the prosecution service, by the court.

If the defence counsel submits a notice of a ground for disqualification against himself, he may not act in the case after submitting the notice of the ground for disqualification.[615]

### 3.2.3. Mandatory participation of the defence counsel in the proceeding

The participation of a defence counsel in a criminal proceeding shall be mandatory if

- the criminal offence is punishable by imprisonment for up to five years or more under an Act,
- the defendant or the person reasonably suspected of having committed a criminal offence is subject to a coercive measure affecting personal freedom or, in another proceeding, to pre-trial detention or preliminary compulsory psychiatric treatment, or is serving a sentence of imprisonment, confinement, or special education in a juvenile correctional institution,
- the defendant or the person reasonably suspected of having committed a criminal offence is hearing-impaired, deaf-blind, blind, speech-impaired, unable to communicate or

[614] CPC 42. §
[615] CPC 43. §

seriously impaired in his communication for any other reason, or has a mental disorder, regardless of his capacity to be held liable for his acts,
- the defendant or the person reasonably suspected of having committed a criminal offence does not know the Hungarian language,
- the defendant or the person reasonably suspected of having committed a criminal offence is unable to defend himself personally for any other reason,
- a defence counsel was appointed by the court, the prosecution service, or the investigating authority upon a motion by the defendant or the person reasonably suspected of having committed a criminal offence or because the appointment was considered necessary for any other reason,
- it is expressly provided for under this Act.[616]

### 3.2.4. Authorised defence counsel

Authorisation to provide defence may be granted by the person reasonably suspected of having committed a criminal offence, the defendant, their statutory representative or adult relative, or, for foreign nationals, the consular officer of their home country.

An authorised attorney-at-law may act as defence counsel after an original or certified copy of his authorisation is filed with the proceeding court, prosecution office, or investigating authority. A European Community lawyer shall be obliged to file with the proceeding court, prosecution office or investigating authority the original cooperation contract concluded with an attorney-at-law or a law office pursuant to the Act on the professional activities of attorneys-at-law or a certified copy thereof and, if it is in a language other than Hungarian, a certified translation thereof.

The statement on the authorisation of the defence counsel may not be registered validly in the client settings register (hereinafter "client settings register") as defined in Act CCXXII of 2015 on the general rules on electronic administration and trust services (hereinafter "Electronic Administration Act"), unless the authorisation is accepted and the statement of acceptance is registered in the client settings register. An authorisation recorded in the client settings register shall be effective from the time when a notice of it is submitted to the proceeding court, prosecution office, or investigating authority.

Unless provided otherwise in a given authorisation, the authorisation shall be effective until the criminal proceeding is concluded with final and binding effect, and it shall also apply to any mediation procedure, procedure for retrial, review, simplified review, removal of assets or things relating to the criminal offence, or rendering data inaccessible, as well as any special procedure.[617]

### 3.2.5. Officially appointed defence counsel

The court, the prosecution service, or the investigating authority shall decide on officially appointing a defence counsel if the participation of a defence counsel in the criminal proceeding is mandatory and the defendant or the person reasonably suspected of having committed a criminal offence does not have an authorised defence counsel. On the basis of the official appointment, the regional bar association of the seat of the proceeding court, prosecution office, or investigating authority shall be responsible for designating the attorney-at-law acting as the defence counsel.

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[616] CPC 44. §
[617] CPC 45. §

The regional bar association shall designate the defence counsel by operating an information system guaranteeing, as possible, the immediacy of designation and the actual availability of the designated defence counsels.

If the participation of a defence counsel in a criminal proceeding is mandatory and the defendant or the person reasonably suspected of having committed a criminal offence does not have a defence counsel, the court, prosecution service, or investigating authority shall appoint a defence counsel (1) at the time of the summons, compulsory attendance or notification where the defendant is summoned, subjected to compulsory attendance or notified, or where a person reasonably suspected of having committed a criminal offence is summoned or subjected to compulsory attendance, to be interrogated as a suspect, (2) without delay in the course of the procedural act in a situation other than those specified in point (1).

The court, the prosecution service, or the investigating authority shall appoint a defence counsel if the participation of a defence counsel in the criminal proceeding is not mandatory but is considered necessary to guarantee an effective defence for the defendant or the person reasonably suspected of having committed a criminal offence.

The prosecution service or the investigating authority shall appoint a defence counsel if the defendant is unable to arrange for defence due to his income and financial situation and moves for the official appointment of a defence counsel. Following the indictment, the court shall appoint a defence counsel upon a motion by the defendant.

No legal remedy shall lie against the official appointment or designation of a defence counsel. The defendant or the person reasonably suspected of having committed a criminal offence may submit a reasoned motion for the designation of another defence counsel. The court, the prosecution office, or the investigating authority before which the proceeding is pending shall decide on the motion.

The officially appointed defence counsel may move for his discharge from the official appointment if justified. The court, the prosecution office, or the investigating authority before which the proceeding is pending shall decide the motion.

The officially appointed defence counsel shall be entitled to a fee and the reimbursement of his costs in consideration of his assistance.[618]

Before the indictment, the investigating authority or the prosecution service shall arrange for the attendance of a defence counsel by applying the provisions on substitute defence counsels as reasonable if (1) the regional bar association fails to designate a defence counsel within one hour after the receipt of the official appointment decision, (2) at the time of designation, the designated defence counsel may not be duly summoned or notified due to the unavailability of the defence counsel, and the procedural act may not be dispensed with.[619]

The official appointment shall be effective until the criminal proceeding is concluded with final and binding effect, and it shall also apply to any mediation procedure, procedure for retrial, review, simplified review, removal of assets or things relating to the criminal offence, or rendering data inaccessible, as well as any special procedure.

An official appointment shall cease to have effect when the authorised defence counsel files the authorisation to act for the defendant or the person reasonably suspected of having committed a criminal offence in accordance with this Act, or notice is given of the registration of the authorisation in the client settings register.

If the authorisation is filed or a notice is given of the registration of the authorisation in the client settings register, the court, the prosecution service, or the investigating authority shall inform the authorised defence counsel about the name and contact details of the officially appointed defence counsel who acted earlier.

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[618] CPC 46. §
[619] CPC 47. §

The authorised defence counsel shall inform, without delay, the officially appointed defence counsel who acted earlier about the fact that he acts as authorised defence counsel in the criminal proceeding.

Upon receipt of such information, the officially appointed defence counsel who acted earlier shall disclose and hand over to the authorised defence counsel, without delay, any and all data and case documents that may be used for defence.[620]

The court, the prosecution service, or the investigating authority shall appoint a substitute defence counsel to substitute a defence counsel if

- the defence counsel fails to appear at a procedural act despite being duly summoned,
- he fails to provide a well-grounded excuse for his absence in advance or fails to arrange for a substitute,
- all other conditions of performing the procedural act are met, and
- the procedural act may not be dispensed with.

If a substitute defence counsel is appointed, the evidentiary procedure may not be concluded in the absence of the defendant's defence counsel during the court proceeding, and the substitute defence counsel may not deliver a closing argument unless the defendant consents to doing so.

The provisions concerning the official appointment of the defence counsel shall apply to the official appointment of a substitute defence counsel with the proviso that the appointing court, prosecution office or investigating authority shall designate the acting defence counsel.

An attorney-at-law acting as the defence counsel for a person or a defendant reasonably suspected of having committed another criminal offence, and who attends the procedural act, may also be designated as the substitute defence counsel, provided that there is no conflict between the interests of the persons or defendants reasonably suspected of having committed the criminal offence.

The scope of the substitute defence counsel's official appointment shall be effective until the procedural act performed in the absence of the defence counsel is completed.

The provisions concerning the officially appointed defence counsels shall apply to the fee and cost reimbursement of the substitute defence counsels.[621]

*Legal case 1. (Hungary):* Being a defence attorney does not exempt one from the legal consequences of perjury. The exemption from criminal responsibility in case of the giving of false testimony applies only to
accused persons who are charged with a criminal offense in the course of criminal court proceedings, and it cannot be granted to defence attorneys. The crime of legal malpractice, as defined in section 247, subsection (1) of Act no. IV of 1978 on the Criminal Code (hereinafter referred to as the Criminal Code), is a criminal offense committed by an attorney by way of breaching his professional duty with the aim of causing unlawful wrong to his client.

The district court found the sixth accused guilty of the crime of perjury [section 238, subsection (2), point c) and subsection (4), subparagraph I of the Criminal Code] and the crime of legal malpractice [section 247, subsections (1) and (2) of the Criminal Code], consequently, it sentenced him to a one year imprisonment the implementation of which was suspended for a two-year long probation period, in addition, it allocated the burden of the costs of criminal proceedings and made provisions on the pieces of evidence.

Proceeding upon the parties' appeals, the high court modified the first instance judgement in respect of the sixth accused by increasing his term of imprisonment to one year and ten months and his probation period to five years and by prohibiting him from exercising the profession of attorney for a period of five years. The high court upheld the remainder of the first instance judgement.

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[620] CPC 48. §
[621] CPC 49. §

The defence attorney of the sixth accused submitted a petition for judicial review against the final court decision to the Curia on the basis of section 416, subsection (1), points a), b) and c) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure). The petitioner argued that the sixth accused could not have been found guilty of the crime of perjury, since the sanctioning of the giving of false testimony, i.e. the submission of false documents to the investigating authority by the accused, acting as a defence attorney, had violated the latter's constitutional rights and had been contrary to common sense and the general principles of law.

Section 416, subsection (1), point b) of the Code of Criminal Procedure stipulates that a petition for judicial review may be submitted if an unlawful sentence has been imposed or an unlawful criminal measure has been applied due to the unlawful qualification of the criminal offense prosecuted or to the violation of any other provisions of criminal law.

By virtue of section 238, subsection (1) and subsection (2), point c) of the Criminal Code, any person who presents a false document or manipulated physical evidence in criminal or civil proceedings is guilty of perjury. Subsection (3) provides that the accused person in criminal proceedings shall not be liable for prosecution on the basis of section 238, subsection (2), point c) of the Criminal Code. The petitioner claimed that the sixth accused had acted as the defence attorney of the first accused in the criminal proceedings, which had excluded the former's criminal liability, as the Code of Criminal Procedure did not allow for his hearing as a witness. He emphasised that the sanctioning of the defence attorney in relation to the exercise of the right to be defended, a constitutional right enshrined in the Fundamental Law of Hungary, was unconstitutional.

The Curia agreed with the viewpoint of the Office of the Prosecutor General according to which the sixth accused's status as a defence attorney could not lead to the application of the exemption from criminal responsibility in his respect on the basis of section 238, subsection (3) of the Criminal Code, because the defence attorney was not an accused person in the case and therefore could not be exempted from criminal responsibility for the commission of the crime of perjury.

The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Code ofCriminal Procedure [section 5, subsection (3) of the Code of Criminal Procedure]. Article XXVIII, paragraph (3) of the Fundamental Law of Hungary stipulates that anyone indicted in criminal proceedings shall be entitled to defence at all stages of such proceedings. Defence attorneys shall not be held accountable for their opinions expressed in defence arguments. Section 50, subsection (3) of the Code of Criminal Procedure provides that with the exception of the rights attached exclusively to the person of the accused, the rights of the accused may also be exercised by his defence attorney independently. The accused person's rights of defence, however, does not entitle him to commit a criminal offense or falsely accuse another person of the commission of a criminal offense. Section 50, subsection (1), points b) and c) of the Code of Criminal Procedure clearly state that the defence attorney is entitled and obliged to use all legal means of defence in the interest of the accused in due time, in addition, it is also evident that the legal restrictions on the accused person's rights of defence equally apply to defence attorneys, which means that such rights do not entitle them either to perpetrate a criminal offense.

It also follows from the accused person's right not to tell the truth that he cannot be held criminally liable for the provision of false evidence, therefore section 238, subsection (3) of the Criminal Code exempts the accused from criminal responsibility in such cases. The rights of defence, on the other hand, do not entitle the accused or his defence attorney to incite another person to commit a criminal offense or to falsely accuse any other person of the perpetration of a criminal offense. The above exemption from criminal responsibility may be granted only to

the person against whom criminal charges have been brought, while his defence attorney is not entitled to be given such impunity.

Based on the case's factual background, the sixth accused drafted, contrary to the victim's intention, a document that contained a false statement and submitted it to the investigating authority, which exceeded the limits of lawful defence and could be qualified as perjury as defined in section 238, subsection (2), point c) of the Criminal Code. The fact that defence attorneys cannot be heard as witnesses in relation to the exercise of their defence activities in criminal proceedings does not justify the argument according to which they may insert the false statement of the threatened victim into a document to be submitted to the judicial authorities.

With regard to the above, the Curia found that the guilt of the sixth accused in respect of the commission of the crime of perjury had been lawfully established in conformity with the relevant substantive pieces of legislation.[622]

*Legal case 2. (US):* The requirement to provide an indigent defendant with counsel is not met when the assignment occurs under circumstances precluding counsel from providing effective assistance. The Supreme Court was absolutely clear in *Moltke v. Gillies*: "An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and then to offer his informed opinion as to what plea should be entered."[623]

The reason the appointment of counsel for indigents is mandatory before there can be any loss of liberty is because the Supreme Court was concerned that without such a mandate, the heavy volume of cases may create an obsession for speedy dispositions, regardless of the fairness of the result. The Court in *Argersinger v. Hamlin* explained that [b]eyond the problem of trials and appeals, is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.[624] The U.S. Supreme Court should have added that counsel is needed to ensure that defendants are treated fairly by the judge.

### 3.3. Closing thoughts

a) With regards to defence activities and their legal theoretic definition, I first and foremost believe that the defense counsel shall not be considered neither the representative of the defendant, nor the assister of either the defendant or the court, but should be defined as an autonomous subject independent from all other participants of the proceedings. My main reason to believe so is that persons (see lawyers) acting as defense counsels i) based on their legal expertise provide the same type of work that can be evaluated as law enforcement activities similar to those of other enacting authorities, and at the same time ii) may not be ordered while doing so, as the determination of the defence strategy is executed exclusively by their own discretion.

b) I consider the current form of the scope of activities as well as the training system of being a lawyer rather disquieting. In my view, an unambiguous system of specialist examination differentiated by branches of law would be necessary, particularly with regard to the actual sphere of activities of lawyers freely chosen by the candidate. Should somebody desire to work as a defense counsel, he should enter examinations in criminal law, criminal procedure law,

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[622] Budapest, the 14th of June 2018. In: *Communication concerning the decision of the Curia of Hungary in criminal case n° Bfv.I.1.537/2017*

[623] Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)

[624] Argersinger v. Hamlin, 407 U.S. 25 (1972)

criminology, forensic science, psychology, law ethics as well as lawyer's procedures related to criminal matters, and should do so before an examination board consisting of defence attorneys exclusively.

c) I also have some critical remarks in relation to the legal regulation of the legal status of the defense counsel: the first major problem is linked to the prosecutor and its presence in proceedings. According to the basic rule, the law in the act of the latter procedure solely requires the presence of the representative of the prosecutor's office, whereas no such general requirement with regards to defense counsel has been defined. This question raises concerns at the level of the rule of law in particular, when – contrary to the defense counsel – the prosecutor is present at the proceeding. I find this such a serious legislative mistake that should be remedied within reasonable time – if not for other reason, that to comply with the international requirement of the defendant's "right to fair proceedings".

I also consider it necessary that the criminal procedure should "evaluate" the sphere of activities of the defense counsel as well as the representative of the prosecutor in the hearing for evidence before court. The first step towards this would be the regulation of the "cross-examining" system as legal baseline. Based on not only practical but theoretical grounds as well, I believe that the fact-finding and pragmatic work at the judicial stage should be the task of the prosecutor as well as the defendant. Bias towards prosecution or defence, as well as the previous knowledge on the subject of the case allows a more adequate and targeted questioning, and thus it may be easier for the judge as "outsider" to evaluate the material of the evidence, and therefore the oft-mentioned "prejudicial risks" could be decreased.

In respect of the procedural rights of the defendant I would also like to highlight my concerns with regards to the regulation of the examination of the witnesses. Although this chapter does not examine the investigation phase, the defense counsel nevertheless should be granted the right to be present at the examination of not only the witnesses summoned by him but also the ones summoned by the prosecutor's office, and should be able to interrogate these witnesses directly. The right to defence includes the right to effective defence, and as such, it cannot be subordinated to the criminal investigation interests of the law enforcement authorities.

The next problem in relation to the procedural rights of the defense counsel is linked to expert evidencing. First of all, I consider it extremely perilous from the requirement aspect related to "fair procedures" that the delegation of experts suggested by the defense counsel is solely incidental, whereas expert opinions gained within their own powers by the investigating authority or the prosecutors – prior to the judicial proceedings – inevitably land on the "judge's table". I believe that it should be stipulated at the investigation or accusation stage that „if an expert opinion related to the case is already available to the investigating authority or the prosecutor and the defendant or the defense counsel also suggests the delegation of an expert, then the investigating authority or the prosecutor should {mandatorily} approve the defense counsel's suggestion on the delegation of an expert".

With regards to pleas, I consider it necessary for the criminal procedure to stipulate their fundamental elements – especially because by prosecutor's statement, certain fundamental criteria are determined with utmost precision but at the same time respecting rhetoric freedom. For this reason, I believe that amongst the relevant regulation related to pleas it should be at least imposed that „if the defense counsel submits an alternative suggestion beside his submission for exoneration, then he should be obliged to submit a suggestion for the applied penalty or relevant measures".

With regards to the defense counsel's procedural rights, I would also mention experienced regulation problems related to revisions or review procedures, namely, that in the case of the present procedures, practicing the right of defence procedure initiation may be dependent on the will-decision of the defendant. In the case of both constructions, I find this legislative decision erroneous, since the reasons for the initiation of the above mentioned procedures i) are

of a nature the recognition of which may almost exclusively be possible for a person experienced in legal matters; ii) ever since their existence, they refer to such unfavourable situations before the remedy of which should not be potentially prevented by the prohibiting statement of the defendant.

Finally, in relation to the interpretation of the sphere of action of the defense counsel, I would like to mention the tendency that is nowadays more and more illustrative of the criminal law enforcement mechanisms of the different states, namely, the different simplifying or diversionary models. What kind of consequences would the possible proliferation of these imply with regards to the future of the activities (or possibly the justification for the existence) of the defense counsel? First of all, I believe that the elimination of judicial work as a contradicting form of procedure may not appear as a long-term legislative goal neither in Hungary, nor at international level. Criminal procedures should not be shifted towards civil rights; it should ultima ratio always maintain its decision-making mechanism, in which the decision in the question of criminal responsibility is made as a result of the joint efforts of the judge, the prosecutor and the defense counsel. In other words: does the defense counsel's profession have a future? Yes, absolutely. But whether we shall meet lawyers as defense counsels or another new agent under a special denomination as participants of the judicial proceedings is another question.

# CHAPTER IV

# COERCIVE MEASURES

## 4.1. General provisions on apllying coercive measures (CPC)

When ordering or enforcing a coercive measure, efforts shall be made to ensure that the application of the coercive measure leads to restricting the fundamental rights of the person concerned only to the extent and for the time strictly necessary. A more restrictive coercive measure may be ordered, if the objective of the coercive measure may not be achieved by applying a less restrictive coercive measure or any other procedural act. A coercive measure shall be enforced with consideration for the person concerned and observing his fundamental rights that are not affected by the restriction. While enforced a coercive measure, it shall be ensured that the coercive measure does not affect any person other than the person concerned to any unnecessary extent. A coercive measure restricting the right to privacy, or of ownership, shall be enforced between the sixth and twenty-second hours of the day, if possible. It shall be ensured that the circumstances of the private life, and personal data, of the person concerned that are not related to the criminal proceeding are not revealed to the public in the course of enforcing a coercive measure. Any unnecessary damage shall be avoided in the course of enforcing a coercive measure. For enforcing a coercive measure, the ordering court or prosecution office may make useof an investigating authority.[625]

A coercive measure may affect (1) personal freedom or (2) assets. Coercive measures affecting personal freedom shall be the following:

- custody,
- restraining order,
- criminal supervision,
- pre-trial detention, and
- preliminary compulsory psychiatric treatment.

Coercive measures affecting assets shall be the following:

- search,
- body search,
- seizure,
- sequestration, and
- rendering electronic data temporarily inaccessible.[626]

### 4.1.1. Apprehending a perpetrator caught in the act. Custody

Any person may apprehend a person caught while committing a criminal offence, with the proviso that he shall hand the apprehended person over to an investigating authority without delay or - if doing so is not possible - inform the police.[627]

Custody means the temporary deprivation of a defendant, or a person reasonably suspected of having committed a criminal offence, of his personal freedom. Upon reasonable suspicion that a criminal offence punishable by imprisonment was committed, the court, prosecution service, or investigating authority may order the defendant,or a person reasonably suspected of having committed the criminal offence, to be placed in custody if (1) caught in the act and his

[625] CPC 271. §
[626] CPC 272. §
[627] CPC 273. §

identity cannot be established, (2) a coercive measure affecting personal freedom subject to judicial permission is likely to be ordered against him, or (3) he disturbed the order of a trial. Custody may last until a decision is adopted on a coercive measure affecting personal freedom subject to judicial permission, but shall not exceed seventy-two hours. If the circumstances remain unchanged, the custody of a defendant or a person reasonably suspected of having committed a criminal offence may not be ordered again. When detained by an authority before custody is ordered, the period of detention shall be counted into the period of custody. If an investigating authority orders custody, it shall notify the prosecution service accordingly within twenty-four hours. The court shall notify the prosecution office with subject-matter and territorial competence over the criminal offence that is the cause of the disturbance.[628]

An adult person designated by the defendant or the person reasonably suspected of having committed a criminal offence shall be informed about the fact that custody was ordered, as well as the place of detention, within eight hours. To ensure the success of a criminal proceeding, or protect the life or physical integrity of a person, the court, prosecution office, or investigating authority that ordered the custody may refuse to inform this person. If the provision of information is refused, the defendant or the person reasonably suspected of having committed a criminal offence shall be allowed to designate another adult person who shall be notified. If the information may not be provided within eight hours, the defendant, the person reasonably suspected of having committed a criminal offence, or a defence counsel may seek legal remedy against the refusal to provide information. The court, prosecution office, or investigating authority that ordered the custody shall make arrangements for the placement of any unattended minor child of, or other person cared for by the defendant or the person reasonably suspected of having committed a criminal offence, and for safeguarding the unattended assets or home of the defendant or the person reasonably suspected of having committed a criminal offence. If the custody of a soldier is ordered, his military superior shall also be informed accordingly.[629]

### 4.2. The purpose and conditions of a coercive measure affecting personal freedom subject to judicial permission (CPC)

In a proceeding conducted for a criminal offence punishable by imprisonment, a coercive measure affecting personal freedom subject to judicial permission may be ordered, extended, or maintained against the defendant if (1) the defendant may be reasonably suspected of having committed a criminal offence, or he was indicted, and (2) doing so is necessary to achieve the objective of the coercive measure affecting personal freedom subject to judicial permission, and that objective may not be achieved by any other means. A coercive measure affecting personal freedom subject to judicial permission may be ordered to

- ensure the attendance of a defendant if (1) he escaped, attempted to escape, or hid from the court, prosecution service, or investigating authority, or (2) it is reasonable to assume that he would become unavailable in a criminal proceeding in particular by escaping or hiding,
- prevent the complication or frustration of the taking of evidence if (1) the defendant, with a view to frustrating the taking of evidence, intimidated or illegally influenced a person involved in the criminal proceeding or any other person, or destroyed, falsified, or hid any means of physical evidence, electronic data, or thing subject to forfeiture of assets, or (2) it is reasonable to assume that the defendant would jeopardise the taking of evidence in particular by intimidating or illegally influencing a person involved in the criminal

[628] CPC 274. §
[629] CPC 275. §

proceeding or any other person, or by destroying, falsifying, or hiding any means of physical evidence, electronic data, or thing subject to forfeiture of assets,
- eliminate the possibility of reoffending if (1) the defendant continued the criminal offence subject to the proceeding after he was interrogated as a suspect, or he was interrogated as a suspect regarding any other intentional criminal offence, punishable by imprisonment, that was committed after he was interrogated as a suspect, or (2) it is reasonable to assume that the defendant would commit the criminal offence he attempted or prepared, continue the criminal offence subject to the proceeding, or commit another criminal offence punishable by imprisonment.[630]

A restraining order may be issued to avoid the complication or frustration of the taking of evidence, or to eliminate the possibility of reoffending with regard to the aggrieved party. Criminal supervision may be ordered to ensure the attendance of a defendant, avoid the complication or frustration of the taking of evidence, or eliminate the possibility of reoffending. Criminal supervision may be ordered in combination with issuing a restraining order. Pre-trial detention may be ordered to ensure the attendance of a defendant, avoid the complication or frustration of the taking of evidence, or eliminate the possibility of reoffending if, considering (1) the nature of the criminal offence, (2) the state and interests of the investigation, (3) the personal and family situation of the defendant, (4) the relationship between the defendant and another person involved in the criminal proceeding or any other person, (5) the behaviour of the defendant before and during the criminal proceeding, in particular, the objective of the coercive measure affecting personal freedom subject to judicial permission may not be achieved by way of a restraining order or criminal supervision. Preliminary compulsory psychiatric treatment may be ordered to eliminate the possibility of reoffending if it is reasonable to assume that the defendant is to be subjected to compulsory psychiatric treatment.[631]

### 4.2.1. Ordering and terminating a coercive measure affecting personal freedom subject to judicial permission

The court shall decide, before the indictment only upon a motion by the prosecution service, on ordering a coercive measure affecting personal freedom subject to judicial permission. A motion for restraining order may also be submitted by an aggrieved party. Before the indictment, the aggrieved party may submit a motion for a restraining order to the proceeding prosecution office. The prosecution office shall forward the motion by the aggrieved party, together with all case documents, to the court without delay. Before the indictment, the court may
- issue a restraining order, order criminal supervision, or issue a restraining order and order criminal supervision in place of pre-trial detention,
- order criminal supervision with more lenient rules of behaviour in place of a restraining order moved for by the prosecution service,
- issue a restraining order in addition to ordering criminal supervision, or issue a restraining order in place of ordering criminal supervision,
- issue a restraining order, order criminal supervision, order criminal supervision and issue a restraining order, or order pre-trial detention in place of preliminary compulsory psychiatric treatment,
- impose rules of behaviour that are more lenient than, or differ from, the rules of behaviour moved for.[632]

[630] CPC 276. §
[631] CPC 277. §
[632] CPC 278. §

The court, prosecution service, or investigating authority shall strive to ensure that the period of the coercive measure affecting personal freedom subject to judicial permission is as short as possible. The coercive measure affecting personal freedom subject to judicial permission shall terminate if

- its period expires without being extended or maintained,
- the time limit for an investigation expires without an indictment,
- the proceeding is terminated or suspended,
- the proceeding is concluded with final and binding effect.

A coercive measure affecting personal freedom subject to judicial permission shall be lifted if (1) the grounds for ordering it ceased to exist, (2) another coercive measure affecting personal freedom subject to judicial permission is ordered in its place, or (3) the pre-trial detention, or preliminary compulsory psychiatric treatment of the defendant is ordered in another case. A coercive measure affecting personal freedom subject to judicial permission may be lifted if the defendant is serving imprisonment, confinement, or special education in a juvenile correctional institution. A restraining order or criminal supervision may be lifted if a restraining order is issued or criminal supervision is ordered in another case, provided that, having regard to the person protected by restraining order or the rule of behaviour imposed, achieving the purpose of the restraining order or criminal supervision is ensured by the restraining order issued or criminal supervision ordered in the other case. The custody of the defendant may be ordered anew if, at the time of his release, the conditions of ordering the coercive measure affecting personal freedom subject to judicial permission are still met, and the coercive measure affecting personal freedom subject to judicial permission was lifted because the pre-trial detention or preliminary compulsory psychiatric treatment of the defendant is ordered in another case. A coercive measure affecting personal freedom subject to judicial permission shall be lifted by a court, or it may be lifted, before the indictment, by the prosecution service, with the exception of a restraining order issued upon request by an aggrieved party.[633]

### 4.3. Restraining order (CPC)

A restraining order shall restrict the defendant in freely keeping contact and shall to this end, restrict his right to move, and to choose a place of residence or place of domicile, freely. When a restraining order is issued, a court shall impose, as a rule of behaviour, that the defendant may not contact, directly or indirectly, and is to stay away from a specified person. To achieve the objective specified, the court may impose as a rule of behaviour that the defendant is to (1) leave, and stay away from, a specified home, or (2) stay away from the actual place of residence or workplace of, or any institute or other establishment regularly visited by, the person protected by restraining order, including, in particular, any upbringing or upbringing-educational institution, or healthcare institution visited for the purpose of medical treatment, or a building visited in the course of practicing a religion. Rules of behaviour shall be imposed in a manner that does not render it impossible for the defendant to exercise such rights that are, with respect to the person protected by restraining order, subject to the rules of behaviour. When issuing a restraining order, the court shall serve the decision on its issuance that reached administrative finality on (1) the person who filed the motion, (2) the person protected by restraining order, and (3) the prosecution service if the aggrieved party moved for the restraining order. The protected person shall be notified when the restraining order is terminated or lifted.[634]

[633] CPC 279. §
[634] CPC 280. §

## 4.4. Criminal supervision (CPC)

Criminal supervision shall restrict the right of the defendant to move, or to choose a place of residence or domicile, freely. When the criminal supervision is ordered, the court shall prescribed that the defendant is

- not to leave a specified area, home, other premises, institute or related fenced area without permission,
- not to visit public places or attend public events of a specific nature, or not to visit certain public spaces, or
- to report to a police organ established to carry out general policing tasks at specific intervals and in a specific manner.

The court may also impose additional rules of behaviour to ensure that the goal of the criminal supervision is achieved. The court shall specify, as a rule of behaviour, the purpose for and the conditions under which the defendant may leave the designated place or area, including, in particular, the satisfaction of common everyday needs, work, or medical treatment.[635]

### 4.4.1. Measures ensuring compliance with the rules of behaviour relating to a restraining order or criminal supervision

Measures ensuring compliance with the rules of behaviour relating to a restraining order or the criminal supervision shall be the following: (1) technical tracking device, and (2) bail.[636]

The court may order that compliance with the rules of behaviour relating toa restraining order or criminal supervision is to be monitored by a police organ established to carry out general policing tasks by using a technical tracking device. The court may order a police organ established to carry out general policing tasks to monitor compliance with the rules of criminal supervision by using a technical tracking device, provided that criminal supervision was ordered solely because the maximum length of pre-trial detention had been reached. If the defendant does not cooperate in handling the technical device, his behaviour shall constitute a violation of the rules of behaviour. The defendant shall be advised accordingly when the use of a technical tracking device is ordered. The court shall clarify the conditions for installing a technical tracking device at the time of ordering its installation.[637]

Bail means a sum determined by a court to facilitate compliance with the rules of behaviour relating to a restraining order or criminal supervision, as well as the attendance of a defendant at the procedural acts. Unless otherwise provided in this Act, bail may be set if any of the reasons applies for ordering a coercive measure affecting personal freedom subject to judicial permission.[638]

A defendant or his defence counsel may move for setting the amount of bail by the court and, should the bail be posted, to

- issue a restraining order, to order criminal supervision, or to issue a restraining order and order criminal supervision in place of a pre-trial detention,
- issue a restraining order in place of a criminal supervision,
- lift the criminal supervision when both criminal supervision is ordered and a restraining order issued, or
- impose more lenient rules of behaviour when the criminal supervision is ordered, or when both criminal supervision is ordered and a restraining order is issued.

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[635] CPC 281. §
[636] CPC 282. §
[637] CPC 283. §
[638] CPC 284. §

The motion for setting the amount of the bail shall indicate the amount to be posted. On the basis of the motion, the court shall

- dismiss the motion to set the amount of the bail and to order a more lenient coercive measure or to impose more lenient rules of behaviour, or
- set the amount of the bail and, should the bail be posted, (1) order a more lenient coercive measure affecting personal freedom subject to judicial permission, (2) lift the criminal supervision, or (3) impose more lenient rules of behaviour.

A court may also set the amount of the bail when it orders, extends, or maintains a coercive measure affecting personal freedom subject to judicial permission, or adjudicates a motion to lift a coercive measure affecting personal freedom subject to judicial permission. If the motion is dismissed by the court, the defendant or his defence counsel may file a motion to set the amount of the bail again, provided that he invokes any new circumstance. The bail may not be set if (1) preliminary compulsory psychiatric treatment is ordered, or (2) a restraining order is issued, for the purpose of imposing more lenient rules of behaviour.[639]

The bail shall be paid in the form of money, and it may be posted by a defendant or his defence counsel. The amount of bail may not be lower than five hundred thousand forints; it shall be set by the court appropriate to the threat pertaining to ensuring attendance, complicating or frustrating the taking of evidence and reoffending, on the basis of the material gravity of the criminal offence and having regard to the personal circumstances and financial situation of the defendant. The amount of bail may be also subject to an appeal.[640]

The bail may be posted within three months after the decision setting the amount reaches administrative finality. The bail may not be withdrawn once posted. After the act of posting the bail is certified, on the basis of a court order,

- the defendant in pre-trial detention shall be released without delay, and the more lenient coercive measure affecting personal freedom subject to judicial permission, as specified in the court decision, shall be enforced according to the prescribed rules of behaviour,
- where a restraining order is issued or criminal supervision is ordered, the coercive measure affecting personal freedom subject to judicial permission specified in the court decision shall be enforced, applying the rules of behaviour specified.

If a defendant or his defence counsel fails to post the bail within the time limit specified in paragraph (1), he may file a motion to set the amount of the bail again, provided that he invokes any new circumstance.[641]

The person posting a bail shall be deprived of his right to the amount posted as bail if the court orders the pre-trial detention of the defendant due to his behaviour displayed after the bail is posted. The person posting a bail shall also be deprived of his right to the amount posted as bail if the pre-trial detention of the defendant may not be ordered because the defendant became unavailable. Once the bail is lost, a bail may not be set again. The amount of the bail shall be returned to the person posting it if the coercive measure affecting personal freedom subject to judicial permission applied against the defendant is terminated or lifted, except for the situation described in CPC.[642]

### 4.4.2. The duration of a restraining order and of criminal supervision

A restraining order that is issued and a criminal supervision that is ordered before the indictment shall remain in effect until a decision is adopted by the court of first instance during the

[639] CPC 285. §
[640] CPC 286. §
[641] CPC 287. §
[642] CPC 288. §

preparation of a trial, but no longer than four months. The period of a restraining order or criminal supervision may be extended repeatedly by a court by up to four months each time. Before the indictment, a motion to extend the period of a restraining order or criminal supervision may be filed with a court by (1) the prosecution service, (2) the aggrieved party or the prosecution service if the restraining order was issued upon a motion filed by the aggrieved party, at least five days before the duration of the coercive measure expires.[643]

If a court of first instance issues or maintains a restraining order or orders or maintains criminal supervision after the indictment, it shall be effective until the announcement of the conclusive decision of the court of the first instance. If a court of first instance issues or maintains a restraining order or orders or maintains criminal supervisions after the conclusive decision is announced, or if the court of second instance issues or maintains a restraining order or orders or maintains criminal supervision, it shall be effective until the second-instance proceeding is concluded. If the court of the second instance issues or maintains a restraining order or orders or maintains criminal supervision after the conclusive decision is announced, or if the court of third instance issues or maintains a restraining order or orders or maintains criminal supervision, it shall be effective until the conclusion of the third-instance proceeding. If the conclusive decision adopted by the court of first or second instance is set aside and the court is instructed to conduct a new proceeding, a restraining order issued or maintained, and a criminal supervision ordered or maintained by the court of second or third instance shall be effective until the adoption of the decision in the repeated proceeding by the court instructed to conduct the repeated proceeding during the preparation of a trial or, if an appeal was filed, until the adoption of the decision by the court authorised to adjudicate the appeal. The period of a restraining order that is issued or maintained, and a criminal supervision that is ordered or maintained after the adjudication of an appeal filed against the setting aside order adopted by the court of second or third instance shall be effective until the adoption, during the preparation of a trial, of the decision by the court instructed to conduct or repeat a proceeding.[644]

The necessity of a restraining order or criminal supervision shall be reviewed

- by the court of first instance if, without a conclusive decision being adopted by the court of first instance, six months have passed,
- by the court of second instance if, without a conclusive decision being adopted by the court of first instance, one year has passed,
- by the court of second instance at least every six months until the court of first instance adopts a conclusive decision if the time limit set out in former point has passed after the court of first instance maintained or ordered criminal supervision or maintained or issued the restraining order following the indictment.

The necessity of a restraining order issued or maintained, or criminal supervision ordered or maintained, after the adoption of a conclusive decision by the court of first or second instance shall be reviewed, every six months, by the court of second or third instance, respectively. If the criminal supervision is ordered or maintained, or the restraining order is issued or maintained by the proceeding court, the six-month time limit shall be calculated from that date.[645]

### 4.4.3. Partial lifting and modification of a restraining order and criminal supervision

[643] CPC 289. §
[644] CPC 290. §
[645] CPC 291. §

If the living conditions of the defendant or the person protected by restraining order change substantially during the period of the restraining order or criminal supervision, as a result of which

- it is necessary to deviate from, or suspend, the imposed rules of behaviour temporarily, the rules of behaviour relating to a restraining order or criminal supervision may be partially lifted ex officio, or upon a motion by the defendant, the defence counsel or the person protected by restraining order, by the prosecution service before the indictment or by the court after the indictment or if the restraining order was issued upon a motion by the aggrieved party,
- it is necessary to modify the imposed rules of behaviour with permanent or final effect, the court, acting upon a motion from the prosecution service, the defendant, the defence counsel, or the person protected by restraining order, shall modify the rules of behaviour relating to the restraining order or criminal supervision.

If a motion to partially lift or modify the rules of behaviour is submitted, the court or the prosecution office shall (1) dismiss the motion, (2) grant the motion in part and partially lift or modify the rules of behaviour, and dismiss the remainder of the motion, or (3) grant the motion and partially lift or modify the rules of behaviour. The decision partially lifting or modifying the rules of behaviour relating to the restraining order shall be communicated (1) to the person protected by restraining order as well, (2) to the prosecution service as well, where the motion to partially lift or modify the rules of behaviour was submitted by the person protected by restraining order.

No legal remedy shall lie against partially lifting or modifying, according to a corresponding motion, any rule of behaviour relating tothe criminal supervision or the restraining order. The person who filed such a motion may seek legal remedy against the dismissal of his motion or a dismissing provision of the decision on his motion. If a motion to partially lift or modify the rules of behaviour relating to the restraining order was filed by the person protected by restraining order, legal remedy against the decision granting the motion in whole may be sought by the defendant or the defence counsel, while against the decision granting the motion in part, legal remedy may be sought also by the defendant or the defence counsel. Unless the possibility of doing so is excluded by the court at the time of ordering the given coercive measure affecting personal freedom subject to judicial permission, the defendant subject to the restraining order or the criminal supervision may deviate, without a specific permission, from the rules of behaviour relating to the restraining order or the criminal supervision for the period and to the extent necessary to perform his obligation to appear arising from being summoned by the court, prosecution service, investigating authority, another authority, or expert, or to exercise his right to appear in relation to any such notice. In that event, the defendant shall

- inform the authority monitoring his compliance with the rules of behaviour about the summons or notice, together with enabling their inspection, on the next working day after the receipt thereof at the latest,
- certify that he appeared before the summoning or notifying authority, including the duration of doing so, within three working days after his appearance.

Any failure to perform the obligations related to information and certification shall constitute a violation of the rules of behaviour.[646]

4.4.4. Enforcing a restraining order and criminal supervision, and violating the applicable rules of behaviour

[646] CPC 292. §

If it is established after ordering the criminal supervision or issuing the restraining order that the conditions for enforcing the coercive measure affecting personal freedom subject to judicial permission are not met, including in particular when the technical tracking device may not be installed, the custody of the defendant shall be ordered, and the court shall adopt a new decision on the coercive measure affecting personal freedom subject to judicial permission. The court may impose a disciplinary fine on a defendant who violates the rules of behaviour relating to the restraining order or the criminal supervision. The defendant who violates the rules of behaviour repeatedly, or in a serious manner, may be taken into custody and

- if he violated the rules of behaviour prescribed in connection with a restraining order, he may be subject to criminal supervision in place of, or in addition to, a restraining order,
- using a technical tracking device may be ordered,
- more adverse or other rules of behaviour may be set, or
- the pre-trial detention of the defendant may be ordered.

If the defendant fails to appear at a procedural act he was summoned to without providing a well-grounded excuse for his absence in advance or immediately after the obstacle is removed, a disciplinary fine may be imposed on him or, with a view to applying a measure, he may be taken into custody.[647]

#### 4.4.5. Lifting a restraining order and criminal supervision, and modifying the rules of behaviour

A motion to lift a restraining order or criminal supervision, or to set more lenient rules of behaviour, may be filed by (1) the prosecution service, the defendant, or the defence counsel, or (2) the defendant, his defence counsel or the aggrieved party if the restraining order was issued upon a motion by the aggrieved party. The motion to lift the restraining order or criminal supervision, or to set more lenient rules of behaviour, shall be examined on its merits, and a decision shall be adopted on it by the court. If the motion was not filed by the prosecution service, the court shall obtain the observations of, or a motion from, the prosecution service. The court

- shall not adjudicate the motion if the defendant is not subject to a coercive measure affecting personal freedom subject to permission by a judge, or he is subject to another coercive measure affecting personal freedom subject to judicial permission, at the time of adjudicating the motion,
- may decide not to adopt a decision on the motion and notify the defendant accordingly if it extended or maintained the coercive measure affecting personal freedom subject to judicial permission at any time during the period between submitting and adjudicating the motion.[648]

If a restraining order or criminal supervision is extended or maintained, the court may set more lenient rules of behaviour ex officio, if the objective to be achieved by the coercive measure affecting personal freedom subject to judicial permission may also be achieved by such rules. The court, before the indictment only upon a motion by the prosecution service, may set more adverse rules of behaviour for the defendant if this is necessary for achieving the objective of the coercive measure affecting personal freedom subject to judicial permission.[649]

### 4.5. Pre-trial detention (CPC)

[647] CPC 293. §
[648] CPC 294. §
[649] CPC 295. §

Pre-trial detention means the act of depriving the defendant of his personal freedom by a judge before a final and binding conclusive decision is adopted.[650]

### 4.5.1. The duration of the pre-trial detention

The period of a pre-trial detention that is ordered before the indictment shall last until a decision adopted by the court of first instance during the preparation of the trial, but for not longer than one month. The period of pre-trial detention may be extended repeatedly by the court by up to three months each time for one year after ordering the pre-trial detention, and up to two months each time afterwards. Before the indictment, the prosecution service may submit a motion to the court to extend the period of pre-trial detention at least five days before the period of pre-trial detention expires.[651]

The pre-trial detention may last up to

a) one year if a criminal offence punishable by imprisonment for up to three years
b) two years if a criminal offence punishable by imprisonment for up to five years
c) three years if a criminal offence punishable by imprisonment for up to ten years
d) four years if a criminal offence punishable by imprisonment for more than ten years,
e) five years if a criminal offence punishable by life imprisonment

serves as basis for the criminal proceeding conducted against the defendant.

The maximum length of the pre-trial detention under point e) shall be extended by another year if

- indictment was brought because of a criminal offence committed in a criminal organisation,
- issuing a request for legal assistance in a criminal matter as regards a country other than a Member State of the European Union was necessary after the indictment,
- indictment was brought because of the felony of terrorist act,
- indictment was brought because of the felony of homicide committed with premeditation, out of greed,
- the court establishes that, after the indictment, the defendant, who is in pre-trial detention, escaped or attempted to escape or, with a view to frustrating the taking of evidence, intimidated or illegally influenced a person involved in the criminal proceeding or any other person, or destroyed, falsified, or hid any means of physical evidence, electronic data, or thing subject to forfeiture of assets.

If the court orders criminal supervision solely because the maximum length of pre-trial detention under point e) was reached, then the court shall (1) prescribe for the defendant that he is not to leave a specific home, other premises, ora fenced area of it without permission, (2) prescribe for a defendant without a domicile suitable for the enforcement of criminal supervision to spend the period of criminal supervision at the accommodation provided by the State, (3) be forbidden to permit for the defendant to leave for work the place designated for him.[652]

### 4.5.2. The enforcement of the pre-trial detention. Adjudicating a motion to terminate the pre-trial detention

[650] CPC 296. §
[651] CPC 297. §
[652] CPC 298. §

If the pre-trial detention of a defendant is ordered, the measures specified in CPC shall be taken without delay by the investigating authority or the prosecution service before the indictment, or the court after the indictment. If it is necessary for the performance of a procedural act, the pre-trial detention shall be enforced in a police detention facility as instructed by the prosecution service; the duration of such a pre-trial detention may not exceed sixty days in total. No complaint shall lie against the decision to place a defendant into a police detention facility. In the absence of grounds for exclusion specified by law, if a defendant is a woman caring for her child below the age of one, the court, upon a motion from the defendant or the defence counsel, shall order the defendant and her child to be held in a unit allowing for their joint placement.[653]

A motion to terminate the pre-trial detention or to order a more lenient coercive measure affecting personal freedom subject to judicial permission may be submitted by the prosecution service or the defendant or his defence counsel. The motion to terminate pre-trial detention or to order a more lenient coercive measure affecting personal freedom subject to judicial permission shall be examined on its merits, and a decision shall be adopted on it by the court. If the motion was not filed by the prosecution service, the court shall obtain the observations of, or a motion from, the prosecution service. If another motion to terminate the pre-trial detention is submitted with identical content, it may not be dismissed without stating any reason as to its merits, provided that three months have passed since the pre-trial detention was ordered, extended, or maintained. The court

- shall not adjudicate the motion if the defendant is not subject to a coercive measure affecting personal freedom subject to judicial permission any longer, or he is subject to another coercive measure affecting personal freedom subject to judicial permission,
- may decide not to adjudicate the motion and, at the same time, notify the defendant and the defence counsel accordingly if the pre-trial detention was extended or maintained at any time during the period between submitting and adjudicating the motion.[654]

### 4.6. Preliminary compulsory psychiatric treatment (CPC)

Preliminary compulsory psychiatric treatment means that the defendant affected by a mental disorder is deprived by a judge of his personal freedom before a final and binding conclusive decision is adopted. With the exception of section 298, the rules on pre-trial detention shall apply to a preliminary compulsory psychiatric treatment accordingly, subject to the derogations laid down in this Chapter.

The spouse or cohabitant of the defendant shall also be entitled to file an appeal against ordering, extending, or maintaining preliminary compulsory psychiatric treatment. A motion to terminate preliminary compulsory psychiatric treatment may also be filed by the spouse or cohabitant of a defendant. If the preliminary compulsory psychiatric treatment is ordered before the indictment, it shall remain in effect until a decision is adopted by the court of first instance during the preparation of a trial, but for no longer than six months. Before the indictment, the court may extend the period of preliminary compulsory psychiatric treatment by up to six months each time. If terminating the preliminary compulsory psychiatric treatment is justified, the institute enforcing preliminary compulsory psychiatric treatment shall inform the prosecution service, before the indictment, or the court, after the indictment, without delay.[655]

### 4.7. Search (CPC)

[653] CPC 299. §
[654] CPC 300. §
[655] CPC 301. §

Search means searching a home, other premises, fenced area, or vehicle for the purpose of conducting a criminal proceeding successfully. The search may also include searching an information system or a data-storage medium. A search may be ordered, if it is reasonable to assume that it leads to

- the apprehension of a perpetrator of a criminal offence,
- the detection of traces of a criminal offence,
- the discovery of a means of evidence,
- the discovery of a thing that may be subject to confiscation or forfeiture of assets, or
- the examination of an information system or data-storage medium.[656]

A search may be ordered by the court, prosecution service, or investigating authority. If a search is to be conducted in the offices of a notary, or in a law office, for the purpose of gaining access to protected data related to the activities of a notary or an attorney-at-law, it shall be ordered by a court. At any search conducted in the offices of a notary, or in a law office, the attendance of a prosecutor shall be obligatory. A search may be conducted even without a court decision if adopting a court decision required for ordering a search would cause any delay that would significantly jeopardise the purpose of the search. In such a situation, the permission of the court shall be obtained ex-postwithout delay. If such a search is not ordered by a court, the result of the search may not be used as evidence.[657]

A decision ordering a search shall specify the purpose of the search and the facts supporting ordering the search. If possible, the decision ordering a search shall specify the person, means of evidence, thing that may be subject to confiscation or forfeiture of assets, information system, or datastorage device to be found during the search.[658]

The search shall be conducted in the presence of the owner, possessor, or user of the real estate or the vehicle concerned. The search may also be conducted in the presence of the defence counsel or a representative of, or an adult person authorised by, the owner, possessor, or user of the real estate or vehicle concerned. If such a person is not present, the search shall be conducted, in order to protect the interests of the person concerned, in the presence of an adult person who does not have any interest in the case. Before starting the search, the content of the decision ordering the search shall be presented, and the decision shall be served on the spot, if possible. If the purpose of the search is to find a specific person, a means of evidence, a thing, an information system, or a data-storage medium, the owner, possessor, user of the real estate or vehicle concerned, or the person authorised by that person shall be called upon to reveal the location of the means of physical evidence or person sought, and to make the electronic data sought accessible. If the call is complied with, the search may not be continued unless it is reasonable to assume that any other means of evidence, thing, information system, or datastorage medium may also be found. A disciplinary fine may be imposed on any person other than the defendant who isimpeding the search.[659]

### 4.8. Body search (CPC)

Body search means searching and inspecting the clothing and body of a person subject to body search for the purpose of finding a means of evidence or a thing that may be subject to confiscation or forfeiture of assets. In the course of a body search, things found on the searched person may also be inspected. A body search may be ordered concerning a defendant, a person

[656] CPC 302. §
[657] CPC 303. §
[658] CPC 304. §
[659] CPC 305. §

reasonably suspected of having committed a criminal offence or a person with regard to whom it is reasonable to assume that he has a means of evidence or a thing that may be subject to confiscation or forfeiture of assets on him. A body search may be ordered by the prosecution service or the investigating authority.[660]

If a body search is aimed at finding a specific thing, the searched person shall be called upon to hand over the thing sought. If such call is complied with, the body search may not be continued. A body search shall not be conducted in an indecent manner. Body cavities may be searched by a doctor only; healthcare workers may also attend the examination. An adult person who is present at the location of the body search and is specified by the person subject to body search may attend the body search, provided that his presence does not harms the interests of the proceeding. With the exception of situations of extreme urgency, the body search shall be conducted by a person of the same sex as the person subject to body search, and only persons of the same sex may be present during the body search. The doctor conducting a cavity search, the healthcare worker assisting during the examination, and the adult person specified by the person searched may be of the opposite sex as the person subject to body search. A disciplinary fine may be imposed on any person other than a defendant and a person reasonably suspected of having committed a criminal offence who is impeding the body search.[661]

### 4.9. Seizure (CPC)

The purpose of a seizure shall be to secure a means of evidence, or a thing or asset that may be subject to confiscation or forfeiture of assets, in order to conduct the criminal proceeding successfully. The seizure restricts the right of ownership over the subject of the seizure. A seizure shall be ordered if its subject (1) is a means of evidence, or (2) may be subject to confiscation or is subject to forfeiture of assets. A movable thing, scriptural money, electronic money, or electronic data may be seized.[662]

A seizure may be ordered by the court, prosecution service, or investigating authority. Seizure of a means of evidence kept in the offices of a notary, or a law office, and containing protected data related to the activities of a notary or an attorney-at-law may be ordered by a court. The prosecution service, before the indictment, or a court, after the indictment, shall order the seizure of

- a postal item or other sealed consignment yet to be delivered to the addressee,
- any communication or consignment not yet delivered to the addressee that is set to be transferred through an electronic communications service, or
- a means of evidence kept in the editorial offices, and relating to the activities, of a media content provider as defined in the Act on the freedom of the press and the fundamental rules on media contents.

If passing a court or prosecutorial decision required for ordering a seizure would cause any delay significantly jeopardising the purpose of seizure, the prosecution service or the investigating authority may enforce the seizure, or prohibit the sending of any communication or consignment, until the entity authorised to order the seizure passes a decision. In such a situation, the decision of the entity authorised to order a seizure shall be obtained without delay. If seizure is not ordered by the entity authorised to order a seizure, any means of evidence or consignment seized shall be returned to the person concerned and any prohibition on sending shall be lifted.[663]

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[660] CPC 306. §
[661] CPC 307. §
[662] CPC 308. §
[663] CPC 309. §

The following may not be seized: (1) any communication or consignment by and between a defendant or a person reasonably suspected of having committed a criminal offence and his defence counsel, and (2) any note on the case by a defence counsel. The following may not be seized:

- any communication or consignment by and between a defendant or a person reasonably suspected of having committed a criminal offence and a person entitled to refuse to give witness testimony, and
- any means of evidence with regard to which giving a witness testimony may be refused, provided that it is kept by a person who may refuse to give a witness testimony.

A document or electronic data may not be seized if it is kept in an office used, for the purpose of practicing or fulfilling his profession or public mandate, by a person, who may refuse to give a witness testimony, and it relates to his profession or public mandate.

Seizure may be ordered if (1) the criminal offence was committed with regard to the means of evidence to be seized, (2) the item to be seized is an instrument of the criminal offence, (3) the means of evidence to be seized carries traces from the perpetrator, (4) the person entitled to refuse to give a witness testimony may be reasonably suspected of being an offender, accessory, accessory after the fact, or money launderer concerning the case, (5) a person who may refuse to give a witness testimony hands over, or makes available, the means of evidence to be seized voluntarily, or (6) a person who may refuse to give a witness testimony was obliged by a court to reveal the identity of his informant.[664]

### 4.9.1. Carrying out the seizure. Seizing documents

The seizure may be enforced by

- taking possession,
- ensuring safekeeping by other means,
- leaving the thing in the possession of the person concerned, or
- with regard to electronic data, in a manner described in CPC.

Seizure may be enforced by leaving the thing in the possession of the person concerned or by ensuring safekeeping by other means if (1) the thing concerned cannot be taken into possession, (2) doing so is justified by the interests of the possessor or processor of the thing or electronic data concerned in using such thing or electronic data, or (3) doing so is necessary for any other important reason. The possession of a seized thing or electronic data may not be transferred to any other person without permission from the court, prosecution office, or investigating authority that ordered its seizure. If such permission is granted, the new possessor shall be responsible for safekeeping the seized thing. The seizure of a thing under special protection granted by the Act on the special protection of borrowed cultural goods may be enforced after the period of special protection expires. The manner of carrying out the seizure shall be specified in the decision ordering the seizure. The necessity to maintain the seizure during the criminal proceeding shall be examined pursuant to the applicable legislation. If the seizure is not necessary any longer for the purposes of a proceeding, arrangements shall be made without delay to terminate the seizure and release the thing seized, or a motion to confiscate the seized thing shall be submitted.[665]

With a view to enforcing seizure, the possessor or processor of a thing or electronic data shall be called upon to reveal the location of the thing, or make accessible the electronic data sought. If compliance with the call is refused, the thing or the electronic data sought shall be located by conducting a search or body search. The person concerned shall be advised about these

[664] CPC 310. §
[665] CPC 311. §

provisions. If a person concerned fails to comply with a call, a disciplinary fine may be imposed on him, with the exception of (1) a defendant or a person reasonably suspected of having committed the criminal offence, (2) a person who may refuse to give witness testimony, or (3) a person who may not be interrogated as a witness. A disciplinary fine may be imposed on any person other than a defendant, or a person reasonably suspected of having committed the criminal offence, who impedes a seizure.[666]

An original document shall be seized if

- it may be confiscated,
- it is a deed that confirms a title to, or a right of disposal regarding, any asset subject to forfeiture of assets,
- it carries the traces of a criminal offence,
- the volume of documents to be examined is significant or cannot be determined in advance,
- doing so is indispensable for taking evidence successfully.

If the original document is not necessary in the course of the proceeding, a copy of it shall be produced as soon as possible, taking into account the technical capacities of the ordering entity and the volume of documents seized. In such an event, seizure of an original document shall be lifted when a copy is produced, but within two months at the latest. Upon his motion, a certified true copy of a seized original document shall be produced for its possessor, unless doing so would jeopardise the interests of the proceeding.[667]

If the possessor of a document, or his defence counsel or representative believes that giving a witness testimony regarding the content of a given document may be refused and he does not consent to inspecting the document concerned, he shall make the document, or the data-storage medium containing the document, available to the investigating authority or the prosecution service in a sealed container. In such an event, members of the proceeding investigating authority or the organ of the prosecution service carrying out prosecutorial investigation may not inspect the content of the document. After accessing the content of a sealed document or data-storage medium, the prosecution service, where the investigation is conducted by an investigating authority, or the superior prosecution office, where the investigation is conducted by a prosecution office, shall decide without delay on ordering the seizure or shall, if it is not authorised to do so, submit a motion to a court to order seizure. If no seizure is ordered by the prosecution service or thecourt, the document concerned may not be used as means of evidence in the pending, or any other, criminal proceeding.[668]

### 4.9.2. Seizing and ordering the preservation of electronic data

The seizure of electronic data may be carried out by

- copying the electronic data,
- moving the electronic data,
- producing a copy of the whole content of the information system or data-storage medium containing the electronic data,
- seizing the information system or data-storage medium containing the electronic data, or
- other means specified by law.

The seizure of electronic data used for making payments may also be carried out by an operation that prevents the person concerned from disposing of the material value represented

[666] CPC 312. §
[667] CPC 313. §
[668] CPC 314. §

by the electronic data. The seizure of electronic data shall be carried out in a manner ensuring, if possible, that the electronic data not necessary for the criminal proceeding are not affected by it, or such data are only affected by the seizure for the shortest period possible. An information system or data-storage medium containing electronic data may be seized if (1) it may be subject to confiscation or forfeiture of assets, (2) it is significant as a means of physical evidence, or (3) it contains a significant volume of electronic data that needs to be examined for the purpose of taking evidence, or the volume of such data cannot be determined in advance. When seizing an information system or data-storage medium, the person authorised to dispose of the electronic data shall be provided, upon his request, with a copy of the pieces of electronic data specified by him, unless doing so would jeopardise the interests of the proceeding.[669]

With a view to detecting or proving a criminal offence, an order to preserve electronic data may be issued. An order to preserve electronic data means restricting the right of the possessor, processor, or controller of electronic data (hereinafter: „preserving entity") to dispose of such electronic data. An order to preserve electronic data may be issued by the court, the prosecution service, or the investigating authority. An order to preserve electronic data may be issued if doing so is necessary to (1) detect a means of evidence, (2) secure a means of evidence, or (3) determine the identity, or actual place of residence, of a suspect. From the time when the corresponding decision is communicated to him, the preserving entity shall preserve the electronic data specified in the decision in an unaltered form, and provide secure storage for such data separately from other data files as necessary. A preserving entity shall protect the electronic data against modification, deletion, destruction, transfer, unauthorised copying, and unauthorised access. An entity that ordered the preservation may sign the electronic data to be preserved with a qualified electronic signature or seal, or an advanced electronic signature or seal based on a qualified certificate. If preserving electronic data at its original location would significantly impede theactivities of the person concerned relating to the technical processing, processing, storage, or transfer of the electronic data, he may, with the permission of the entity that ordered the preservation, copy the electronic data to be preserved into another information system or on another data-storage medium. After such copying, the ordering entity may lift the restrictions, in whole or in part, concerning the information system or data-storage medium containing the original electronic data. During the period of such a coercive measure, the electronic data to be preserved may be accessed only by the court, prosecution service, investigating authority, or, with the permission of the entity that ordered the preservation, the preserving entity. During the period of such a measure, the preserving entity may not provide information to any other person regarding any electronic data to be preserved without the permission of the ordering entity. If any electronic data to be preserved is modified, deleted, destroyed, transferred, copied, accessed without authorisation, or any attempt to do so is detected, the preserving entity shall inform the entity that ordered preservation without delay. After an order to preserve electronic data is issued, the entity that ordered the preservation shall start the examination of the electronic data concerned without delay. As the result of such examination, the entity that ordered the preservation shall decide whether to order the seizure to be enforced in another way, or lift the order of preservation. The period of an order of preservation may not exceed three months. An order of preservation shall terminate when the corresponding criminal proceeding is concluded. A preserving entity shall be informed about the conclusion of the criminal proceeding.[670]

The provisions on redeeming, selling, and confiscating a seized thing, as well as on lifting a seizure or retaining a seized thing shall apply to electronic data accordingly.[671]

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[669] CPC 315. §
[670] CPC 316. §
[671] CPC 317. §

### 4.9.3. Redeeming and selling a seized thing

If a thing is seized for the sole purpose of securing the forfeiture of assets and no well-grounded claim for its release was submitted, the person from whom the thing was seized may move for accepting the redemption of the thing concerned. The prosecution service, before the indictment, or a court, after the indictment, shall decide on accepting the redemption of the seized thing. The redemption amount shall be determined by the prosecution service or the court. The redemption amount shall be set at the estimated value of the thing concerned. The motion to accept the redemption of a thing shall be dismissed if

- the person concerned disputes the amount determined,
- determining the redemption amount would protract the proceeding, or
- determining the redemption amount would involve disproportional costs.

No legal remedy shall lie against the dismissal of a motion to accept the redemption of a thing. An amount paid as redemption shall take the place of the thing seized and shall be subject to the seizure without a separate decision to that effect; upon such a redemption, the seizure of the originally seized thing shall cease. In such an event, forfeiture of assets shall be ordered with regard to the amount replacing the thing concerned.[672]

If a thing seized during a proceeding is not necessary any longer for the purpose of taking of evidence, it shall be examined ex officio and without delay if seizure of the thing may be lifted or the thing may be sold. The thing seized may be sold if (1) it is not necessary any longer for the purpose of taking of evidence, (2) its seizure may not be lifted, and (3) no well-grounded claim was submitted concerning the thing seized. If the conditions specified in paragraph (2) are met, the court, before the indictment only upon a motion by the prosecution service, shall order the seized thing to be sold, provided that the thing seized

- is a perishable good,
- is unfit for extended storage,
- could be handled, stored, or safeguarded only at disproportional and considerable cost, taking into account its value or the foreseeably long period of storage, or
- would be significantly depreciated during the expected period of seizure, or it is reasonable to assume that such a risk exists.

Where a seized thing is not needed any longer for the taking of evidence and its seizure may not be lifted, the court, before the indictment only upon a motion by the prosecution service, may order the seized thing to be sold also if a well-grounded claim was submitted regarding the seized thing and the person who submitted the well-grounded claim agrees to the sale. Before the indictment, the sale of a thing may also be ordered by the prosecution service or an investigating authority.

Any consideration received for the seized thing shall take the place of the seized thing and shall be subject to the seizure without a separate decision to that effect; the seizure of the originally seized thing shall cease when it is sold. In such an event, confiscation or forfeiture of assets shall be ordered with regard to the amount replacing the thing concerned.

If a seized thing is sold and it is necessary for the subsequent taking of evidence, a sample of the seized thing shall be retained, or an image or audio-visual recording of the thing shall be made, that is suitable for proving the relevant features of the thing concerned beyond a reasonable doubt at a subsequent stage of the proceeding.

If the seizure of an organism cannot be enforced by leaving the thing in the possession of the person concerned,

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[672] CPC 318. §

a) than provisions should be made as soon as possible to ensure that the organism is not required for the taking of evidence, and

b) provided that the conditions set out in CPC are met, (1) the court, before the indictment only upon a motion by the prosecution service, shall order the sale of the organism or (2) the prosecution service or the investigating authority shall order, before the indictment, the sale of the organism subject to consent by the person submitting a well-grounded claim if a well-grounded claim was submitted concerning the organism seized.[673]

### 4.9.4. Lifting the seizure and confiscating a seized thing. Retaining a seized thing

Seizure shall be lifted if (1) it is not necessary any longer for the proceeding, (2) the thing seized has been redeemed, with regard to the thing originally seized, (3) the proceeding is terminated, or (4) the time limit for an investigation expired.

With the exception of live vertebrate animals, if a seized thing does not have any value and it is not claimed by any person, it shall be destroyed after the seizure is lifted.

A court-ordered seizure may also be lifted by the prosecution service before the indictment.

If possessing a seized thing is in breach of the law or threatens public safety, the court shall decide, before the indictment only upon a motion by the prosecution service and if the conditions under CPC are met, to confiscate it in place of lifting its seizure.

If a seized thing is confiscated or destroyed and it is necessary for the taking of evidence, a sample of the seized thing shall be retained, or an image or audio-visual recording of the thing shall be made, that is suitable for proving the relevant features of the thing concerned beyond a reasonable doubt at a subsequent stage of the proceeding.

If the court, the prosecution service or the investigating authority notifies, an organ authorised to initiate or conduct the proceeding, in the proceeding of which the seized thing may be confiscated, the measure may be dispensed with for up to five working days.

When the seizure is lifted, the seized thing shall be released to the person who was its owner at the time when the act the criminal proceeding is based on was committed, provided that no reasonable doubt arises concerning his right of ownership. If there is no person to whom a thing is to be released under this provision, and such a person cannot be identified on the basis of the data available in the proceeding at the time of the release, the thing shall be released to any person who submits a well-grounded claim for it.

If there is no person to whom a thing could be released under this provision, and such a person could not be identified on the basis of data available in the proceeding at the time of release, the thing shall be released to any person from whom it was seized.

If a proceeding is terminated because a given act does not constitute a criminal offence, the thing seized shall be released to the person from whom it was seized.

The ownership of a thing seized from a defendant or a person reasonably suspected of having committed the criminal offence shall be acquired by the State on the basis of a court decision if it is owned by another person beyond any doubt, but that person could not be identified. If such a person is identified subsequently, he may file a claim for releasing the thing concerned or any consideration received from its sale. Such a claim shall be decided by a court with subject-matter and territorial jurisdiction under the Act on the Code of Civil Procedure.[674]

If a thing originally seized cannot be released any more, any consideration received from its sale or redemption, reduced by the cost of handling, storage and safekeeping, shall be released to the person concerned. If seizure was ordered without ground, the consideration received for the thing may not be reduced by the cost of handling, storage or safekeeping. The court,

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[673] CPC 319. §

[674] CPC 321. §

prosecution office, or investigating authority passing a decision lifting the seizure of the thing concerned shall decide on this matter in its decision. The person concerned may enforce claims exceeding this amount according to the provisions of civil law.[675]

A thing to be released to a defendant may be retained to secure the payment of any financial penalty, forfeiture of assets, or criminal costs payable by him; provisions to this end shall be included in the conclusive decision. When the seizure is lifted, a thing to be released to a defendant may be retained, upon a motion from a civil party, to secure a civil claim; provisions to this end shall be included in the conclusive decision. The retention to secure a civil claim shall be lifted if the civil party concerned does not file and application for enforcement within two months after the time limit set for payment expires, or the civil party concerned does not apply for a security measure in a civil action within two months after he is order to enforce his civil claim by other legal means.[676]

### 4.10. Sequestration (CPC)

Sequestration means the suspension of a right of disposal over the sequestrated thing for the purpose of securing the forfeiture of assets or a civil claim.

Sequestration may be ordered regarding

- a thing,
- scriptural money or electronic money,
- a financial instrument as defined in the Act on investment undertakings,
- any other right of pecuniary value, or
- any other claim of pecuniary nature.

Sequestration may be ordered if (1) a proceeding is conducted because of a criminal offence with regard to which the forfeiture of assets may be ordered, or (2) its purpose is to secure a civil claim, and it is reasonable to assume that enforcing the forfeiture of assets, or satisfying the civil claim, would be frustrated.

If a real estate is to be confiscated, sequestration shall be ordered.[677]

Sequestration may be ordered to secure a civil claim upon a motion by the civil party concerned regarding specified assets owned by, or due to, the defendant or the person reasonably suspected of having committed the criminal offence. Sequestration may also be ordered if a civil claim specified in section 557 is sent by the proceeding court to a court with subject-matter and territorial jurisdiction under the Act on the Code of Civil Procedure.

Before the indictment, sequestration may be ordered to secure a civil claim upon a motion from an aggrieved party if the aggrieved party submitted a notice of his intent to enforce a civil claim, and his notice contains all data required CPC. If a notice is incomplete, the proceeding court, prosecution office, or investigating authority shall inform the aggrieved party accordingly when a motion for sequestration is submitted.

If the court, in its conclusive decision that is not final and binding, ordered forfeiture of assets or granted a civil claim, it may order sequestration as security, upon a motion from the civil party regarding a civil claim, or otherwise also ex officio, until the proceeding is concluded with final and binding effect.[678]

Sequestration ordered to secure a forfeiture of assets may also affect assets that may not be subject to forfeiture of assets, provided that the purpose of sequestration is to safeguard such assets and the separation of assets gained from committing a criminal offence would require

[675] CPC 322. §
[676] CPC 323. §
[677] CPC 324. §
[678] CPC 325. §

considerable time. A sequestration may last until the separation of assets, but no longer than three months.[679]

Sequestration may be ordered by the court, the prosecution service, or the investigating authority. Before the indictment, sequestration shall be ordered by a court if (1) its purpose is to secure a civil claim, (2) it affects assets specified in CPC, or (3) the value of the sequestrated assets exceeds one hundred million forints. An aggrieved party may submit a motion for sequestration to the proceeding prosecution office before the indictment. The prosecution office shall forward the motion by the aggrieved party, together with all case documents, to the court without delay.

If sequestration may be ordered by a court and adopting a court decision required for ordering the sequestration would cause any delay that would significantly jeopardise the purpose of sequestration, the prosecution service or an investigating authority may order the sequestration until the court decision is adopted. In such a situation, the permission of thecourt shall be obtained ex-post without delay. If the court does not order sequestration, it shall order the sequestration to be lifted and make arrangements for the enforcement of such order without delay.[680]

### 4.10.1. Enforcing sequestration. Redeeming sequestered assets

If there is a publicly certified register of the sequestered assets, sequestration shall be carried out by entering the sequestration into the publicly certified register concerned. If there is no publicly certified register of the sequestered assets, an economic operator capable of enforcing the suspension of the right of disposal over the sequestered assets shall be designated to carry out the sequestration. Measures for the enforcement of sequestration shall be taken without delay.

The organ keeping the publicly certified register, or the designated economic operator, shall enforce the sequestration without delay and shall inform the court, prosecution office, or investigating authority that ordered the sequestration about the completion of its enforcement. If the thing to be sequestered to secure a civil claim is a movable thing and doing so is necessary to preserve the thing, the court, prosecution office, or investigating authority that ordered sequestration may, in addition to the measure specified in CPC, take the thing into possession. The provisions on enforcing seizure shall apply as appropriate to taking into possession a thing sequestered in such a manner. Sequestration of a thing under special protection granted by the Act on the special protection of borrowed cultural goods may be enforced after the period of special protection expires.[681]

If sequestration was ordered to secure a forfeiture of assets, and no wellgrounded claim for taking the sequestered assets available was submitted, the person who was entitled to dispose of such assets when the sequestration was ordered may move for a accepting the redemption of the sequestered assets.

The prosecution service, before the indictment, or the court, after the indictment, shall decide on accepting the redemption of any sequestered asset. The redemption amount shall be determined by the prosecution service or the court. The redemption amount shall be set at the estimated value of the assets concerned. The motion to accept the redemption of an asset shall be dismissed if (1) the person concerned disputes the amount determined, (2) determining the redemption amount would protract the proceeding, or (3) determining the redemption amount would involve disproportional costs.

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[679] CPC 326. §
[680] CPC 327. §
[681] CPC 328. §

No legal remedy shall lie against the dismissal of a motion to accept the redemption of asequestered asset. An amount paid as redemption shall take the place of the sequestered assets and shall be subject to sequestration without a separate decision to that effect; upon such a redemption, the sequestration of the originally sequestered assets shall cease. In such an event, the forfeiture of assets shall be ordered with regard to the consideration replacing the assets concerned. If the sequestration was ordered to secure a civil claim, the provisions laid down in CPC shall apply to the redemption of sequestered assets, with the provison that

- the redemption of sequestered assets may not be accepted without the consent of the civil party or, before the indictment, the aggrieved party concerned,
- the redemption amount may not exceed the amount of the claim specified by the civil party or, before the indictment, the aggrieved party, and
- the court shall decide on accepting the redemption of sequestered assets.[682]

### 4.10.2. Lifting sequestration

The aggrieved party or the civil party may initiate making the sequestrated assets available before the court with subject-matter and territorial jurisdiction pursuant to the Act on the Code of Civil Procedure.[683]

Sequestration shall be lifted if

- the grounds for ordering sequestration have ceased,
- the criminal proceeding is terminated, or the time limit for the investigation has expired,
- the proceeding is completed without ordering the forfeiture of assets, or the civil claim is dismissed,
- the court adjudicated on the merits the existence of the right enforced by civil claim and the amount of the claim,
- it was ordered to secure a civil claim, and the court orders the enforcement by other legal means of the civil claim, or
- the aggrieved party abandons his civil claim or the civil party withdrew his civil claim.[684]

Sequestration may be lifted by the ordering organ before the indictment, or the court after the indictment. Sequestration ordered by an investigating authority may be lifted also by the prosecution service or the court before the indictment. Sequestration ordered by a court may be lifted also by the prosecution service before the indictment.

If a sequestered real estate is sold pursuant to the Act on enforcement procedures applied by the tax authority, or the Act on judicial enforcement, part of the sale revenue, as specified in the relevant Act, shall replace the real estate sold, and it shall be subject to sequestration without a specific decision to that effect. The sequestration of the real estate shall terminate upon its sale.

If the sequestered assets are the assets of an economic operator in liquidation, and the sequestration is to be considered a creditor claim in the liquidation proceeding pursuant to the Act on bankruptcy procedure and liquidation procedure, then this creditor claim shall replace the sequestered assets upon registration by the liquidator and shall be subject to sequestration without any separate decision; sequestration shall terminate as regards the original assets.

If the assets of the debtor economic operator are distributed in a liquidation proceeding, the creditor claim referred to in paragraph (3) shall be replaced by the relevant part of the distributed assets which shall be subject to sequestration without any separate decision; sequestration shall

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[682] CPC 329. §
[683] CPC 330. §
[684] CPC 331. §

terminate as regards the creditor claim. If when the assets are distributed, the creditor claim cannot be replaced by the distributed assets, the sequestration shall terminate.[685]

### 4.11. Asset management during seizure and sequestration

Any thing, electronic data, or assets seized or sequestration for the purpose of confiscation or forfeiture of assets shall be managed during the period of seizure or sequestration according to the rules of normal operation. In the course of the seizure or sequestration, it shall be ensured that the value of criminal assets is not reduced in any way beyond normal depreciation. In the course of managing criminal assets, disposing of such assets in any way shall be aimed at preserving the value of the criminal assets. Any asset transformed by a measure taken during asset management shall replace the original asset, and it shall be subject to seizure or sequestration without any specific decision.[686]

The organ responsible for handling exhibits and criminal assets shall participate, as provided for by the applicable legislation, in the management of criminal assets and seized means of evidence. The organ responsible for handling exhibits and criminal assets shall carry out, as provided for by applicable legislation, tasks concerning criminal assets and seized means of evidence, including, in particular, their (1) registration, (2) storage, safekeeping, and (3) management.

The organ responsible for handling exhibits and criminal assets shall, in situations specified in an Act, take any and all measures, and initiate any and all criminal procedural decisions at the competent court, prosecution office, or investigating authority that is necessary to preserve the value of criminal assets and seized means of evidence.[687]

### 4.12. Rendering electronic data temporarily inaccessible

Rendering electronic data temporarily inaccessible means that the right of disposal over data published on an electronic communications network is restricted, and access to such data is prevented, with temporary effect.

Rendering electronic data temporarily inaccessible may be ordered where a proceeding is conducted regarding a criminal offence subject to public prosecution, with regard to which rendering electronic data permanently inaccessible may be ordered, and doing so is necessary to interrupt the criminal offence.

Rendering electronic data temporarily inaccessible may be ordered by a court. Rendering electronic data temporarily inaccessible may be ordered in the form of (1) temporarily removing the electronic data concerned, or (2) temporarily preventing access to the electronic data concerned.

The entity obliged to render electronic data temporarily inaccessible shall inform its users about the legal basis of removing, or preventing access to, a piece of content. The information to be provided shall be set out in a separate law. An order to remove electronic data temporarily and an order to preserve electronic data may be issued simultaneously.[688]

#### 4.12.1. Removing electronic data temporarily

[685] CPC 332. §
[686] CPC 333. §
[687] CPC 334. §
[688] CPC 335. §

The hosting service provider or the intermediary service provider providing hosting services, as defined in the Act on certain issues of electronic commerce services and information society services, that processes the electronic data concerned shall be ordered to temporarily remove the electronic data. A removing entity shall remove the electronic data temporarily within one working day after the corresponding decision is communicated to it.

An order to remove electronic data temporarily shall be lifted and an order to restore the electronic data concerned shall be issued by a court if (1) the grounds for the order have ceased, or (2) the proceeding has been terminated. The temporary removal of electronic data shall terminate when a criminal proceeding is terminated with final and binding effect.

The decision removing electronic data temporarily and restoring electronic data shall be communicated to the removing entity, and the removing entity shall restore the electronic data within one working day after the corresponding decision was communicated to it. The decision referred to in CPC shall be served on the person entitled to dispose of the electronic data concerned if his identity and contact details are known from the available data of the proceeding. The court may, ex officio or upon a motion from the prosecution service, impose a disciplinary fine on a removing entity if it fails to perform an obligation to temporarily remove or restore electronic data.[689]

### 4.12.2. Preventing access to electronic data temporarily. Call for the voluntary removal of electronic data

In a criminal proceeding instituted on the ground of drug trafficking, inciting substance abuse, facilitating drug production, abuse of drug precursors, abuse of new psychoactive substances, child pornography, criminal offence against the State, terrorist act, terrorism financing, or incitement to war, the court shall issue an order to temporarily prevent access to all electronic data relating to any of the criminal offences referred to in this paragraph, provided that

- the removing entity failed to perform its obligation to temporarily remove the electronic data concerned,
- a request to a foreign authority for legal assistance concerning the temporary removal of electronic data did not bring any result within thirty days after the corresponding request was issued by the court,
- identifying the removing entity is impossible or would involve disproportional difficulty, or
- no result can be expected from sending a request to a foreign authority for legal assistance concerning the temporary removal of electronic data, or sending such a request would involve disproportional difficulty.

In its decision, the court may order an electronic communications service provider to prevent access to electronic data temporarily. Such a decision shall be served on the person entitled to dispose of the electronic data concerned if his identity and contact details are known from the data of the proceeding.

The court shall communicate the order to temporarily prevent access to electronic data also to the National Media and Infocommunications Authority (hereinafter the "NMHH") for the purpose of organising the enforcement of, and verifying compliance with, the coercive measure. The NMHH shall enter the order to temporarily prevent access to electronic data into the central database of decisions to render electronic data inaccessible and, at the same time, it shall notify the electronic communications service providers concerned about the court decision by

[689] CPC 336. §

electronic means without delay; the service providers concerned shall temporarily prevent access to the electronic data within one working day after receipt of the notice. If an electronic communications service provider fails to perform this obligation, the NMHH shall inform the court accordingly without delay.

A person entitled to dispose of the electronic data concerned may submit an appeal against such a decision within eight days of service.

The court shall lift a temporary prevention of access to electronic data if

- the hosting service provider concerned performs its obligation to remove electronic data temporarily,
- the grounds for the order have otherwise ceased, or
- the proceeding has been terminated, unless rendering electronic data permanently inaccessible may be ordered under section 77 (2) of the Criminal Code.

The temporary prevention of access to electronic data shall terminate when a criminal proceeding is terminated with final and binding effect.

The court decision lifting, or on the termination of, a temporary prevention of access to electronic data shall be served on the person entitled to dispose of the electronic data concerned if his identity and contact details are known from the data of the proceeding. An appeal against such a court decision may be filed by the prosecution service only.

If an electronic communications service provider fails to perform its obligation to restore access, the NMHH shall inform the court accordingly without delay.

The court may, ex officio or upon a motion from the prosecution service, impose a disciplinary fine on an electronic communications service provider if it fails to comply with its obligation to temporarily prevent, or to restore, access to electronic data.[690]

Before issuing an order to render electronic data temporarily inaccessible, the prosecution service or the investigating authority may issue a call to a media content provider, as defined in the Act on the freedom of the press and the fundamental rules on media contents, or a hosting service provider or an intermediary service provider providing hosting services, which is capable of preventing access to the electronic data concerned, to remove electronic data voluntarily, unless doing so would harm the interests of a criminal proceeding. Compliance with such a call shall not be mandatory; such a call shall be aimed at accelerating the prevention of access to the electronic data concerned.

### 4.13. Article 5 of the Convention – Right to liberty and security (ECrHR)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

[690] CPC 337. §

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

The Court's judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[691] The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[692] Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle „imposes a shared responsibility between the States Parties and the Court" as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto.

### 4.13.1. Deprivation of liberty. Criteria to be applied

In proclaiming the „right to liberty", Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4.[693]

The difference between restrictions on movement serious enough to fall within the ambit of a
deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance.[694]

A deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms.[695]

The Court does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty, and undertakes an autonomous assessment of the situation.[696]

In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a

[691] Ireland v. the United Kingdom (1978)
[692] Konstantin Markin v. Russia (2012)
[693] De Tommaso v. Italy (2017)
[694] Stanev v. Bulgaria (2012)
[695] Guzzardi v. Italy (1980)
[696] Creangă v. Romania (2012)

whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[697]

The requirement to take account of the "type" and "manner of implementation" of the measure
in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good.[698]

In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.[699]

Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty.[700]

The purpose of measures taken by the authorities depriving individuals of their liberty is not decisive for the assessment of whether there has in fact been a deprivation of liberty. The Court takes this into account only at a later stage of its analysis, when examining the compatibility of the measures with Article 5 § 1.[701]

The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question.[702]

Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.[703]

However, where an eight-year-old child was left alone in a police station for over twenty-four hours, it was not necessary to assess whether he had been kept in closed and guarded premises, since he could not be expected to leave the police station alone.[704]

Where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion.[705]

An element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.[706]

The fact that a person is not handcuffed, put in a cell or otherwise physically restrained does not constitute a decisive factor in establishing the existence of a deprivation of liberty.[707]

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[697] Medvedyev and Others v. France (2010)
[698] Austin and Others v. the United Kingdom (2012)
[699] R.R. and Others v. Hungary (2021)
[700] Khlaifia and Others v. Italy (2016)
[701] Rozhkov v. Russia (2017)
[702] Storck v. Germany (2005)
[703] Guzzardi v. Italy (1980)
[704] Tarak and Depe v. Turkey (2019)
[705] Rantsev v. Cyprus and Russia (2010)
[706] Krupko and Others v. Russia (2014)
[707] M.A. v. Cyprus (2013)

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action.[708]

The fact that a person lacks legal capacity does not necessarily mean that he is unable to understand and consent to situation.[709]

### 4.13.2. Measures adopted within a prison. Security checks of air travellers. Deprivation of liberty outside formal arrest and detention

Disciplinary steps imposed within a prison which have effects on conditions of detention cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and fall outside the scope of Article 5 § 1 of the Convention.[710]

Where a passenger has been stopped by border officials during border control in an airport in order to clarify his situation and where this detention has not exceeded the time strictly necessary to comply with relevant formalities, no issue arises under Article 5 of the Convention.[711]

The question of applicability of Article 5 has arisen in a variety of circumstances, including:

- the placement of individuals in psychiatric or social care institutions;[712]
- taking of an individual by paramedics and police officers to hospitals;[713]
- confinement in airport transit zones;[714]
- confinement in land border transit zones;[715]
- questioning in a police station;[716]
- placement in a police car to draw up an administrative-offence report;[717]
- stops and searches by the police;[718]
- house search;[719]
- police escorting;[720]
- house arrest;[721]
- keeping irregular migrants in asylum hotspot facilities.[722]

### 4.13.3. Positive obligations with respect to deprivation of liberty. Lawfulness of the detention under Article 5 § 1

Article 5 § 1, first sentence, lays down a positive obligation on the State not only to refrain from

[708] H.L. v. the United Kingdom (2004)
[709] D.D. v. Lithuania (2012)
[710] Bollan v. the United Kingdom (2000)
[711] Gahramanov v. Azerbaijan (2013)
[712] De Wilde, Ooms and Versyp v. Belgium (1971)
[713] Aftanache v. Romania (2020)
[714] Riad and Idiab v. Belgium (2008)
[715] Ilias and Ahmed v. Hungary (2019)
[716] Cazan v. Romania (2016)
[717] Zelčs v. Latvia (2020)
[718] Foka v. Turkey (2008)
[719] Stănculeanu v. Romania (2018)
[720] Tsvetkova and Others v. Russia (2018)
[721] Buzadji v. the Republic of Moldova (2016)
[722] J.R. and Others v. Greece (2018)

active infringement of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction.[723]

The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.[724]

The responsibility of a State is engaged if it acquiesces in a person's loss of liberty by private individuals or fails to put an end to the situation.[725]

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty.[726]

The right to liberty and security is of the highest importance in a „democratic society" within the meaning of the Convention.[727] The Court therefore considers that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision.[728]

The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible, inter alia, with the very purpose of Article 5 of the Convention.[729] It is also incompatible with the requirement of lawfulness under the Convention.[730]

No deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1.[731]

Three strands of reasoning may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls (under Article 5 §§ 3 and 4).[732]

As regards detention taking place during an international armed conflict, the safeguards under Article 5 must be interpreted and applied taking into account the context and the provisions of international humanitarian law.[733]

If a given instance of deprivation of liberty does not fit within the confines of one of the sub-paragraphs of Article 5, as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.[734]

In order to meet the requirement of lawfulness, detention must be „in accordance with a procedure prescribed by law". The Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law.[735] In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned.

For example, the Court found that there had been a violation of Article 5 where the authorities

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[723] El-Masri v. the former Yugoslav Republic of Macedonia (2012)
[724] „Storck v. Germany" (2005)
[725] Medova v. Russia (2009)
[726] Selahattin Demirtaş v. Turkey (2020)
[727] Ladent v. Poland (2008)
[728] Belozorov v. Russia and Ukraine (2015)
[729] Kurt v. Turkey (1998)
[730] Anguelova v. Bulgaria (2002)
[731] I.S. v. Switzerland (2020)
[732] Buzadji v. the Republic of Moldova (2016)
[733] Hassan v. the United Kingdom (2014)
[734] Merabishvili v. Georgia (2017)
[735] Medvedyev and Others v. France (2010)

had failed to lodge an application for extension of a detention order within the time-limit prescribed by law.[736] By contrast, an alleged breach of a circular concerning the manner in which inquiries had to be conducted into certain types of offences did not invalidate the domestic legal basis for arrest and subsequent detention.[737] Where the trial court had refused to release the applicant despite the Constitutional Court's decision finding his detention to be unlawful, the applicant's continued pre-trial detention could not be regarded as „in accordance with a procedure prescribed by law".[738]

While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. In cases where Article 5 § 1 of the Convention is at stake, the Court must exercise a certain power to review whether national law has been observed.[739] In doing so, the Court must have regard to the legal situation as it stood at the material time.[740]

The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it.[741]

The general principles implied by the Convention to which the Article 5 § 1 case-law refers are the principle of the rule of law and, connected to the latter, that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness which is, moreover, the very aim of Article 5.[742]

Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[743]

Article 5 § 1 thus does not merely refer back to domestic law, it also relates to the „quality of the law" which implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application. Factors relevant to this assessment of the „quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the „lawfulness" and "length" of his continuing detention.[744]

For example, the practice of keeping a person in detention under a bill of indictment without any specific basis in the national legislation or case-law is in breach of Article 5 § 1.[745] Likewise, the practice of automatically renewing pre-trial detention without any precise legislative foundation is contrary to Article 5 § 1.[746]

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[736] G.K. v. Poland (2004)
[737] Talat Tepe v. Turkey (2004)
[738] Şahin Alpay v. Turkey (2018)
[739] Creangă v. Romania (2012)
[740] Włoch v. Poland (2000)
[741] Plesó v. Hungary (2012)
[742] Simons v. Belgium (2012)
[743] Medvedyev and Others v. France (2010)
[744] J.N. v. the United Kingdom (2016)
[745] Baranowski v. Poland (2007)
[746] Svipsta v. Latvia (2006)

By contrast, the continued detention of a person on the basis of an order by the Indictment Chamber requiring further investigations, without issuing a formal detention order, did not disclose a violation of that Article.[747]

Provisions which are interpreted in an inconsistent and mutually exclusive manner by the domestic authorities will, too, fall short of the "quality of law" standard required under the Convention.[748] However, in the absence of any case-law, the Court is not called upon to give its own interpretation of national law. Therefore, it may be reluctant to conclude that the national courts have failed to act in accordance with a procedure prescribed by law.[749]

Although diplomatic notes are a source of international law, detention of crew on the basis of such notes is not lawful within the meaning of Article 5 § 1 of the Convention insofar as they are not sufficiently precise and foreseeable. In particular, the lack of specific reference to the potential arrest and detention of crew members will fall foul of the requirements of legal certainty and foreseeability under Article 5 § 1 of the Convention.[750]

The requirements of legal certainty become even more paramount where a judge has been deprived of his liberty.[751] Where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention.[752]

In addition, any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness.[753]

The notion of „arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[754]

The notion of arbitrariness varies to a certain extent depending on the type of detention involved. The Court has indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1; where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied on and the detention in question.[755]

The speed with which the domestic courts replace a detention order which has either expired or has been found to be defective is a further relevant element in assessing whether a person's detention must be considered arbitrary.[756] Thus, the Court considers in the context of sub-paragraph (c) that a period of less than a month between the expiry of the initial detention order and the issuing of a fresh, reasoned detention order following a remittal of the case from the

[747] Laumont v. France (2001)
[748] Nasrulloyev v. Russia (2007)
[749] Włoch v. Poland (2000)
[750] Medvedyev and Others v. France (2010)
[751] Baş v. Turkey (2020)
[752] Alparslan Altan v. Turkey (2019)
[753] S., V. and A. v. Denmark (2018)
[754] A. and Others v. the United Kingdom (2009)
[755] Saadi v. the United Kingdom (2008)
[756] Mooren v. Germany (2009)

appeal court to a lower court did not render the applicant's detention arbitrary.[757] In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance, in which the applicant remained in a state of uncertainty as to the grounds for his detention on remand, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant's detention arbitrary.[758]

A period of detention is, in principle, „lawful" if it is based on a court order. Detention on the basis of an order later found to be unlawful by a superior court may still be valid under domestic law.[759] Detention may remain in accordance with „a procedure prescribed by law" even though the domestic courts have admitted that there had been flaws in the detention proceedings but held the detention to be lawful nevertheless.[760] Thus, even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1.[761]

The Court distinguishes between acts of domestic courts which are within their jurisdiction and those which are in excess of jurisdiction. Detention orders have been found to be ex facie invalid in cases where the interested party did not have proper notice of the hearing, the domestic courts had failed to conduct the means inquiry required by the national legislation, or the lower courts had failed properly to consider alternatives to imprisonment.[762] On the other hand, where there was no evidence that the national courts' conduct amounted to a „gross or obvious irregularity", the Court held that the detention was lawful.

The absence or lack of reasoning in detention orders is one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5 § 1. Thus, the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1.[763]

Likewise, a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness.[764]

However, the Court may consider the applicant's detention to be in conformity with the domestic legislation despite the lack of reasons in the detention order where the national courts were satisfied that there had been some grounds for the applicant's detention on remand. Furthermore, where the domestic courts had quashed the detention order for lack of reasons but considered that there had been some grounds for the applicant's detention, the refusal to order release of the detainee and remittal of the case to the lower courts for determination of the lawfulness of detention did not amount to a violation of Article 5 § 1.

A breach of Article 5 § 1 has occurred where a lack of any reasons for ordering pre-trial detention was combined with a failure to fix its duration. However, there is no requirement for the national courts to fix the duration of pre-trial detention in their decisions regardless of how the matter is regulated in domestic law.[765] The existence or absence of time-limits is one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was foreseeable in its application and provided safeguards against

[757] Minjat v. Switzerland (2003)
[758] Khudoyorov v. Russia (2005)
[759] Bozano v. France (1986)
[760] Erkalo v. the Netherlands (1998)
[761] Yefimenko v. Russia (2013)
[762] Lloyd and Others v. the United Kingdom (2005)
[763] Stašaitis v. Lithuania (2002)
[764] Khudoyorov v. Russia (2005)
[765] Merabishvili v. Georgia (2017)

arbitrary detention.[766] Moreover, authorities should consider less intrusive measures than detention.[767]

The following procedural flaws have been found not to render the applicant's detention unlawful:

- a failure to notify the detention order officially to the accused did not amount to a „gross or obvious irregularity" in the exceptional sense indicated by the case-law given that the authorities genuinely believed that the order had been notified to the applicant;[768]
- a mere clerical error in the arrest warrant or detention order which was later cured by a judicial authority;[769]
- the replacement of the formal ground for an applicant's detention in view of the facts mentioned by the courts in support of their conclusions.[770]

A failure to give adequate reasons for such replacement however may lead the Court to conclude that there has been a breach of Article 5 § 1.[771]

It is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release. The Court however recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable. Nevertheless, the national authorities must attempt to keep it to a minimum.[772] Administrative formalities connected with release cannot justify a delay of more than a few hours.[773] A wrongful arrest of individuals when the basis for their detention had ceased to exist, as a result of administrative shortcomings in the transmission of documents between various State bodies, discloses a breach of Article 5 even if it is of short duration.[774]

### 4.14. Authorised deprivations of liberty under Article 5 § 1 (ECrHR)

Article 5 § 1 (a) applies to any „conviction" occasioning deprivation of liberty pronounced by a court and makes no distinction based on the legal character of the offence of which a person has been found guilty whether classified as criminal or disciplinary by the internal law of the State in question.[775]

The term signifies both a finding of guilt, and the imposition of a penalty or other measure involving the deprivation of liberty.[776]

Matters of appropriate sentencing fall in principle outside the scope of the Convention. It is not the role of the Court to decide what is the appropriate term of detention applicable to a particular offence. However, measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application.[777]

The provision does not prevent Contracting States from executing orders for detention imposed by competent courts outside their territory.[778] Although Contracting States are not

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[766] Meloni v. Switzerland (2008)
[767] Ambruszkiewicz v. Poland (2006)
[768] Marturana v. Italy (2008)
[769] Douiyeb v. the Netherlands (1999)
[770] Gaidjurgis v. Lithuania (2001)
[771] Calmanovici v. Romania (2008)
[772] Giulia Manzoni v. Italy (1997)
[773] Ruslan Yakovenko v. Ukraine (2015)
[774] Kerem Çiftçi v. Turkey (2021)
[775] Galstyan v. Armenia (2007)
[776] Del Río Prada v. Spain (2013)
[777] Aleksandr Aleksandrov v. Russia (2018)
[778] X. v. Germany (1963)

obliged to verify whether the proceedings in a foreign State resulting in the conviction were compatible with all the requirements of Article 6, a conviction can not be the result of a flagrant denial of justice.[779] If a conviction is the result of proceedings which were „manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Article 5 § 1 (a).[780]

*a) Competent court:*
The term „court" denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure. The forms of the procedure need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. In addition, the body in question must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful.[781]

A court is not „competent" if its composition is not „established by law".[782]

*b) Detention must follow „after" conviction:*
The term „after" does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the conviction. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue.[783] However, with the passage of time, the causal link gradually becomes less strong and might eventually be broken if a position were reached in which a decision not to release and to re-detain (including the prolonging of preventive detention) were based on grounds unconnected to the objectives of the legislature or the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5.

The Court has found that various forms of preventive detention beyond the prison sentence constituted an applicant's detention „after conviction by a competent court." In such circumstances the detention at issue was not part of a penalty, but rather ensued from another „measure involving deprivation of liberty".[784]

A decision not to release a detainee may become inconsistent with the objectives of the sentencing court's detention order if the person concerned continued to be detained on the grounds of a risk that he or she would reoffend, but the person is, at the same time, deprived of the necessary means, such as suitable therapy, to demonstrate that he or she was no longer dangerous.[785]

The reasonableness of the decision to extend a person's detention in order to protect the public is called into question where the domestic courts plainly had at their disposal insufficient elements warranting the conclusion that the person concerned was still dangerous to the public, notably because the courts failed to obtain indispensable and sufficiently recent expert advice. The question whether medical expertise was sufficiently recent is not answered by the Court in a static way but depends on the specific circumstances of the case, in particular, whether there

[779] Ilaşcu and Others v. Moldova and Russia (2004)
[780] Willcox and Hurford v. the United Kingdom (2013)
[781] X v. the United Kingdom (1981)
[782] Yefimenko v. Russia (2013)
[783] James, Wells and Lee v. the United Kingdom (2012)
[784] Ruslan Yakovenko v. Ukraine (2015)
[785] Klinkenbuß v. Germany (2016)

were potentiallysignificant changes in the applicant's situation since the last examination by an expert.[786] Moreover, when the offender has been detained in the same institution for a considerable time and his therapeutic treatment has reached a deadlock, it is particularly important to consult an external expert in order to obtain fresh propositions for initiating the necessary treatment.[787]

A defendant is considered to be detained „after conviction by a competent court" within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal.[788] The term „after conviction" cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest of convicted persons, who appeared for trial while still at liberty. It cannot be overlooked that the guilt of a person, detained during appeal or review proceedings, has been established in the course of a trial conducted in accordance with the requirements of Article 6.[789]

Article 5 § 1 (a) applies where persons of unsound mind are detained in psychiatric facilities after conviction.[790]

*c) Impact of appellate proceedings:*

A period of detention will, in principle, be lawful if it is carried out pursuant to a court order. A

subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. The Strasbourg organs have refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by domestic appellate courts to have been based on errors of fact or law.[791] However, detention following conviction is unlawful where it has no basis in domestic law or is arbitrary.[792]

*d) Detention for non-compliance with a court order or legal obligation:*

The choice of the language in the first limb of Article 5 § 1 (b) presumes that the person arrested or detained must have had an opportunity to comply with a court order and has failed to do so.[793] Individuals cannot be held accountable for not complying with court orders if they have never been informed of them.

A refusal of a person to undergo certain measures or to follow a certain procedure prior to being ordered to do so by a competent court has no presumptive value in decisions concerning compliance with such a court order.[794]

The domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty. Factors to be taken into consideration include the purpose of the order, the feasibility of compliance with the order, and the duration of the detention. The issue of proportionality assumes particular significance in the overall scheme of things.[795]

The Convention organs have applied the first limb of Article 5 § 1 (b) to cases concerning, for example, a failure to pay a court fine, a refusal to undergo a medical examination concerning mental health, or a blood test ordered by a court, a failure to observe residence restrictions, a

[786] D.J. v. Germany (2017)
[787] Tim Henrik Bruun Hansen v. Denmark (2019)
[788] Ruslan Yakovenko v. Ukraine (2015)
[789] Wemhoff v. Germany (1968)
[790] Klinkenbuß v. Germany (2016)
[791] Benham v. the United Kingdom (1996)
[792] Tsirlis and Kouloumpas v. Greece (1997)
[793] Beiere v. Latvia (2011)
[794] Petukhova v. Russia (2013)
[795] Gatt v. Malta (2010)

failure to comply with a decision to hand over children to a parent, a failure to observe binding-over orders, a breach of bail conditions and a confinement in a psychiatric hospital against arbitrariness.[796]

The second limb of Article 5 § 1 (b) allows for detention only to „secure the fulfilment" of any obligation prescribed by law. There must therefore be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist.[797] Article 5 § 1 (b) refers back to domestic law as the contents of the obligation, as well as to the procedure to be observed for imposing and complying with such an obligation.[798]

The obligation must be of a specific and concrete nature. A wide interpretation would entail consequences incompatible with the notion of the rule of law.[799] The obligation not to commit a criminal offence can only be considered as „specific and concrete" if the place and time of the imminent commission of the offence and its potential victims have been sufficiently specified. In the context of a duty to refrain from doing something, as distinct from a duty to perform a specific act, it is necessary, prior to concluding that a person has failed to satisfy his obligation at issue, that the person concerned was made aware of the specific act which he or she was to refrain from committing and that the person showed himself or herself not to be willing to refrain from so doing.[800]

The duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific, as long as no specific measures have been ordered which have not been complied with.[801]

An arrest will only be acceptable in Convention terms if „the obligation prescribed by law" cannot be fulfilled by milder means. The principle of proportionality further dictates that a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.[802]

In this assessment the Court considers the following points relevant: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention.[803]

Situations examined under the second limb of Article 5 § 1 (b) include, for example,

- an obligation to submit to a security check when entering a country;[804]
- to disclose details of one's personal identity;[805]
- to undergo a psychiatric examination;[806]
- to leave a certain area;[807]
- to appear for questioning at a police station;[808]
- to keep the peace by not committing a criminal offence;[809]

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[796] Trutko v. Russia (2016); Beiere v. Latvia (2011), where the domestic proceedings did not provide sufficient guarantees
[797] Vasileva v. Denmark (2003)
[798] Rozhkov v. Russia (2017)
[799] S., V. and A. v. Denmark (2018)
[800] Kurt v. Austria (2021)
[801] S., V. and A. v. Denmark (2018)
[802] Saadi v. the United Kingdom (2008)
[803] Vasileva v. Denmark (2003)
[804] McVeigh and Others v. the United Kingdom (1981)
[805] Vasileva v. Denmark (2003)
[806] Nowicka v. Poland (2002)
[807] Epple v. Germany (2005)
[808] Iliya Stefanov v. Bulgaria (2008)
[809] Ostendorf v. Germany (2013)

- to reveal the whereabouts of attached property to secure payment of tax debts.[810]

*e) Purpose of arrest or detention:*

„Effected for the purpose of bringing him before the competent legal authority" qualifies all the three alternative bases for arrest or detention under Article 5 § 1 (c).[811] A person may be detained under the first limb of Article 5 § 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence.[812]

Pre-trial detention is capable of operating as a preventive measure only to the extent that it is justified on the grounds of a reasonable suspicion concerning an existing offence in relation to which criminal proceedings are pending.[813] The second alternative of that provision („when it is reasonably considered necessary to prevent his committing an offence") does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence as regards, in particular, the place and time of its commission and its victim(s). In order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention.[814]

The second limb of Article 5 § 1 (c) provides a distinct ground for detention, independent of the existence of „a reasonable suspicion of his having committed an offence." It thus applies to preventive detention outside criminal proceedings.[815]

The existence of the purpose to bring a suspect before a court has to be considered independently of the achievement of that purpose. The standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest or while the applicant was in custody.[816]

The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest.[817]

The „purpose" requirement of bringing a detainee before a court is to be applied with a degree of flexibility to detention falling under the second limb of Article 5 § 1 (c), in order not to prolong unnecessarily short preventive detention. When a person is released from preventive detention after a short period of time, either because the risk has passed or, for example, because a prescribed short time-limit has expired, the purpose requirement should not constitute an obstacle to preventive detention. When criminal proceedings were suspended for an unspecified time during the Covid-19 pandemic, the basis of the applicant's detention during the period in question continued to be for the purposes of being brought before the competent legal authority.[818]

Detention pursuant to Article 5 § 1 (c) must be a proportionate measure to achieve the stated aim.[819] It is incumbent on the domestic authorities to convincingly demonstrate that detention

[810] Göthlin v. Sweden (2014)
[811] Lawless v. Ireland (1961)
[812] Selahattin Demirtaş v. Turkey (2020)
[813] Kurt v. Austria (2021)
[814] A. v. Denmark (2018)
[815] S., V. and A. v. Denmark (2018)
[816] Petkov and Profirov v. Bulgaria (2014)
[817] Mehmet Hasan Altan v. Turkey (2018)
[818] Fenech v. Malta (2021)
[819] Ladent v. Poland (2008)

is necessary. Where the authorities order the detention of an individual pending trial on the grounds of his or her failure to appear before them when summoned, they should make sure that the individual in question had been given adequate notice and sufficient time to comply and take reasonable steps to verify that he or she has in fact absconded.[820]

The necessity test under the second limb of Article 5 § 1 (c) requires that measures less severe than detention have to be considered and found to be insufficient to safeguard the individual or public interest. The offence in question has to be of a serious nature, entailing danger to life and limb or significant material damage. In addition, the detention should cease as soon as the risk has passed, which called for monitoring, the duration of the detention being also a relevant factor.[821]

The expression „competent legal authority" has the same meaning as „judge or other officer authorised by law to exercise judicial power" in Article 5 § 3.[822]

*f) Meaning of „reasonable suspicion":*

The „reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c).[823] The fact that a suspicion is held in good faith is insufficient in itself.[824]

A „reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.[825] Therefore, a failure by the authorities to make a genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded disclosed a violation of Article 5 § 1 (c).[826]

Suspicions must be justified by verifiable and objective evidence. Vague and general references in the authorities' decisions and documents to a legal provision or unspecified „case material" cannot be regarded as sufficient to justify the „reasonableness" of a suspicion, in the absence of any specific statement, information or complaint.[827]

What is reasonable depends on all the circumstances, but the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge.[828]

The term „reasonableness" also means the threshold that the suspicion must meet to satisfy an objective observer of the likelihood of the accusations.[829]

As a rule, problems with the „reasonableness of suspicion" arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a „reasonable suspicion" that the facts at issue had actually occurred. In addition to its factual side, the existence of a "reasonable suspicion" within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered to fall under one of the sections of the law dealing with criminal behaviour. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.[830]

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[820] Vasiliciuc v. the Republic of Moldova (2017)
[821] S., V. and A. v. Denmark (2018)
[822] Schiesser v. Switzerland (1979)
[823] Selahattin Demirtaş v. Turkey (2020)
[824] Sabuncu and Others v. Turkey (2020)
[825] Fox, Campbell and Hartley v. the United Kingdom (1990)
[826] Stepuleac v. Moldova (2007)
[827] Akgün v. Turkey (2021)
[828] Merabishvili v. Georgia (2017)
[829] Kavala v. Turkey (2019)
[830] Selahattin Demirtaş v. Turkey (2020)

Further, it must not appear that the alleged offences themselves were related to the exercise of the applicant's rights under the Convention.[831]

In assessing whether the minimum standard for the reasonableness of a suspicion required for an individual's arrest has been met, the Court has regard to the general context of the facts of a particular case including the applicant's status, the sequence of the events, the manner in which the investigations were carried out and the authorities' conduct.[832]

The minimum standard was not met when the applicants' arrest and detention on suspicion of
having committed the crime of mass disorder were tainted by arbitrariness and formed part of a strategy of the authorities to hinder and put an end to peaceful protests.[833]

While reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained „reasonable" throughout the detention.[834]

In the context of terrorism, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5 § 1 (c) is impaired.[835]

The subsequent gathering of evidence in relation to a particular charge may sometimes reinforce a suspicion linking an applicant to the commission of terrorism-related offences. However, it cannot form the sole basis of a suspicion justifying detention. In any event, the subsequent gathering of such evidence does not release the national authorities from their obligation to provide a sufficient factual basis that could justify a person's initial detention.[836] While the context of a case must be taken into account in interpreting and applying Article 5, the authorities do not have carte blanche to order the detention of an individual during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying the minimum requirements of Article 5 § 1 (c).[837]

Uncorroborated hearsay evidence of an anonymous informant was held not to be sufficient to found „reasonable suspicion" of the applicant being involved in mafia-related activities.[838] By contrast, incriminating statements dating back to a number of years and later withdrawn by the suspects did not remove the existence of a reasonable suspicion against the applicant. Furthermore, it did not have an effect on the lawfulness of the arrest warrant.[839] The Court has also accepted that concrete and detailed statements of an anonymous witness can constitute a sufficient factual basis for a reasonable suspision in the context of organised crime.[840]

*g) The term „offence":*

The term „offence" has an autonomous meaning, identical to that of "criminal offence" in Article 6. The classification of the offence under national law is one factor to be taken into account. However, the nature of the proceedings and the severity of the penalty at stake are also relevant.[841]

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[831] Ragıp Zarakolu v. Turkey (2020)
[832] Ibrahimov and Mammadov v. Azerbaijan (2020)
[833] Shmorgunov and Others v. Ukraine (2021)
[834] Ilgar Mammadov v. Azerbaijan (2014)
[835] O'Hara v. the United Kingdom (2001)
[836] Selahattin Demirtaş v. Turkey (2020)
[837] Akgün v. Turkey (2021)
[838] Labita v. Italy (2000)
[839] Talat Tepe v. Turkey (2004)
[840] Yaygin v. Turkey (2021)
[841] Benham v. the United Kingdom (1996)

*h) Detention of a minor:*

The notion of a minor encompasses persons under the age of 18.[842] Sub-paragraph d) is not only a provision which permits the detention of a minor. It contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of (a) their educational supervision or (b) bringing them before the competent legal authority.[843]

The first limb of Article 5 § 1 d) authorises the deprivation of a minor's liberty in his or her own interests, irrespective of the question whether he or she is suspected of having committed a criminal offence or is simply a child „at risk".[844]

In the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching. Such supervision must embrace many aspects of the exercise, by the authority, of parental rights for the benefit and protection of the person concerned.[845]

„Educational supervision" must nevertheless contain an important core schooling aspect so that schooling in line with the normal school curriculum should be standard practice for all detained minors, even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education. Detention based on „behaviour correction" or the need to prevent a minor from committing further delinquent acts is not permissible under Article 5 § 1 (d) of the Convention.[846]

Sub-paragraph (d) does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.[847]

The placement of a minor in a closed institution must also be proportionate to the aim of „educational supervision." It must be a measure of last resort, taken in the best interests of the child and intended to prevent serious risks for the child's development.[848]

If the State has chosen a system of educational supervision involving a deprivation of liberty, it is obliged to put in place appropriate institutional facilities which meet the security and educational demands of that system in order to satisfy the requirements of Article 5 § 1 d).[849] Regarding implementation of a pedagogical and educational system, the State is to be afforded a certain margin of appreciation.[850]

The Court does not consider that a juvenile holding facility itself constitutes „educational supervision", if no educational activities are provided.[851]

The second limb of Article 5 § 1 (d) governs the lawful detention of a minor for the purpose of bringing him or her before the competent legal authority. According to the travaux préparatoires, this provision was intended to cover detention of a minor prior to civil or administrative proceedings, while the detention in connection with criminal proceedings was intended to be covered by Article 5 § 1 (c). However, the detention of a minor accused of a crime during the preparation of a psychiatric report necessary for the taking of a decision on his

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[842] Koniarska v. the United Kingdom (2000)
[843] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (2006)
[844] D.L. v. Bulgaria (2016)
[845] P. and S. v. Poland (2012)
[846] Blokhin v. Russia (2016)
[847] Bouamar v. Belgium (1988)
[848] D.L. v. Bulgaria (2016)
[849] A. and Others v. Bulgaria (2011)
[850] D.L. v. Bulgaria (2016)
[851] Ichin and Others v. Ukraine (2010)

mental conditions has been considered to fall under sub-paragraph d), as being detention for the purpose of bringing a minor before the competent authority.[852]

*i) Detention for medical or social reasons:*

Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds.[853]

The reason why the Convention allows these individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they may be a danger to public safety but also that their own interests may necessitate their detention.[854]

The essential criteria when assessing the „lawfulness" of the detention of a person „for the prevention of the spreading of infectious diseases" are: (1) whether the spreading of the infectious disease is dangerous to public health or safety; and (2) whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.[855]

The term „a person of unsound mind" does not lend itself to precise definition since psychiatry is an evolving field, both medically and in social attitudes. However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms.[856] The term must be given an autonomous meaning, without the Court being bound by the interpretation of the same or similar terms in domestic legal orders.[857] It is not a requirement that the person concerned suffered from a condition which would be such as to exclude or diminish his criminal responsibility under domestic criminal law when committing an offence.

An individual cannot be deprived of his liberty as being of „unsound mind" unless the following three minimum conditions are satisfied:[858] (1) the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required; (2) the individual's mental disorder must be of a kind to warrant compulsory confinement; (3) the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

Article 5 § 1 (e) of the Convention does not specify the possible acts, punishable under the criminal law, for which an individual may be detained as being „of unsound mind". Nor does that provision identify the commission of a previous offence as a precondition for detention.[859]
119. No deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert.[860]

Where no other possibility exists, for instance because of a refusal of the person concerned to appear for an examination, at least a medical expert's assessment on the basis of the case file

[852] X. v. Switzerland (1979)
[853] Enhorn v. Sweden (2005)
[854] Guzzardi v. Italy (1980)
[855] Enhorn v. Sweden (2005)
[856] Rakevich v. Russia (2003)
[857] Petschulies v. Germany (2016)
[858] Ilnseher v. Germany (2018)
[859] Denis and Irvine v. Belgium (2021)
[860] Ruiz Rivera v. Switzerland (2014)

of the actual state of that person's mental health must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind.[861]

As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons.[862]

Article 5 § 1 (e) authorises the confinement of a mentally disordered person even where no medical treatment is envisaged, but such a measure must be duly justified by the seriousness of the person's state of health and the need to protect the person concerned or others.[863]

A mental condition must be of a certain gravity in order to be considered as a „true" mental disorder.[864] To be qualified as a true mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1, the mental disorder in question must be so serious as to necessitate treatment in an institution appropriate for mental health patients.[865]

In deciding whether an individual should be detained as a person „of unsound mind", the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case.[866]

The competent domestic authority must subject the expert advice before it to a strict scrutiny and reach its own decision on whether the person concerned suffered from a mental disorder.[867]

The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition. However, changes, if any, to the mental condition of the detainee following the adoption if the detention order must be taken into account.[868] Medical expert reports relied on by the authorities must therefore be sufficiently recent.[869]

The Convention does not require the authorities, when assessing the persistence of mental disorders, to take into account the nature of the acts committed by the individual concerned which gave rise to his or her compulsory confinement.[870]

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement.[871] However, the continuation of deprivation of liberty for purely administrative reasons is not justified.[872]

The detention of persons of unsound mind must be effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.[873] A lack of available spaces in a suitable institution cannot justify the continued detention in an ordinary prison of a person suffering from psychiatric disorders.[874]

By contrast, a person can be placed temporarily in an establishment not specifically designed

[861] D.C. v. Belgium (2021)
[862] Hutchison Reid v. the United Kingdom (2003)
[863] N. v. Romania (2017)
[864] Glien v. Germany (2013)
[865] Petschulies v. Germany (2016)
[866] Plesó v. Hungary (2012)
[867] Ilnseher v. Germany (2018)
[868] Ilnseher v. Germany (2018)
[869] Kadusic v. Switzerland (2018)
[870] Denis and Irvine v. Belgium (2021)
[871] Luberti v. Italy (1984)
[872] R.L. and M.-J.D. v. France (2004)
[873] O.H. v. Germany (2011)
[874] Sy v. Italy (2022)

for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.[875]

In view of an intrinsic link between the lawfulness of a deprivation of liberty and its conditions of execution, the detention of a person of unsound mind on the basis of the original detention order can become lawful once that person is transferred from an institution unsuitable for mental health patients to a suitable institution.[876]

The administration of suitable therapy has become a requirement of the wider concept of the „lawfulness" of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness.[877]

The deprivation of liberty under Article 5 § 1(e) thus has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment. Appropriate and individualised treatment is an essential part of the notion of „appropriate institution".[878]

Article 5 § 1 (e) of the Convention also affords procedural safeguards related to the judicial decisions authorising a person's involuntary hospitalisation.[879] The notion of „lawfulness" requires a fair and proper procedure offering the person concerned sufficient protection against arbitrary deprivation of liberty.[880]

The proceedings leading to the involuntary placement of an individual in a psychiatric facility must thus provide effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights.[881]

It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. This implies that an individual confined in a psychiatric institution should, unless there are special circumstances, receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement.[882]

The mere appointment of a lawyer, without that lawyer actually providing legal assistance in the proceedings, could not satisfy the requirements of necessary "legal assistance" for persons confined as being of „unsound mind". An effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts.[883]

*j) Detention of alcoholics and drug addicts:*

Article 5 § 1 (e) of the Convention should not be interpreted as only allowing the detention of „alcoholics" in the limited sense of persons in a clinical state of "alcoholism", because nothing in the text of this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking.[884]

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[875] Pankiewicz v. Poland (2008)
[876] Ilnseher v. Germany (2018)
[877] Rooman v. Belgium (2019)
[878] Rooman v. Belgium (2019)
[879] M.S. v. Croatia (2015)
[880] V.K. v. Russia (2017)
[881] M.S. v. Croatia (2015)
[882] N. v. Romania (2017)
[883] M.S. v. Croatia (2015)
[884] Kharin v. Russia (2011)

Therefore, persons who are not medically diagnosed as „alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.[885] That does not mean however that Article 5 § 1 (e) permits the detention of an individual merely because of his alcohol intake.[886]

*k) Vagrants:*

The case-law on „vagrants" is scarce. The scope of the provision encompasses persons who have no fixed abode, no means of subsistence and no regular trade or profession. These three conditions, inspired by the Belgian Criminal Code, are cumulative: they must be fulfilled at the same time with regard to the same person.[887]

*l) Detention of a foreigner:*

Article 5 § 1 (f) allows States to control the liberty of aliens in an immigration context.[888] While the first limb of that provision permits the detention of an asylum seeker or other immigrant prior to the State's grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion.[889]

The question as to when the first limb of Article 5 § 1 (f) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.[890]

The principle that detention should not be arbitrary applies to the detention under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb. „Freedom from arbitrariness" in the context of the first limb of Article 5 § 1 (f) therefore means that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.[891]

The Court has expressed reservations as to the practice of the authorities to automatically place asylum seekers in detention without an individual assessment of their particular needs.[892]

When reviewing the manner in which the detention order was implemented the Court must have regard to the particular situation of would-be immigrants.[893]

In the case of massive arrivals of asylum-seekers at State borders, subject to the prohibition of arbitrariness, the lawfulness requirement of Article 5 may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal.[894]

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[885] Hilda Hafsteinsdóttir v. Iceland (2004)
[886] Witold Litwa v. Poland (2000)
[887] De Wilde, Ooms and Versyp v. Belgium (1971)
[888] (Khlaifia
and Others v. Italy [GC], 2016, § 89).
[889] Saadi v. the United Kingdom (2008)
[890] Suso Musa v. Malta (2013)
[891] Saadi v. the United Kingdom (2008)
[892] Thimothawes v. Belgium (2017)
[893] Kanagaratnam v. Belgium (2011)
[894] Z.A. and Others v. Russia (2019)

Article 5 § 1 (f) does not prevent States from enacting domestic law provisions that formulate the grounds on which such confinement can be ordered with due regard to the practical realities of massive influx of asylum-seekers. In particular, subparagraph 1(f) does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is generally necessary to ensure the asylum seekers' presence pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily and that, to that end, structure and adapted procedures have been put in place at the transit zone.[895]

*m) Detention with a view to deportation or extradition:*

Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. In this respect, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that „action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of its application, whether the underlying decision to expel can be justified under national or Convention law.[896] A test of necessity of detention may still be required under domestic legislation.[897]

The Court has nevertheless regard to the specific situation of the detained individuals and any particular vulnerability (such as health or age) which may render their detention inappropriate.[898] When a child is involved the Court has considered that, by way of exception, the deprivation of liberty must be necessary to fulfil the aim pursued, namely to secure the family's removal. The presence in a detention centre of a child accompanying his or her parents will comply with Article 5 § 1 (f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be put in place.[899]

Detention may be justified for the purposes of the second limb of Article 5 § 1 (f) by enquiries from the competent authorities, even if a formal request or an order of extradition has not been issued, given that such enquires may be considered "actions" taken in the sense of the provision.[900]

Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f).[901]

To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.[902]

Detention with a view to expulsion should not be punitive in nature and should be accompanied by appropriate safeguards.[903]

The domestic authorities have an obligation to consider whether removal is a realistic prospect

[895] Z.A. and Others v. Russia (2019)
[896] Chahal v. the United Kingdom (1996)
[897] Muzamba Oyawv. Belgium (2017)
[898] Thimothawes v. Belgium (2017)
[899] A.B. and Others v. France (2016)
[900] X.v. Switzerland (1980)
[901] Khlaifia and Others v. Italy (2016)
[902] A. and Others v. the United Kingdom (2009)
[903] Azimov v. Russia (2013)

and whether detention with a view to removal is from the outset, or continues to be, justified.[904] There must procedural safeguards in place capable of preventing the risk of arbitrary detention pending expulsion.[905]

In its assessment of whether domestic law provides sufficient procedural safeguards against arbitrariness, the Court may take into account the existence or absence of time-limits for detention as well as the availability of a judicial remedy. However, Article 5 § 1(f) does not require States to establish a maximum period of detention pending deportation or automatic judicial review of immigration detention. The case-law demonstrates that compliance with time-limits under domestic law or the existence of automatic judicial review will not in themselves guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) of the Convention.

Article 5 § 1 (f) or other sub-paragraphs do not permit a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat.[906]

The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention.[907]

When an extradition request concerns a person facing criminal charges in the requesting State, the requested State is required to act with greater diligence than when an extradition is sought for the purposes of enforcing a sentence, in order to secure the protection of the rights of the person concerned.[908]

As regards extradition arrangements between States when one is a party to the Convention and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5.[909]

The implementation of an interim measure following an indication by the Court to a State Party that it would be desirable not to return an individual to a particular country does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 of the Convention.[910] Detention should still be lawful and not arbitrary.[911]

The fact that the application of such a measure prevents the individual's deportation does not render his detention unlawful, provided that the expulsion proceedings are still pending and the duration of his continued detention is not unreasonable.[912]

## 4.15. Guarantees for persons deprived of liberty (ECrHR)

[904] Al Husin v. Bosnia and Herzegovina (2019)
[905] Kim v. Russia (2014)
[906] A. and Others v. the United Kingdom (2009)
[907] Öcalan v. Turkey (2005)
[908] Gallardo Sanchez v. Italy (2015)
[909] Öcalan v. Turkey (2005)
[910] Gebremedhin [Gaberamadhien] v. France (2007)
[911] Azimov v. Russia (2013)
[912] S.P. v. Belgium (2011)

The words used in Article 5 § 2 should be interpreted autonomously and, in particular, in accordance with the aim and purpose of Article 5 which is to protect everyone from arbitrary deprivations of liberty. The term „arrest" extends beyond the realm of criminal law measures and the words „any charge" do not indicate a condition of applicability but an eventuality which is taken into account. Article 5 § 4 does not make any distinction between persons deprived of their liberty on the basis of whether they have been arrested or detained. Therefore, there are no grounds for excluding the latter from the scope of Article 5 § 2,[913] which extends to detention for the purposes of extradition[914] and medical treatment[915] and also applies where persons have been recalled to places of detention following a period of conditional release.[916]

Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty and is an integral part of the scheme of protection afforded by Article 5.[917] Where a person has been informed of the reasons for his arrest or detention, he may, if he sees fit, apply to a court to challenge the lawfulness of his detention in accordance with Article 5 § 4.[918]

Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty.[919]

It is plain from the wording of Article 5 § 2 that the duty on States is to furnish specific information to the individual or his representative.[920] If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian.[921]

Whether the promptness of the information conveyed is sufficient must be assessed in each case according to its special features. However, the reasons need not be related in their entirety by the arresting officer at the very moment of the arrest.[922]

The constraints of time imposed by the notion of promptness will be satisfied where the arrested person is informed of the reasons for his arrest within a few hours.[923]

The reasons do not have to be set out in the text of any decision authorising detention and do not have to be in writing or in any special form.[924]

However, if the condition of a person with intellectual disability is not given due consideration in this process, it cannot be said that he was provided with the requisite information enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to challenge the lawfulness of detention unless a lawyer or another authorised person was informed in his stead.[925]

The reasons for the arrest may be provided or become apparent in the course of post-arrest interrogations or questioning.[926]

Arrested persons may not claim a failure to understand the reasons for their arrest in circumstances where they were arrested immediately after the commission of a criminal and

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[913] Van der Leer v. the Netherlands (1990)
[914] Shamayev and Others v. Georgia and Russia (2005)
[915] Van der Leer v. the Netherlands (1990)
[916] X. v. Belgium (1973)
[917] Khlaifia and Others v. Italy (2016)
[918] Fox, Campbell and Hartley v. the United Kingdom (1990)
[919] Van der Leer v. the Netherlands (1990)
[920] Saadi v. the United Kingdom (2006)
[921] X. v. the United Kingdom (1980)
[922] Khlaifia and Others v. Italy (2016)
[923] Kerr v. the United Kingdom (1999)
[924] X. v. Germany (2011)
[925] Z.H. v. Hungary (2012)
[926] Fox, Campbell and Hartley v. the United Kingdom (1990)

intentional act or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests.[927]

Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features.[928] However, a bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2.[929]

Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4.[930] However, Article 5 § 2 does not require that the information consist of a complete list of the charges held against the arrested person.[931]

Where persons are arrested for the purposes of extradition, the information given may be even less complete.[932]

Where the warrant of arrest, if any, is written in a language which the arrested person does not understand, Article 5 § 2 will be complied with where the applicant is subsequently interrogated, and thus made aware of the reasons for his arrest, in a language which he understands.[933]

However, where translators are used for this purpose, it is incumbent on the authorities to ensure that requests for translation are formulated with meticulousness and precision.[934]

### 4.16. Right to be brought promptly before a judge. The nature of the appropriate judicial officer. Substantive requirement (ECrHR)

Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty.[935]

Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3. Judicial control is implied by the rule of law, „one of the fundamental principles of a democratic society [...], which is expressly referred to in the Preamble to the Convention" and „from which the whole Convention draws its inspiration".[936]

Judicial control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures.[937]

The opening part of Article 5 § 3 is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1 c).[938]

Judicial control on the first appearance of an arrested individual must above all be prompt, to

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[927] Öcalan v. Turkey (2000)
[928] Fox, Campbell and Hartley v. the United Kingdom (1990)
[929] Murray v. the United Kingdom (1994)
[930] Khlaifia and Others v. Italy (2016)
[931] Bordovskiy v. Russia (2005)
[932] Suso Musa v. Malta (2013)
[933] Delcourt v. Belgium (1967)
[934] Shamayev and Others v. Georgia and Russia (2005)
[935] Aquilina v. Malta (1999)
[936] Brogan and Others v. the United Kingdom (1988)
[937] Ladent v. Poland (2008)
[938] De Jong, Baljet and Van den Brink v. the Netherlands (1984)

allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision.[939]

Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention, not even on grounds of prior judicial involvement.[940]

Any period in excess of four days is prima facie too long.[941] Shorter periods can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner.[942] The requirement of promptness is even stricter in a situation where the placement in police custody follows on from a period of actual deprivation of liberty.[943]

Where a person is detained under the second limb of Article 5 § 1 (c) outside the context of criminal proceedings, the period needed between a person's arrest for preventive purposes and the person's prompt appearance before a judge should be shorter than in the case of pre-trial detention in criminal proceedings. As a rule, release at a time before prompt judicial control in the context of preventive detention should be a matter of hours rather than days.[944]

The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3.[945]

Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person.[946] Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court. It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny.[947]

The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer.[948]

The expression „judge or other officer authorised by law to exercise judicial power" is a synonym for „competent legal authority" in Article 5 § 1 (c). The exercise of „judicial power" is not necessarily confined to adjudicating on legal disputes. Article 5 § 3 includes officials in public prosecutors' departments as well as judges sitting in court. The „officer" referred to in paragraph 3 must offer guarantees befitting the "judicial" power conferred on him by law.[949]

Formal, visible requirements stated in the „law" as opposed to standard practices are especially important for the identification of the judicial authority empowered to decide on the liberty of an individual.[950]

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[939] McKay v. the United Kingdom (2006)
[940] Bergmann v. Estonia (2008)
[941] Oral and Atabay v. Turkey (2009)
[942] Gutsanovi v. Bulgaria (2013)
[943] Vassis and Others v. France (2013)
[944] S., V. and A. v. Denmark (2018)
[945] Pantea v. Romania (2003)
[946] McKay v. the United Kingdom (2006)
[947] Niedbała v. Poland (2000)
[948] McKay v. the United Kingdom (2006)
[949] Schiesser v. Switzerland (1979)
[950] Hood v. the United Kingdom (1999)

The „officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.[951]

The first of such conditions is independence of the executive and of the parties. This does not mean that the "officer" may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence. A judicial officer who is competent to decide on detention may also carry out other duties, but there is a risk that his impartiality may arouse legitimate doubt on the part of those subject to his decisions if he is entitled to intervene in the subsequent proceedings as a representative of the prosecuting authority.[952] In this respect, objective appearances at the time of the decision on detention are material: if it then appears that the „officer authorised by law to exercise judicial power" may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt.[953]

The procedural requirement places the „officer" under the obligation of hearing the individual brought before him or her in person before taking the appropriate decision.[954] A lawyer's presence at the hearing is not obligatory. However, the exclusion of a lawyer from a hearing may adversely affect the applicant's ability to present his case.[955]

The substantive requirement imposes on the „officer" the obligations of reviewing the circumstances militating for or against detention and of deciding, by reference to legal criteria, whether there are reasons to justify detention.[956] In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention.[957]

The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1 (c).[958]

The matters which the judicial officer must examine go beyond the question of lawfulness. The review required under Article 5 § 3, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention.[959]

The examination of lawfulness may be more limited in scope in the particular circumstances of a given case than under Article 5 § 4.[960]

If there are no reasons to justify detention, the „officer" must have the power to make a binding order for the detainee's release.[961]

It is highly desirable in order to minimise delay, that the judicial officer who conducts the first

automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time frame. In any event, as a matter of interpretation, it cannot be required

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[951] Schiesser v. Switzerland (1979)
[952] Huber v. Switzerland (1990)
[953] Hood v. the United Kingdom (1999)
[954] Schiesser v. Switzerland (1979)
[955] Lebedev v. Russia (2007)
[956] Pantea v. Romania (2003)
[957] Krejčíř v. the Czech Republic (2009)
[958] Oral and Atabay v. Turkey (2009)
[959] Aquilina v. Malta (1999)
[960] Stephens v. Malta (2009)
[961] Assenov and Others v. Bulgaria (1998)

that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum four days.[962]

### 4.17. Right to trial within a reasonable time or to be released pending (ECrHR)

*a) Period to be taken into consideration:*
In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance.[963] In view of the essential link between Article 5 § 3 of the Convention and paragraph 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained „for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence", as specified in the latter provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty "after conviction by a competent court".[964]

*b) General principles:*
The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.

The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.[965]

The persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention. But when the national judicial authorities first examine, „promptly" after the arrest, whether to place the arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention.[966] Where such the grounds continued to justify the deprivation of liberty, the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings.[967]

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[962] Magee and Others v. the United Kingdom (2015)
[963] Wemhoff v. Germany (1968)
[964] Belevitskiy v. Russia (2007)
[965] Buzadji v. the Republic of Moldova (2016)
[966] Merabishvili v. Georgia (2017)
[967] Idalov v. Russia (2012)

The arguments for and against release must not be „general and abstract",[968] but contain references to the specific facts and the applicant's personal circumstances justifying his detention.[969]

Quasi-automatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3.[970]

It falls on the authorities to establish the persistence of reasons justifying continued pre-trial detention.[971] The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release.[972]

Where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention.[973] It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.[974]

*c) Justification for any period of detention:*

Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain minimum period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.[975]

## 4.18. Grounds for continued detention (ECrHR)

The Convention case-law has developed four basic acceptable reasons for refusing bail: (a) the risk that the accused will fail to appear for trial; (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (c) commit further offences, or (d) cause public disorder. However, nothing precludes the national judicial authorities from endorsing or incorporating by reference the specific points cited by the authorities seeking the imposition of pre-trial detention.[976]

*a) Danger of absconding:*

The danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pretrial detention.[977]

The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted.[978]

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[968] Boicenco v. Moldova (2006)
[969] Aleksanyan v. Russia (2008)
[970] Tase v. Romania (2008)
[971] Merabishvili v. Georgia (2017)
[972] Bykov v. Russia (2009)
[973] Giorgi Nikolaishvili v. Georgia (2009)
[974] Tase v. Romania (2008)
[975] Idalov v. Russia (2012)
[976] Buzadji v. the Republic of Moldova (2016)
[977] Panchenko v. Russia (2005)
[978] Becciev v. Moldova (2005)

The mere absence of a fixed residence does not give rise to a danger of flight.[979] The danger of flight necessarily decreases with the passages of time spent in detention.[980]

When the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance.[981]

While the severity of the sentence faced is a relevant element in the assessment of the risk that an accused might abscond, the gravity of the charges cannot by itself serve to justify long periods of detention on remand.[982]

Although, in general, the expression "the state of evidence" may be a relevant factor for the existence and persistence of serious indications of guilt, it alone cannot justify lengthy detention. [983]

*b) Obstruction of the proceedings:*

The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon in abstracto, it has to be supported by factual evidence.[984]

The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings.[985] However, it cannot be based only on the likelihood of a severe penalty, but must be linked to specific facts.[986]

In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out.[987]

In cases concerning organised criminal activities or gangs, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-suspects, or otherwise obstruct the proceedings, is often particularly high.[988]

*c) Repetition of offences:*

The seriousness of a charge may lead the judicial authorities to place and leave a suspect in detention on remand in order to prevent any attempts to commit further offences. It is however necessary that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned.[989]

Previous convictions could give a ground for a reasonable fear that the accused might commit a new offence.[990]

It cannot be concluded from the lack of a job or a family that a person is inclined to commit new offences.[991]

*d) Preservation of public order:*

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[979] Sulaoja v. Estonia (2005)
[980] Neumeister v. Austria (1968)
[981] Merabishvili v. Georgia (2017)
[982] Idalov v. Russia (2012)
[983] Dereci v. Turkey (2005)
[984] Becciev v. Moldova (2005)
[985] Jarzyński v. Poland (2005)
[986] Merabishvili v. Georgia (2017)
[987] Clooth v. Belgium (1991)
[988] Staykov v. Bulgaria (2021)
[989] Clooth v. Belgium (1991)
[990] Selçuk v. Turkey (2006)
[991] Sulaoja v. Estonia (2005)

It is accepted that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. Inaddition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.[992]

The protection of public order is particularly pertinent in cases involving charges of grave breaches of fundamental human rights, such as war crimes against civilian population.[993]

## 4.19. Special diligence - Alternative measures – Bail - Pre-trial detention of minors (ECrHR)

The complexity and special characteristics of the investigation are factors to be considered in ascertaining whether the authorities displayed "special diligence" in the proceedings.[994]

The right of an accused in detention to have his case examined with particular expedition must not unduly hinder the efforts of the judicial authorities to carry out their tasks with proper care.[995]

A temporary suspension of criminal proceedings for a period of approximately three months due to the exceptional circumstances surrounding the Covid-19 pandemic has been found to be in compliance with the duty of special diligence when the proceedings had been actively pursued both before and after the emegency measures had been put in place.[996]

When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.[997] That provision proclaims not only the right to „trial within a reasonable time or to release pending trial" but also lays down that „release may be conditioned by guarantees to appear for trial".[998]

The guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount must therefore be assessed principally "by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond".[999]

Bail may only be required as long as reasons justifying detention prevail.[1000] If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account.[1001] The authorities must take as much care in fixing

[992] Letellier v. France (1991)
[993] Milanković and Bošnjak v. Croatia (2016)
[994] Scott v. Spain (1996)
[995] Shabani v. Switzerland (2009)
[996] Fenech v. Malta (2021)
[997] Idalov v. Russia (2012)
[998] Khudoyorov v. Russia (2005)
[999] Gafà v. Malta (2018)
[1000] Muşuc v. Moldova (2007)
[1001] Vrenčev v. Serbia (2008)

appropriate bail as in deciding whether or not the accused's continued detention is indispensable.[1002]

Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means and his capacity to pay.[1003]

In certain circumstances it may not be unreasonable to take into account also the amount of the loss imputed to him.[1004]

The fact that a detainee remains in custody after being granted bail suggests that the domestic courts have not taken the necessary care in fixing appropriate bail.[1005]

The authorities are required to conduct the proceedings with „special diligence" also after bail is formally granted but the individual remains in detention as a result of his inability to pay.[1006]

Automatic refusal of bail by virtue of the law, devoid of any judicial control, is incompatible with the guarantees of Article 5 § 3.[1007]

However, where the domestic courts have given properly reasoned detention orders despite the law limiting their power to grant bail, the Court has found no violation of Article 5 § 3.[1008]

The pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.[1009]

### 4.20. Right to have lawfulness of detention speedily examined by a Court (ECrHR)

Article 5 § 4 is the habeas corpus provision of the Convention. It provides detained persons with the right to actively seek a judicial review of their detention.[1010]

Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided „speedily" by a court and to have their release ordered if the detention is not lawful.[1011]

The fact that the Court has found no breach of the requirements of Article 5 § 1 of the Convention does not mean that it is dispensed from carrying out a review of compliance with Article 5 § 4. The two paragraphs are separate provisions and observance of the former does not necessarily entail observance of the latter.[1012]

In cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance.[1013]

While Article 5 § 4 normally contemplates situations in which an individual takes proceedings while in detention, the provision could also apply where the individual is no longer in detention during appeal proceedings the outcome of which is crucial in determining the lawfulness of the individual's detention.[1014]

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[1002] Piotr Osuch v. Poland (2009)
[1003] Toshev v. Bulgaria (2006)
[1004] Mangouras v. Spain (2010)
[1005] Gafà v. Malta (2018)
[1006] Kolakovic v. Malta (2015)
[1007] Piruzyan v. Armenia (2012)
[1008] Grubnyk v. Ukraine (2020)
[1009] Nart v. Turkey (2008)
[1010] Mooren v. Germany (2009)
[1011] Ilnseher v. Germany (2018)
[1012] Douiyeb v. the Netherlands (1999)
[1013] Khlaifia and Others v. Italy (2016)
[1014] Oravec v. Croatia (2017)

While the guarantee of speediness is no longer relevant for the purpose of Article 5 § 4 after the person's release, the guarantee of effectiveness of the review continues to apply even thereafter since a former detainee may well have a legitimate interest in the determination of the lawfulness of his or her detention even after having been released.[1015] In particular, a decision on the issue of lawfulness may affect the „enforceable right to compensation" under Article 5 § 5 of the Convention.[1016]

No issue arises under Article 5 § 4 where the impugned detention is of a short detention and the detainee is released speedily before any judicial review of the lawfulness of his or her detention could take place.[1017] However, where there is no judicial remedy at all available to individuals to challenge the lawfulness of their detention, examination of a complaint under Article 5 § 4 has been considered warranted, regardless of the length of the detention.[1018] Article 5 § 4 has also been found to apply to short periods of detention where the scope of the available judicial review was unduly limited. [1019]

Where a person is deprived of his liberty pursuant to a conviction by a competent court, the supervision required by Article 5 § 4 is incorporated in the decision by the court at the close of judicial proceedings and no further review is therefore required. However, in cases where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time, the possibility of recourse to a body satisfying the requirements of Article 5 § 4 of the Convention is required.[1020]

Article 5 § 4 also comes back into play when, following a conviction, new issues affecting the lawfulness of a detention arise.[1021]

Where the Contracting States provide for procedures which go beyond the requirements of Article 5 § 4 of the Convention, the provision's guarantees have to be respected also in these procedures. Article 5 § 4 has thus been found to be applicable in the post-conviction period because domestic law provided that a person is detained on remand until his or her conviction becomes final, including during appeal proceedings, and accorded the same procedural rights to all remand prisoners.[1022]

Although Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance.[1023]

Article 5 § 4 can also be applicable to proceedings before constitutional courts.[1024]

Article 5 § 4 entitles an arrested or detained person to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the „lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty. The notion of „lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1.[1025]

The „court" to which the detained person has access for the purposes of Article 5 § 4 does not

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[1015] Kováčik v. Slovakia (2011)
[1016] S.T.S. v. the Netherlands (2011)
[1017] Slivenko v. Latvia (2003)
[1018] Moustahi v. France (2020)
[1019] Petkov and Profirov v. Bulgaria (2014)
[1020] Kafkaris v. Cyprus (2011)
[1021] Etute v. Luxembourg (2018)
[1022] Stollenwerk v. Germany (2017)
[1023] Toth v. Austria (1991)
[1024] Ilnseherv. Germany (2018)
[1025] Khlaifia and Others v. Italy (2016)

have to be a court of law of the classical kind integrated within the standard judicial machinery of the country.[1026] It must however be a body of „judicial character" offering certain procedural guarantees. Thus the „court" must be independent both of the executive and of the parties to the case.[1027]

The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue.[1028]

It is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4. However, where automatic review has been instituted, the decisions on the lawfulness of detention must follow at „reasonable intervals".[1029] A breach of time-limits for automatic reviews established in law does not necessarily amount to a violation of Article 5 § 4, if the lawfulness of an applicant's detention was nonetheless examined speedily by a court.[1030]

Where no automatic review of the lawfulness of detention is provided for in domestic law, a ban on submitting fresh requests for release for a period of time might be justified in cases of manifest abuse of detainees' procedural rights. However, it is incumbent on the authorities to demonstrate the necessity of such a measure by relevant and sufficient reasons in order to obviate any suspicion of arbitrariness.[1031]

By virtue of Article 5 § 4, a detainee is entitled to apply to a „court" having jurisdiction to decide „speedily" whether or not his deprivation of liberty has become „unlawful" in the light of new factors which have emerged subsequently to the initial decision depriving a person of his liberty.[1032]

If a person is detained under Article 5 § 1 (c) of the Convention, the „court" must be empowered to examine whether or not there is sufficient evidence to give rise to a reasonable suspicion that he or she has committed an offence, because the existence of such a suspicion is essential if detention on remand is to be "lawful" under the Convention.[1033]

A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings „at reasonable intervals" to put in issue the lawfulness of his detention.[1034]

A system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own.[1035]

The criteria for „lawful detention" under Article 5 § 1 (e) entail that the review of lawfulness guaranteed by Article 5 § 4 in relation to the continuing detention of a mental health patient should be made by reference to the patient's contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the origin of the initial decision to detain.[1036]

A requirement to complete a probationary period as a condition for discharge from compulsory confinement could in principle thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it proves unlawful.[1037]

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[1026] Weeks v. the United Kingdom (1987)
[1027] Stephens v. Malta (2009)
[1028] M.H. v. the United Kingdom (2013)
[1029] Abdulkhanov v. Russia (2012)
[1030] Aboya Boa Jean v. Malta (2019)
[1031] Dimo Dimov and Others v. Bulgaria (2020)
[1032] Azimov v. Russia (2013)
[1033] Dimo Dimov and Others v. Bulgaria (2020)
[1034] M.H. v. the United Kingdom (2013)
[1035] X. v. Finland (2012)
[1036] Juncal v. the United Kingdom (2013)
[1037] Denis and Irvine v. Belgium (2021)

The bringing of proceedings to challenge the lawfulness under Article 5 § 1 (f) of administrative detention pending deportations does not need to have a suspensive effect on the implementation of the deportation order. Such a requirement would, paradoxically, lead to prolonging the very situation which the detainee was seeking to end by challenging the administrative detention.[1038]

Article 5 § 4 does not impose an obligation on a court examining an appeal against detention to address every argument contained in the appellant's submissions. However, the court cannot treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty.[1039] If the court fails to give adequate reasons, or gives repeated stereotyped decisions which provide no answer to the arguments of the applicant, this may disclose a violation by depriving the guarantee under Article 5 § 4 of its substance.[1040]

The „court" must have the power to order release if it finds that the detention is unlawful; a mere power of recommendation is insufficient.[1041]

Article 5 § 4 proceedings need not necessarily result in freedom, but may also lead to another form of detention. Where an individual's detention is covered by both sub-paragraphs (a) and (e) of Article 5 § 1, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 of that provision as making confinement in a mental institution immune from review of its lawfulness merely because the initial decision ordering detention was taken by a court under Article 5 § 1(a). The reason for guaranteeing a review under Article 5 § 4 is equally important to persons detained in a mental institution regardless of whether or not they were serving, in parallel, a prison sentence.[1042]

The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.[1043]

In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required.[1044] The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty.[1045] However, Article 5 § 4 does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention, but that it should be possible to exercise the right to be heard at reasonable intervals.[1046]

An oral hearing is also required in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses, where the judicial authorities are called upon to examine the personality and the level of maturity of the detainee in order to decide on his dangerousness. However, a hearing is not essential in all circumstances, particularly where it was unlikely to result in any additional clarification.[1047]

That an applicant could not be heard, in person or by tele-or videoconference, on the lawfulness of his immigration detention due to initial infrastructure problems related to the Covid-19 pandemic has been found to be compatible with Article 5 § 4, having regard to the

[1038] A.M.v. France (2016)
[1039] Ilijkov v. Bulgaria (2001)
[1040] G.B. and Others v. Turkey (2019)
[1041] Benjamin and Wilson v. the United Kingdom (2022)
[1042] Kuttner v. Austria (2015)
[1043] A. and Others v. the United Kingdom (2009)
[1044] Nikolova v. Bulgaria (1999)
[1045] Kampanis v. Greece (1995)
[1046] Çatal v. Turkey (2012)
[1047] Derungs v. Switzerland (2016)

general interest of public health and the fact that the applicant had been represented and heard through his lawyer.[1048]

Article 5 § 4 does not as a general rule require a hearing to be public. However, the Court has not excluded the possibility that a public hearing could be required in particular circumstances.[1049]

The proceedings must be adversarial and must always ensure „equality of arms" between the parties.[1050] In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears to have a bearing on the continuing lawfulness of the detention.[1051] Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention.[1052]

Even if the detainee has not been allowed unlimited access to the investigation file, Article 5 § 4 has been found to have been complied with when the detainee had sufficient knowledge of the content of those items of evidence that formed the basis for his pre-trial detention and thus had an opportunity to effectively challenge his detention.[1053]

It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer.[1054]

Since detention proceedings require special expedition, a judge may decide not to wait until a detainee avails himself of legal assistance, and the authorities are not obliged to provide him with free legal aid in the context of detention proceedings.[1055]

The principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court[1056] as well as in the proceedings which the Contracting States, as a matter of choice, make available to post-conviction detainees.[1057]

The right to adversarial proceedings means that the parties, in principle, have the right to be informed of and to discuss any document or observation presented to the court for the purpose of influencing its decision, even if it comes from an independent legal officer. The right to adversarial proceedings necessarily entitles the detainee and his lawyer to be informed within a reasonable time about the scheduling of a hearing, without which the right would be devoid of substance.[1058]

Terrorism falls into a special category. Article 5 § 4 does not preclude the use of a closed hearing wherein confidential sources of information supporting the authorities' line of investigation are submitted to a court in the absence of the detainee or his lawyer. What is important is that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the opportunity to refute them, and to participate effectively in proceedings concerning his continued detention.[1059]

Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such

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[1048] Bah v. the Netherlands (2021)
[1049] D.C.v. Belgium (2021)
[1050] Reinprecht v. Austria (2005)
[1051] Ţurcan v. Moldova (2007)
[1052] Ragıp Zarakolu v. Turkey (2020)
[1053] Atilla Taş v. Turkey (2021)
[1054] Cernák v. Slovakia (2013)
[1055] Karachentsev v. Russia (2018)
[1056] Çatal v. Turkey (2012)
[1057] Stollenwerk v. Germany (2017)
[1058] Venet v. Belgium (2019)
[1059] Sher and Others v. the United Kingdom (2015)

proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful.[1060] The question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case.[1061]

The opportunity for legal review must be provided soon after the person is taken into detention and thereafter at reasonable intervals if necessary.[1062]

The notion of „speedily" (à bref délai) indicates a lesser urgency than that of „promptly" in Article 5 § 3.[1063]

However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of "speediness" of judicial review under Article 5 § 4 comes closer to the standard of „promptness" under Article 5 § 3.[1064]

The standard of „speediness" is less stringent when it comes to proceedings before a court of appeal.[1065] Where the original detention order was imposed by a court in a procedure offering appropriate guarantees of due process, the Court is prepared to tolerate longer periods of review in the proceedings before the second instance court.[1066] These considerations apply even more so to complaints concerning proceedings before the constitutional courts which are separate from proceedings before ordinary courts. Proceedings before the higher courts are less concerned with arbitrariness, but provide additional guarantees based primarily on an evaluation of the appropriateness of continued detention.[1067] Nevertheless, the constitutional courts are similarly bound by the requirement of speediness under Article 5 § 4.[1068]

In principle, however, since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible.[1069]

### 4.20.1. The period to be taken into consideration

The Court has taken as a starting point the moment that the application for release was made/proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant's detention, including any appeal. If an administrative remedy has to be exhausted before recourse can be had to a court, time begins to run when the administrative authority is seised of the matter.[1070]

If the proceedings have been conducted over two levels of jurisdiction, an overall assessment must be made in order to determine whether the requirement of „speedily" has been complied with.[1071]

The term „speedily" cannot be defined in the abstract. As with the „reasonable time" stipulations in Article 5 § 3 and Article 6 § 1 it must be determined in the light of the circumstances of the individual case.[1072]

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[1060] Baranowski v. Poland (2007)
[1061] Rehbock v. Slovenia (2000)
[1062] Molotchko v. Ukraine (2012)
[1063] Brogan and Others v. the United Kingdom (1988)
[1064] Shcherbina v. Russia (2014)
[1065] Abdulkhanov v. Russia (2012)
[1066] Shcherbina v. Russia (2014)
[1067] Mehmet Hasan Altan v. Turkey (2018)
[1068] G.B. and Others v. Turkey (2019)
[1069] Khlaifia and Others v. Italy (2016)
[1070] Sanchez-Reisse v. Switzerland (1986)
[1071] Hutchison Reid v. the United Kingdom (2003)
[1072] R.M.D. v. Switzerland (1997)

In making such an assessment, the circumstances to be taken into account include the complexity of the proceedings, their conduct by the domestic authorities and by the applicant, what was at stake for the latter.[1073]

Where one year per instance may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition.[1074] Where an individual's personal liberty is at stake, the Court has very strict standards concerning the State's compliance with the requirement of speedy review of the lawfulness of detention.[1075] It is incumbent on the respondent State to put in place the most appropriate internal procedures to comply with its obligations under Article 5 § 4 of the Convention.[1076]

Where the national authorities decide in exceptional circumstances to detain a child and his or her parents in the context of immigration controls, the lawfulness of such detention should be examined by the national courts with particular expedition and diligence at all levels.[1077]

Where the determination involves complex issues – such as the detained person's medical condition – this may be taken into account when considering how long is „reasonable" under Article 5 § 4. However, even in complex cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention.[1078]

In exceptional situations, the complexity of the case may justify the length of periods which in an ordinary context cannot be considered as "speedy".[1079]

Detention on remand in criminal cases calls for short intervals between reviews.[1080] If the length of time before a decision is taken is prima facie incompatible with the notion of speediness, the Court will look to the State to explain the reason for the delay or to put forward exceptional grounds to justify the lapse of time in question.[1081]

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.[1082]

### 4.21. Right to compensation for unlawful detention (ECrHR)

The right to compensation set forth in paragraph 5 presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Court.[1083]

In the absence of a finding by a domestic authority of a breach of any of the other provisions of Article 5, either directly or in substance, the Court itself must first establish the existence of such a breach for Article 5 § 5 to apply.[1084]

The applicability of Article 5 § 5 is not dependent on a domestic finding of unlawfulness or proof that but for the breach the person would have been released.[1085] The arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5 § 5 applicable.[1086]

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[1073] Ilnseher v. Germany (2018)
[1074] Panchenko v. Russia (2005)
[1075] Kadem v. Malta (2003)
[1076] Dimo Dimov and Others v. Bulgaria (2020)
[1077] G.B. and Others v. Turkey (2019)
[1078] Frasik v. Poland (2010)
[1079] Mehmet Hasan Altan v. Turkey (2018)
[1080] Bezicheri v. Italy (1989)
[1081] Musiał v. Poland (1999)
[1082] E. v. Norway (1990)
[1083] N.C. v. Italy (2002)
[1084] Yankov v. Bulgaria (2003)
[1085] Blackstock v. the United Kingdom (2005)
[1086] Harkmann v. Estonia (2006)

Where domestic law provides for a right of compensation for acquitted persons who have been deprived of their liberty, such an automatic entitlement does not necessarily imply that the detention in question is to be considered as contrary to the provisions of Article 5. However, Article 5 § 5 applies if the detention is characterised by the national courts as "unlawful" within the meaning of domestic law.[1087]

Article 5 § 5 creates a direct and enforceable right to compensation before the national courts.[1088]

Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4.[1089]

An enforceable right to compensation must be available either before or after the Court's judgment.[1090]

The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty.[1091] Compensation must be available both in theory[1092] and practice.[1093]

In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive formalism.[1094]

The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5 § 4 of the Convention.[1095]

Crediting a period of pre-trial detention towards a penalty does not amount to compensation required by Article 5 § 5, because of its non-financial character.[1096] However, a reduction of sentence could constitute compensation within the meaning of Article 5 § 5 if it was explicitly granted to afford redress for the violation in question and it had a measurable and proportionate impact on the sentence served by the person concerned.[1097]

Article 5 § 5 comprises a right to compensation not only in respect of pecuniary damage but also for any distress, anxiety and frustration that a person may suffer as a result of a violation of others provisions of Article 5.[1098]

### 4.21.1. Existence of damage and amount of compensation

Article 5 § 5 does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. There can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.[1099] However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation.[1100]

Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation.[1101] In determining the existence of a violation of Article 5 § 5, the Court has

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[1087] Norik Poghosyan v. Armenia (2020)
[1088] A. and Others v. the United Kingdom (2009)
[1089] Michalák v. Slovakia (2011)
[1090] Stanev v. Bulgaria (2012)
[1091] Ciulla v. Italy (1989)
[1092] Dubovik v. Ukraine (2009)
[1093] Chitayev and Chitayev v. Russia (2007)
[1094] Fernandes Pedroso v. Portugal (2018)
[1095] Bozano v. France (1984)
[1096] Włoch v. Poland (2011)
[1097] Porchet v. Switzerland (2019)
[1098] Sahakyan v. Armenia (2015)
[1099] Wassink v. the Netherlands (1990)
[1100] Danev v. Bulgaria (2010)
[1101] Damian-Burueana and Damian v. Romania (2009)

regard to its own practice under Article 41 of the Convention in similar cases as well as to the factual elements of the
case, such as the duration of the applicant's detention.[1102]

The mere fact that the amount awarded by the national authorities is lower than the award the Court would have made in similar cases does not per se entail a violation of Article 5 § 5.[1103]

However, compensation which is negligible or wholly disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 § 5 as this would render the right guaranteed by that provision theoretical and illusory.[1104]

An award cannot be considerably lower than that awarded by the Court in similar cases.[1105]

There may be differences in approach between assessing the loss of victim status under Article
5 § 1 on account of the quantum of compensation awarded at national level, on the one hand, and the matter of a right to compensation in terms of Article 5 § 5, on the other.[1106]

[1102] Vasilevskiy and Bogdanov v. Russia (2018)
[1103] Mehmet Hasan Altan v. Turkey (2018)
[1104] Vasilevskiy and Bogdanov v. Russia (2018)
[1105] Ganea v. Moldova (2011)
[1106] Tsvetkova and Others v. Russia (2018)

# CHAPTER V

# DIVERSION POSSIBILITIES IN CRIMINAL PROCEEDINGS. FORMS OF INDICTMENT

## 5.1. Introduction

The legal policy reasons for introducing simplification procedures are mainly motivated by considerations of expediency and economy of litigation. This approach undoubtedly reduces the role of evidence as a whole in criminal proceedings, and it is still debated among procedural law scholars whether these legal instruments are necessary at all, and to what extent their application affects the original, real functions of criminal proceedings (e.g. the need to establish material truth, the principle of the immediacy of the trial, the principle of publicity).[1107]

The Council of Europe issued a recommendation on the need to introduce legal instruments based on the principle of opportunity as early as 1981. Behind these efforts lies primarily the desire to reduce the burden on the judiciary and to develop a culture of conflict management. It should be noted that some European jurisdictions, including the US, had already known about „shortcut procedures" before the Recommendation was issued. Indeed, even today, the ECrHR does not necessarily consider it a violation of the Convention for national courts to refrain from holding trials, depending on the subject matter of the case and the personal interests of the accused.[1108]

The general expectations for „simplification" or „alternative" procedures are summarised below:

- They must be based on the voluntary participation of the accused, backed up by various legal safeguards.
- The law must define the precise legal content of the cooperation, such as the conditions of application, the expectations of the accused and the positive legal consequences of the scheme.[1109]

Each procedure can be grouped in several ways: 1. according to the need for a contribution; 2. as a condition of the confession;[1110] 3. according to the level of the criminal sanctions; 4. the nature (extent) of the discretionary power of the prosecution or court.

Objections to the legality of alternative procedures are mostly found in the domestic literature, but according to Tibor KIRÁLY, such questions can only arise if the legislator makes the „simplification" dependent on the person of the defendant rather than the subject of the case.[1111] Moreover, according to Péter HACK, it would be necessary to reconsider in its entirety „[...] whether it is worth insisting on the trial as the exclusive form of procedure [...], which is

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[1107] For my part, I believe that the application of the general rules of procedure (i.e. the taking of evidence) is necessary in all cases where (1) the adjudication of the case requires a more complex investigation (e.g. witness hearings, expert evidence) or (2) the accused is in denial of any of the offences contained in the indictment.

[1108] In „Jussila v. Finland" (2006), the Court of Justice did not find a breach of the Convention in a case in which the applicant was fined more than EUR 300 without a hearing for failings in his VAT declaration.

[1109] Erzsébet KADLÓT: What kind of criminal procedural law do we want? In: Erika CSEMÁNÉ VÁRADI (ed.): *Concepts and their realisation in the post-change criminal policy. Hungarian Society of Criminology.* Miskolc, Bíbor Publishing House, 2009. 55.

[1110] According to Árpád ERDEI (1991), it is not sufficient to apply the summary procedure to a mere investigative confession: if the accused is not willing to repeat it in court, the case should be transferred to the ordinary trial procedure. „A proper balance of the components of the interest will help to exclude the possibility that the tactics of the accused will result in a delay rather than a simplification of the proceedings." In: Árpád ERDEI: The reign of the dethroned queen or the sacred cow of the theory of evidence. *Hungarian Law*, 1991/4. 210-216.

[1111] Tibor KIRÁLY:Evidence in the Criminal Procedure Code. *Criminological Publications,* 1996/54. 215.

essentially more similar to the misdemeanour procedure than to the criminal procedure, namely when the judge is alone with the accused [...].”[1112]

The popularity of these procedures is largely related to the fact that – as KLEIN mentions[1113] – „judges are under ever-increasing pressure to move their calendars and „dispose” of cases. They are often evaluated by how quickly cases are concluded; the more efficient the judge is, the more likely it will be that he obtains favorable treatment by the court administrators. The quickest disposition occurs when the defendant enters a plea of guilty. And that means that the judge will want a lawyer who understands and cooperates, and a defendant who understands that if there is no plea, the sentence after trial may very well be the maximum permissible.”

### 5.2. The mediation procedure (CPC)

According to its legal definition, mediation is a procedure to facilitate the agreement between the suspect and the victim, the reparation of the consequences of the crime and the future law-abiding behaviour of the suspect, which may be applied at the request of the suspect or the victim or with their voluntary consent.[1114] This definition indicates a complex legislative intention, since it also includes aspects aimed at developing a culture of conflict management, compensating the victim and re-socialising the perpetrator. The use of mediation is therefore essentially based on a 'prosecution hypothesis' that the nature of the offence and the person of the accused or victim justify the out-of-court resolution of the case.

In Hungary, the introduction of victim protection measures and the reform of the penal system based on new approaches was only possible after the political regime change in 1989, so the literature on the subject was still waiting to be written. However, the use of alternative dispute resolution has become a fundamental legal practice in the US and in Western European countries. [1115]

The conditions of the mediation procedure are contained partly by the CPC and partly by the Criminal Code. Based on CPC, a mediation procedure may be conducted upon the motion by the suspect or the aggrieved party, or with their voluntary consent, with a view to facilitating the conclusion of an agreement between the suspect and the aggrieved party, the reparation of the consequences of the criminal offence, and the future law abiding conduct of the suspect. The suspect may submit his consent or motion serving as a ground for the mediation procedure through also his defence counsel.

With a view to conducting a mediation procedure, the prosecution service shall suspend the proceeding if (1) the suspect or the aggrieved party initiates, or consents to, a mediation procedure, (2) the suspect confessed to having committed the criminal offence before the indictment, and (3) having regard to the nature of the criminal offence, the manner of its commission, and the identity of the suspect, a) reparation of the consequences of the criminal offence can be expected, and b) conducting a criminal proceeding may be dispensed with, or conducting a mediation procedure is not inconsistent with the principles of sentencing.

Suspending the proceeding for the purpose of conducting a mediation procedure shall not be prevented by the fact that the suspect has already voluntarily paid for, in whole or in part, the damages or pecuniary loss caused by his criminal offence or the value affected by the criminal offence, or he provided reparation for the injury caused by his criminal offence, in a manner and to an extent accepted by the aggrieved party.[1116]

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[1112] Péter HACK: The reform of the criminal procedure. In: Erika CSEMÁNÉ VÁRADI (ed.), ibid. 64.
[1113] KLEIN, ibid. 5.
[1114] CPC 412. §
[1115] Ilona GÖRGÉNYI: *Restitution in criminal law, mediation in criminal cases*. Budapest, HVG-ORAC, 2006. 61.
[1116] CPC 412. §

*a) Proceedings prior to a mediation procedure:*
If the suspect or the aggrieved party initiates, or consents to, a mediation procedure without the conditions of conducting a mediation procedure, as specified in this Act, being met, the prosecution service shall pass a decision refusing to suspend the proceeding for the purpose of conducting a mediation procedure.

If the suspect or the aggrieved party initiates a mediation procedure, the prosecution service shall make the necessary arrangements to obtain a statement of consent from the suspect or the aggrieved party. After obtaining such a statement, the prosecution service shall decide whether to suspend or refuse to suspend the proceeding for the purpose of conducting a mediation procedure.

If the aggrieved party initiates a mediation procedure before the suspect is interrogated, the prosecution service, after interrogating the suspect, shall make the necessary arrangements to obtain a statement of consent from the suspect and (1) to suspend the proceeding for the purpose of conducting a mediation procedure, or (2) to refuse to conduct a mediation procedure.

A decision passed by the prosecution service on suspending the proceeding, or refusing to do so, for the purpose of conducting a mediation procedure shall be communicated to the suspect and the aggrieved party who initiated, or consented to, the mediation procedure.[1117]

The prosecution service may suspend a proceeding once for a period of six months for the purpose of conducting a mediation procedure.

A decision suspending the proceeding shall also be communicated by the prosecution service to the probation service with subject-matter and territorial competence to conduct a mediation procedure.

A statement made by the suspect or the aggrieved party in the course of a mediation procedure may not be used as evidence in the case. The result of a mediation procedure may not be taken into account to the detriment of the suspect.

The detailed rules of conducting a mediation procedure shall be laid down by an Act.[1118]

*b) Proceedings after an agreement is reached in a mediation procedure:*
If an agreement, as defined in the Act on mediation procedures, is concluded by and between the aggrieved party and the suspect in the course of a mediation procedure, the mediator shall submit the agreement to the prosecution service.

The prosecution service shall set aside the agreement if it is in conflict with the Act on mediation procedures. The prosecution service shall communicate the decision to the mediator and to all parties to the agreement set aside.

If the prosecution service does not set aside the agreement within five working days after receiving the agreement, it shall be deemed that the prosecution service did not raise any objection regarding the legality of the agreement.

If an obligation set out in the agreement may not be performed while the proceeding is suspended, the prosecution service may extend the period of suspension for an additional period of up to eighteen months.

If the mediation procedure is concluded while the proceeding is suspended, and the proceeding may not be terminated or suspended for any other reason, the prosecution service shall order the proceeding to be resumed.[1119]

*c) Based on CC, the positive conditions of mediation procedure are as fallows:*

[1117] CPC 413. §
[1118] CPC 414. §
[1119] CPC 415. §

- In case of any of the six types of crime: against against life, limb and health (Chapter XV. of CC), against personal freedom (Chapter XVIII of CC), against human dignity and fundamental rights (Chapter XXI. of CC), crime against traffic regulations (Chapter XXII. of CC), against property (Chapter XXXVI. of CC), against intellectual property rights (Chapter XXXVII. of CC).
- The crime punishable with imprisonment not exceeding five years.
- Motioned by/with the consent of the suspect and the victim.
- The suspect has made a confession to the crime before the indictment.
- Reparation of the consequences of the crime is expected (with regard to the nature of the crime, method of perpetration and the identity of the suspect) and the conduct of the judicial procedure is omissible / the mediation procedure is not contrary to the principles of the imposition of the punishment.

*d) Negative conditions:*
- the defendant is repeat offender or habitual recidivist;
- perpetration in criminal organization;
- the crime caused death;
- intentional perpetration during probation/conditional sentence/conditional prosecutorial suspension;
- participation in mediation procedurewithin two years;
- crime committed to the detriment military body in military criminal procedure.

As I mentioned, the public prosecutor's office will suspend the proceedings for the purpose of mediation if the objective and subjective conditions for mediation are met. It follows (in principle) from the grammatical interpretation of this norm that the prosecution service will order the procedure to be compulsory in such cases. However, the use of the word „may" instead of „suspend" would clearly have been appropriate, since it is an optional procedural option. The main reason for this is that certain statutory conditions (e.g. the personal circumstances of the suspect) are in themselves a matter for consideration and therefore raise issues which are subject to subjective judgement and need to be decided. It is a different matter that in the legal literature different views have developed as to the legitimacy of the prosecution's monopoly in this area:
- According to HERKE, the possibility of prosecutorial discretion „{...} allows for a completely subjective assessment of the case, unduly restricting the ordering of mediation proceedings."[1120]
- However, according to GELLÉR, „the deletion of the condition ensuring the possibility of prosecutorial discretion from the conditions for the ordering of mediation proceedings cannot be supported. The contrary view ignores two aspects. On the one hand, the reason for the existence of mediation and active remorse as legal instruments is that the State withdraws from its criminal claim {...} at its own discretion. And if that is so, it may necessarily reserve the right to maintain its claim for punishment in certain cases {...}."[1121]

As a criticism of the current regulation, it should be noted that the legislator in the CPC – breaking with the solution of the former act – does not define the material legal conditions of the procedure in an exact manner. Nevertheless, the conditions of application of the active remorse provided for in the CC will of course continue to apply. The conditions of application of the procedure described in the current CPC too general, and, in my view, the victim's interests cannot justify them. Overall, the solution could be for the Prosecutor General's Office to

[1120] Csongor HERKE: On the subjective conditions for ordering mediation. *Prosecution Review,* 2016/4. 91.
[1121] Balázs GELLÉR – István AMBRUS: *General Doctrines of Hungarian Criminal Law I.*. Budapest, ELTE Eötvös Publishers, 2017. 335-336.

continuously specify the normative provisions on the use of the procedure in circulars or other internal instructions.

The „mediability" of certain crimes is a separate point of discussion. In my opinion, violent crimes (see: crimes against life, health, human freedom, etc.) should be excluded from the scope of the procedure as a whole. The nature of these and the „privileged" role of the fundamental right they violate or threaten make the state's obligation to protect them to such an extent that the prosecutor should not be able to refrain from the indictment. On the contrary, the use of the procedure may be justified in the case of crimes against traffic, property, or intellectual property rights.

In the case of traffic crimes, cases with fatal results are obviously out of the question. In many cases, mediation will also not take place because there is often no victim of the crime (e.g. drink-driving).[1122]

In the case of crimes against property or intellectual property rights, the application of the procedure should be much more extended. This would clearly be in the interest of the victims. However, the application of the procedure could be problematic in those cases, where the distinction between natural and legal persons is not clear (e.g. in the case of fraud, the passive person and the victim are not the same).[1123]

Overall, the frequency of these procedures depends on the effectiveness of the agreements. However, it is clear that it will take many decades before this possibility becomes common practice in the Hungarian procedural system.

### 5.3. Conditional suspension by the prosecutor (CPC)

Unlike mediation, this procedure does not require the consent of the victim and is usually initiated by the prosecutor's office.

Based on CPC, the prosecution service may suspend the proceeding by a decision if the proceeding is expected to be terminated in light of the future behaviour of the suspect.

Conditional suspension by the prosecutor shall be permitted if (1) the proceeding is conducted for a criminal offence punishable under an Act by up to three or, in cases deserving special consideration, five years of imprisonment, and (2) the behaviour of the suspect is expected to change in a favourable manner as a result of conditional suspension by the prosecutor, having regard to the nature of the criminal offence, the manner of its commission, and the identity of the suspect.

This procedure shall not be permitted if the suspect

- is a multiple recidivist,
- committed the criminal offence in a criminal organisation,
- committed a criminal offence causing death, or
- committed an intentional criminal offence during the probationary period of a suspended imprisonment or after being sentenced to imprisonment to be served for committing an intentional criminal offence, but before enforcement of the sentence was completed, or during the period of release on probation or conditional suspension by the prosecutor.

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[1122] GÖRGÉNYI, ibid. 162.

[1123] For example: if the car actually used by the family was legally purchased in the name of a business company and is stolen, the family members are considered victims in addition to the victim legal person. József KÓ: Methodological results of the research. In: Ferenc IRK (ed.): *Victims and opinions.* Budapest, 2004. In: GÖRGÉNYI, ibid. 162.

If conditional suspension by the prosecutor is permitted, the prosecution service may suspend the proceeding once, determined in years or years and months, for a period within the penalty range specified in the Special Part of the Criminal Code, but for at least one year.[1124]

*a) Conditional suspension by the prosecutor with regard to other reasons for terminating liability to punishment:*

The prosecution service shall suspend the proceeding, ex officio or upon request by the defendant or his defence counsel for a period of one year with a view to meeting a condition specified by an Act if, after the start of the proceeding, the defendant behaves in a manner that constitutes a reason for terminating his liability to punishment under the Special Part of the Criminal Code, and the defendant can be expected to behave in a manner that would result in the termination of his liability to punishment.[1125]

If the prosecution service intends to impose rules of behaviour in addition to applying conditional suspension by the prosecutor, it shall make arrangements to clarify whether (1) the suspect is capable of complying with the rule of behaviour or the obligation planned, (2) the suspect consents to the planned psychiatric treatment or to the planned treatment of his alcohol dependence, and (3) the aggrieved party consents to reparation, if it is possible.[1126]

The prosecution service may require the suspect, by way of imposing a rule of behaviour or an obligation, to

- pay for the damages, pecuniary loss, tax revenue loss, or customs revenue loss caused by his criminal offence, or the value affected by the criminal offence,
- provide reparation to the aggrieved party in another way,
- provide material means to a specific cause, or perform work to the benefit of the public,
- undergo psychiatric treatment or treatment for alcohol dependence, subject to his prior consent.

At the time of ordering conditional suspension by the prosecutor, a prosecution servicemay also order the supervision by a probation officer of the suspect.

In case conditional suspension by the prosecutor is applied, if the amount of damages, pecuniary loss, tax revenue loss, or customs revenue loss caused by the criminal offence, or the value affected by the criminal offence, can be quantified and was not recovered during the proceeding, the prosecution service shall oblige a suspect to pay that amount or restore the original situation, provided that the suspect is able to do so and the aggrieved party consents to this option.[1127]

*b) Proceedings after applying conditional suspension by the prosecutor:*

If the proceeding may not be terminated or suspended for any other reason, the prosecution service shall order the proceeding to be resumed if

- the suspect, or with consent from the suspect, his defence counsel, files a complaint against the conditional suspension by the prosecutor,
- during the period of conditional suspension by the prosecutor, the suspect is interrogated as a suspect for an intentional criminal offence committed during the period of conditional suspension by the prosecutor, including any situation where the reasonable suspicion may not be communicated because the whereabouts of the suspect are unknown or he is staying abroad,

[1124] CPC 416. §
[1125] CPC 417. §
[1126] CPC 418. §
[1127] CPC 419. §

- the suspect violates seriously the rules of supervision by a probation officer or a rule of behaviour imposed in the decision applying conditional suspension by the prosecutor, or fails, and is unlikely, to perform his obligations.[1128]

### 5.4. Cooperation of the suspect. The arrangement (CPC)

If the person who may be reasonably suspected to have committed a criminal act cooperates by contributing to the detection of the case (or other criminal case), or to the presentation of evidence to such an extent that the interests of national security or criminal prosecution related to cooperation takes priority over the interest of establishing the criminal liability of the person reasonably suspected to have committed a crime, depending on the stage of the proceeding, the prosecutor's office shall 1. reject the denunciation[1129] or 2. terminate the procedure.[1130]

Cooperation shall be excluded if the object of incrimination is a crime which

- intentionally causes the death of another person,
- causes permanent disability or
- intentionally causes serious health impairment.

In case of cooperation the state shall compensate for damages (compensation for immaterial injuries) which the defendant is liable to effect pursuant to civil law (if it is not indemnified in any other way).

If a decision is made on the compensation for damages (compensation for immaterial injuries) in a civil procedure, the legal grounds of this claim shall be protected and the state shall be represented by the Minister of Justice in the civil procedure. The statement in the civil procedure may not encompass facts according to which the identity of the defendant and the reasons for cooperation may be deducted.[1131]

The arrangement regulated under the CPC is a form of plea bargain in a broader sense. However, in a narrower sense it may be called only a plea bargain-like arrangement because no agreement is concluded related to the facts of the case but only related to certain legal issues.

Before the indictment the prosecutor's office and the defendant may conclude an arrangement in relation to the crime committed by the defendant on the admission of culpability and its consequences.[1132] The private prosecutor may not conclude an arrangement with the accused.[1133]

The conclusion of the arrangement may be initiated by the defendant, the defence counsel and the prosecutor's office alike (the prosecutor's office even during the interrogation of the defendant). The participation of the defence counsel in the procedure directed at the conclusion of the arrangement is mandatory.

In the interest of the conclusion of an arrangement the prosecutor's office, the defendant and the defence counsel (with the consent of the defendant only the prosecutor's office and the defence counsel) may conciliate concerning the admission of culpability and the substantial elements of the arrangement (except for the findings of fact and the classification of the crime according to the Criminal Code). If the prosecutor's office and the defendant have agreed in the purport of the arrangement, the prosecutor's office shall warn the defendant of the consequences of the planned arrangement during the interrogation of the defendant as suspect, and the

[1128] CPC 420. §
[1129] CPC 382. §
[1130] CPC 399. §
[1131] HERKE (2018), ibid. 76 – 77.
[1132] CPC 407. §
[1133] CPC 786. §

arrangement shall be included in the protocol of the interrogation of the suspect. The protocol shall be signed jointly by the prosecutor, the defendant and the defence counsel.

If the prosecutor's office and the defendant did not conclude an arrangement, the initiation and the related documents may not be used as evidence and the prosecutor's office may not inform the court about the motion for the conclusion of the arrangement either.

In the arrangement the defendant may confess to his culpability in relation to all or only certain crimes substantiating the criminal procedure.[1134]

The purpose of the arrangement:

a) Mandatory substantial elements of the arrangement:

- the findings of fact and classification of the crime according to the Criminal Code (established by the prosecutor's office);
- statement of the defendant admitting culpability and his intention to make a testimony
- type, degree and length of punishment (independently imposed measures) (even by consideration of the mitigating §)

b) Potential substantial elements of the arrangement:

- additional penalty
- measure imposed in addition to the penalty or measure
- termination of the procedure (rejection of denunciation) in relation to specific crimes (e.g., less significant crime, cooperation)
- (partial) dispensation from cost of criminal proceedings
- other obligations undertaken by the defendant (cooperation, compensation for the damages of the victim, participation in mediation, other obligations may be prescribed within conditional prosecutorial suspension)

c) The object of the arrangement may not be:

- involuntary treatment in a mental institution
- forfeiture
- confiscation of property
- irreversibly rendering electronic information inaccessible.[1135]

I would note that in the US – what is less understandable, and more bothersome and unjust – is the role of the trial judge in the plea bargaining process. The ABA Model Code of Judicial Conduct requires judges to act honorably, fairly, and with integrity.[1136] In recognizing the need to identify ethical standards relating to plea bargaining for defense counsel, prosecutors, and judges, the ABA has adopted Standards for Criminal Justice (Pleas of Guilty, Chapter 14). The most recent edition deleted previous provisions that had established procedures for judicial participation in plea bargaining, and instead, added a new section providing that "a judge should not ordinarily participate in plea negotiation discussions among the parties."[1137] To emphasize the importance of the requirement of judicial detachment, there is a separate mandate: "A judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." The Commentary to the Standards is explicit: "These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.[1138]

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[1134] CPC 410. §

[1135] HERKE (2018), ibid. 77 – 78.

[1136] See: ABA Model Code of Judicial Conduct, In 2003, the Model Code of Judicial Conduct's Canon 1, Commentary, was amended to explain what was meant by "integrity": "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character." Id. (Any resemblance to the Boy Scout Pledge, is, I'm sure, completely unintended.). In: KLEIN, ibid. 5.

[1137] See ABA Standards for Criminal Justice, Chapter 14 - Pleas of Guilty, at Standard 14-3.3(d) (2d ed. 1986)

[1138] Id. at Standard 14-3.3 cmt.

The defense counsel has the professional and ethical obligation to explain to his client all significant consequences of a guilty plea. Judges' attempts to obtain a guilty plea by offering a shorter prison sentence than what would be imposed after trial ignore the substantial collateral consequences that may impact a defendant who accepts the plea bargain. Judges very rarely inform a defendant that accepting the "one-time offer" (1) might affect his livelihood; (2) might make the imposition of civil damages more likely; (3) might require the defendant to register as a sex offender; (4) might subject the defendant to mandatory substance abuse testing; (5) could result in the defendant and his family being denied access to governmental benefits such as public assistance funds; (6) could result in defendant no longer being eligible to live in public housing; and (7) might result in loss of the right to vote. Defense counsel must understand the threat that these consequences pose to the individual's capacity for re-entry into the society. Denying an ex-inmate the possibilities of employment and acceptance by the community is nonsensical and counterproductive.[1139]

The ECrHR has noted that it can be considered a common feature of European criminal-justice systems for an accused to receive a lesser charge or a reduced sentence in exchange for a guilty or nolo contendere plea in advance of trial, or for providing substantial cooperation with the investigative authority.[1140] There cannot therefore be anything improper in the process of charge or sentence bargaining in itself, or in the pressure an individual to accept pre-trial resolution of the case by the fact that he or she would be required to appear in court.[1141] For the Court, plea bargaining, apart from offering important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.[1142]

The Court has also noted that the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, which amounts, in substance, to a waiver of a number of procedural rights.[1143] This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards by free will.[1144] Thus, by analogy with the principles concerning the validity of waivers, the Court has found that a decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.[1145]

In „V.C.L. and A.N. v. the United Kingdom" (2021), a case of human trafficking where the victims of trafficking were prosecuted for drug-related offences (committed in relation to their trafficking) and where they pleaded guilty to the charges in question, the Court found, in particular, that in the absence of any assessment by the authorities of whether the applicants had been trafficked and, if so, of whether that fact could have had any impact on their criminal liability, those pleas were not made „in full awareness of the facts". Moreover, in such circumstances, any waiver of rights by the applicants would have run counter to the important public interest of combatting trafficking and protecting its victims. The Court therefore did not

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[1139] KLEIN, ibid. 6-7.
[1140] „Natsvlishvili and Togonidze v. Georgia" (2014)
[1141] „Deweer v. Belgium" (1980)
[1142] „Natsvlishvili and Togonidze v. Georgia" (2014)
[1143] „Navalnyy and Ofitserov v. Russia" (2016)
[1144] See: Section General considerations of Article 6 in its criminal aspect.
[1145] „Natsvlishvili and Togonidze v. Georgia" (2014)

accept that the applicants' guilty pleas amounted to a waiver of their rights under Article 6 of the Convention.

### 5.5. Forms of indictment (CPC)

Charge implies the demand of the state for punishment enforced by the entitled person or body (the accuser) versus a specific person (the accused) before the court because the suspicion is reasonably that certain conduct of the specific person performed the findings of fact of a crime.

The indictment has two major forms. In case of public accusation the public prosecutor and in case of private prosecution the private prosecutor (generally the victim) is entitled to the rights of the representation of accusation. The form of public accusation is the indictment or the memorandum and the form of private prosecution is the motion for prosecution (in case of substitute private prosecution) or the denunciation (in case of private prosecution).

Four forms of private prosecution shall be differentiated:

- Main private prosecution: the victim is entitled to the representation of accusation without the consent of the prosecutor (private prosecution is in essence such pursuant to the CPC).
- Subsidiary private prosecution: the representation of the accusation by the victim or harmed party implemented accessorily or relatively independently and concurrently with the prosecutor (in Hungary the private party is similar to the accessory private prosecutor, who enforces the civil claim as the victim).
- Substitute private prosecution: the representation of accusation by the victim instead of the prosecutor if the prosecutor omits the formal accusation, drops the charge or does not appeal against the verdict of acquittal, etc. (substitute private prosecution is enforced within limitations in Hungary, however, in case of the absence of appeal, for example, it is not enforced).
- The counter charge: in case of certain mutually committed criminal acts subject to private prosecution, the accused may also bring charges versus the private prosecutor.[1146]

The prosecutor's office shall bring charges via the submission of the indictment to the court.[1147] The prosecutor's office working beside the court competent to adjudge the case of first instance is generally authorised to bring charges, in case of criminal acts subject to the competence of various prosecutor's offices, the prosecutor's office which took measures earlier according to the principle of precedence shall proceed.[1148]

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[1146] „In the US, after the prosecutor studies the information from investigators and the information they gather from talking with the individuals involved, the prosecutor decides whether to present the case to the grand jury. When a person is indicted, they are given formal notice that it is believed that they committed a crime. The indictment contains the basic information that informs the person of the charges against them. For potential felony charges, a prosecutor will present the evidence to an impartial group of citizens called a grand jury. Witnesses may be called to testify, evidence is shown to the grand jury, and an outline of the case is presented to the grand jury members. The grand jury listens to the prosecutor and witnesses, and then votes in secret on whether they believe that enough evidence exists to charge the person with a crime. A grand jury may decide not to charge an individual based upon the evidence, no indictment would come from the grand jury. All proceedings and statements made before a grand jury are sealed, meaning that only the people in the room have knowledge about who said what about whom. The grand jury is a constitutional requirement for certain types of crimes (meaning it is written in the United States Constitution) so that a group of citizens who do not know the defendant can make an unbiased decision about the evidence before voting to charge an individual with a crime. Grand juries are made up of approximately 16-23 members. Their proceedings can only be attended by specific persons. For example, witnesses who are compelled to testify before the grand jury are not allowed to have an attorney present. At least twelve jurors must concur in order to issue an indictment." https://www.justice.gov/usao/justice-101/charging (21.03.2024.)

[1147] CPC 421. §

[1148] CPC 29. §

The indictment has legal and other elements[1149]:

*a) The legal elements of the indictment:*
- identifiable denomination of the accused,
- accurate description of the act as an object of the accusation,
- classification of the act as an object of the accusation under the Criminal Code,
- motion for the imposition of penalty (order of measure) or for the acquittal of the accused not punishable by reason of his mental incapacity (if the accused makes a confession at the preparatory session, for the specific degree as well).

*b) Other elements of the indictment:*
- denomination of the means of evidence,
- motions for proof,
- denomination of the statutes pertaining to the competence and the jurisdiction of the court and the prosecutor's office,
- statements of the prosecutor's office,
- further motions of the prosecutor's office,
- motion for the maintenance of the coercive measure bound to judicial consent concerning personal freedom.

The prosecutor's office may motion in the indictment the termination of the parental right of custody of the accused ex officio or at initiation. The presentation of the motion for the termination of the parental right of custody may be motioned for by the child of the accused or the other parent. If the prosecutor's office does not agree with the initiation, it shall send the initiation to the guardianship authority in the interest of the consideration of the institution of action for the termination of the parental custodial right and it shall also inform the motioner about that.[1150]

If the prosecution and the accused has concluded an arrangement, the prosecutor's office shall bring charges by reason of the findings of fact and the classification in the arrangement included in the protocol.[1151] In that case the prosecutor's office shall make a motion within the indictment (supplemented by the protocol) for the court
- to affirm the arrangement,
- what punishment it should impose (what measure it should order) in accordance with the contents of the arrangement,
- what other provisions it should apply in correspondence with the arrangement.

If the indictment is submitted in the absence of the accused, in a given case even the innuendo may be omitted before the submission of the indictment. At the same time, the indictment should contain the enumeration of the circumstances concerning the conditions of the proceedings in the absence of the accused.[1152]

### 5.5.1. The memorandum

Another form of public accusation besides the indictment is the memorandum in case of this special accelerated procedure, which does not necessarily require the cooperation of the accused

[1149] CPC 422. §
[1150] CPC 572. §
[1151] CPC 424. §
[1152] CPC 748. §

and is not intended to apply less severe sanctions to the accused. So, this procedure is therefore clearly and exclusively aimed at shortening the proceedings and has no other purpose.

Based on CPC, a prosecution office may bring a defendant before a court in an immediate summary procedure within two months after a criminal offence is committed, provided that (1) the criminal offence is punishable by imprisonment for up to ten years under an Act, (2) the evaluation of the case is simple, (3) the evidence is available, and (4) the defendant was caught in the act when he committed the criminal offence or the defendant confessed to the commission of the criminal offence.[1153]

In this cases, the proceeding prosecution office shall inform the suspect that it intends to conduct an immediate summary procedure. If the defendant does not wish to authorise a defence counsel, the prosecution service shall appoint a defence counsel without delay.

The prosecution service shall

- prepare a memorandum containing personal data suitable for the identification of the suspect, a description, and the qualification pursuant to the Criminal Code, of the act serving as ground for the immediate summary proceeding, and a list of all means of evidence;
- ensure the inspection of the case documents for the defendant and his defence counsel, after the trial date is set, at a time and in a way adequate for preparing the defence, but one hour before the commencement of the trial at the latest.[1154]

a) On the whole, I think that the application of this procedure – similar to the mediation procedure and the conditional suspension of the prosecutor – could be applied in the case of crimes with a maximum term of imprisonment of up to 5 years.

b) The second condition for application is the simplicity of the case. Here, the simplicity of the facts and the legal classification must be considered together. With regard to the facts, it is necessary to examine whether the investigative evidence clearly establishes who committed what, when, where and how. With regard to the simplicity of the legal classification, the relevant criteria are: (1) whether there are other criminal proceedings pending against the defendant; (2) whether it is clear that a specific crime was committed; (3) whether there is no contradiction in the evidence (a „closed logical chain" of evidence is a basic requirement in this case). It should be noted that there is not necessarily a correlation between the simplicity of the facts and the substantive seriousness of the crime.

c) The third condition is the availability of evidence, which can usually be established on the basis of the evidence obtained in the case of a person caught „red-handed" or on the basis of a confession. At the same time, many other means of evidence may be available to the prosecutor to justify the ordering of such proceedings (e.g. camera or audio recordings, fingerprints).

d) A further condition is that the accused is caught in the act or confesses. In judicial practice, being caught in the act means that the offender commits the crime in the presence of witness(es), in whole or in part, or is apprehended during the pursuit or when leaving the scene. This is most often the case in the case of drink-driving offences, where police officers pull over and stop a suspect driving a vehicle and take a breathalyser test.

I would remark that „accelerated procedures" are used across Europe and in all cases the prosecutor initiates this proceedings:

- In Spain (from 2003) these procedures are available for certain less serious crimes. The process is used for common offences where a simple factual assessment allows the proceedings to be completed within fifteen days (used in around 5% of cases).[1155]

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[1153] CPC 723. §

[1154] CPC 726. §

[1155] Anna KISS – Adám MÉSZÁROS: *The timeliness of investigations and the acceleration of investigations.* https://bm-tt.hu/wp-content/uploads/2022/02/be_gyorsitas_kutjel_meszaros_kiss_2011-doc.pdf (21.03.2024.).

- Under the Italian procedural code, under the „giudicio direttissimo" judicial construction, the prosecutor has to bring a suspect caught in the act before the competent judge within 48 hours. Thereafter, if the prosecutor considered that, despite the clear evidentiary situation, the short time available was not sufficient to allow a full investigation, he could request a „direct procedure", in which he had 90 days to conduct the investigation.[1156]
- In England, the accused is able to notify the prosecutor's office in writing that he or she wished to make a confession. If this was accepted, the proceedings would proceed without a trial.[1157]

### 5.5.2. The denunciation

The private prosecution (counter charge) procedure commences upon a denunciation.[1158] In the denunciation it needs to be presented that (1) versus who, (2) by reason of what act and (3) on the basis of what evidence the institution of the criminal procedure is requested by the victim.

In a private prosecution procedure the prosecution is represented by the victim. If the person with international immunity proceeds as a private prosecutor, the court shall suspend the procedure concurrently with the passing of the case from the minister of justice to the minister of foreign affairs until the decision on immunity based on international law is made (and if immunity exists, the procedure shall be terminated).

The denunciation must be made at the court, but in such a case the charge may not be based on the address of the victim (his residence).

If the denunciation was rejected (or the procedure was terminated) because the act is not a crime to be persecuted by public prosecution, the prosecutor's office in its decision shall inform the victim that by reason of the obtainment of a crime to be persecuted by private prosecution, the charge needs to be made by a private prosecutor. The victim may take action as a private prosecutor within one month as of the receipt of the decision rejecting his complaint, and in the absence of a private motion, he may supplement his statement within this deadline.[1159]

The denunciation shall be examined by the court, and if transfer, suspension or termination of the procedure is inadmissible, the court

- shall send the denunciation and the documents of the procedure to the prosecutor's office, if the act needs to be punished by public prosecution or it must be taken into consideration whether the representation of accusation should be taken over by prosecutor's office (concerning this the prosecutor's office needs to make a declaration within 8 days),
- may request the victim to specify the denunciation in writing,
- may order investigation if the identity of the denounced person or the crime cannot be established on the basis of the denunciation (if the identity of the unknown perpetrator cannot be established on the basis of the data of the investigation either, the court shall terminate the procedure), or if means of evidence need to be detected.

The prosecutor's office may take over once the representation of the accusation from the private prosecutor, who in this case is endowed with the rights of the victim and burdened by the obligations of the victim. While the private prosecutor may drop the charge at any time, the

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[1156] László PUSZTAI: The new Italian Code of Criminal Procedure from the perspective of domestic codification. *Hungarian Law,* 1991/4. 236.
[1157] Miklós LÉVAI: The system of criminal sanctions in England and Wales; lessons from criminal policy. *Criminological Publications,* 1991/42. 30.
[1158] CPC 765. §
[1159] CPC 372. §

prosecutor's office may only withdraw from the representation of the accusation, in such a case the right of the private prosecutor to prosecution renascences.[1160]

### 5.5.3. The motion for prosecution and the written announcement

In a substitute private prosecution the victim may take action as prosecutor, therefore, substitute private prosecution is admissible only in case of those criminal acts which have a victim. In substitute private prosecution the provisions concerning international immunity are directive.[1161]

The conditions of proceeding as a substitute private prosecutor are summarised in the following table:

a) In case of the rejection of the denunciation: 1. the act does not qualify as crime; 2. the suspicion of a crime is absent; 3. ground for exemption from punishability or culpability.

b) The reason for termination of the procedure: 1. the act does not qualify as crime; 2. the crime was not committed by the suspect; 3. the commission of a crime cannot be established; 4. ground for exemption from punishability or culpability.

c) In case of dropping the charge: 1. the victim may take action within 15 days as of the receipt of the court notification about dropping the charge; 2. no cause for the exclusion of a substitute private prosecution exists (except for: an undercover agent, a cooperative defendant, an arrangement).

Formal accusation in the substitute private prosecution takes the form of a motion for prosecution (in case of dropping the charge the written announcement of the victim about his intention to take action as a substitute private prosecutor).

The grounds for exemption of the substitute private prosecution are stipulated under CPC 787. § (3) as fallows:

- the denounced person (the defendant) is juvenile,
- ground for exemption from punishability or culpability is minor age or insanity,
- the crime did not injure or threaten the rights or rightful interests of the victim directly,
- the victim is the state or a body exercising public authority,
- rejection of the denunciation (termination of the procedure) against an undercover agent, a member of a body entitled to apply covert instruments or a covertly cooperating person,
- rejection of the denunciation (termination of the procedure) by reason of an arrangement with the defendant,
- termination of the procedure in the case of a less significant crime within the framework of an arrangement.

In the substitute private prosecution procedure the presence of the legal representative of the victim as well as of the defence counsel are mandatory. In the substitute private prosecution procedure the victim files his civil claim in the motion for prosecution at the latest and a mediation proceeding is admissible only if the prosecutor's office has taken over the representation of accusation (namely, this may ensue on one occasion).

From a certain point of view the motion for prosecution has less content-based elements than the indictment (it does not include motion for the sanctions, no motions for evidence are necessary, nor does it refer to competence and jurisdiction etc.), whereas its mandatory element is e.g., the denomination of the civil claim (if any) and the scope of testimonies to be read out.

The motion for prosecution and the written announcement shall be signed by the victim and the legal representative too. Substitute private prosecution may not be instituted at the court competent in re the residence of the victim as well.

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[1160] HERKE (2018), ibid. 80. – 81.
[1161] CPC 721. §

The court shall reject the motion for prosecution (written announcement) under a nonconclusive order:

- expiry of the deadline determined by law,
- the victim does not have a legal representative (this may be substituted within 15 days as of the service of the order),
- taking action as a substitute private prosecutor is inadmissible,
- the motion for prosecution /written announcement does not include the legal accessories (this may be substituted within 15 days).[1162]

## 5.6. The notion of „ciminal charge" (ECrHR)

*a) General principles:*

The concept of a „criminal charge" has an „autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States.[1163] This is true both for the determination of the "criminal" nature of the charge and for the moment from which such a „charge" exists.

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

*b) The existence of a „charge":*

The concept of „charge" has to be understood within the meaning of the Convention. The Court takes a „substantive", rather than a „formal", conception of the „charge" contemplated by Article 6.[1164] Charge may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether „the situation of the [suspect] has been substantially affected".[1165]

The Court held that a person arrested on suspicion of having committed

- a criminal offence,[1166]
- a suspect questioned about his involvement in acts constituting a criminal offence,[1167]
- a person who has been questioned in respect of his or her suspected involvement in an offence,[1168] irrespective of the fact that he or she was formally treated as a witness,[1169] as well as
- a person who has been formally charged with a criminal offence under procedure set out in domestic law[1170]

could all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. On the other hand, a person questioned in the context of a border control, in the absence of a need to determine the existence of a reasonable suspicion that she had committed an offence, was not considered to be under a criminal charge.[1171] In „Sassi and

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[1162] HERKE (2018), ibid. 81. – 82.
[1163] „Blokhin v. Russia" (2016)
[1164] „Deweer v. Belgium" (1980)
[1165] „Eckle v. Germany" (1982); „Ibrahim and Others v. the United Kingdom" (2016); „Simeonovi v. Bulgaria" (2017)
[1166] „Heaney and McGuinness v. Ireland" (2000); „Brusco v. France" (2010)
[1167] „Aleksandr Zaichenkov v. Russia" (2010); „Yankov and Others v. Bulgaria" (2010)
[1168] „Stirmanov v. Russia" (2019)
[1169] „Kalēja v. Latvia" (2017)
[1170] „Pélissier and Sassi v. France" (1999); „Pedersen and Baadsgaard v. Denmark" (2004)
[1171] „Beghal v. the United Kingdom" (2019)

Benchellali v. France" (2021), concerning statements given by the applicants to certain French authorities on a US base at Guantánamo, the Court did not consider that the questioning in the context of administrative missions, unrelated to the judicial proceedings, with the aim of identifying the detainees and collecting intelligence, not for the purpose of gathering evidence of an alleged criminal offence, amounted to the existence of a criminal charge.

In „Deweer v. Belgium" (1980), a letter sent by the public prosecutor advising the applicant of the closure of his business establishment and soliciting him to pay a sum of money as a settlement for avoiding prosecution amounted to the existence of a "criminal charge" triggering the applicability of Article 6 of the Convention.

Similarly, in „Blaj v. Romania" (2014), the Court examined the context in which actions were taken against the applicant who had been caught in the very act of committing an offence of a corruptive nature (in flagrante delicto). For the Court, the taking of forensic samples on the crime scene and from the applicant and inviting the applicant to open an envelope in his office suggested that the authorities had treated the applicant as a suspect. In these circumstances, the information communicated to the applicant during the ensuing questioning had implicitly and substantially affected his situation, triggering the applicability of Article 6.

*c) The "criminal" nature of a charge:*

As regards the autonomous notion of "criminal", the Convention is not opposed to the moves towards "decriminalisation" among the Contracting States. However, offences classified as „regulatory" following decriminalisation may come under the autonomous notion of a „criminal"
offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention.[1172]

Moreover, the Court has held that the Convention allows States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a „mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction under Article 6 to satisfy itself that the disciplinary does not improperly encroach upon the criminal sphere.[1173]

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in „Engel and Others v. the Netherlands" (1976): (1) classification in domestic law; (2) nature of the offence; (3) severity of the penalty that the person concerned risks incurring.

The first criterion is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.[1174]

In evaluating the second criterion, which is considered more important,[1175] the following factors can be taken into consideration:

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[1172] „Öztürk v. Germany" (1984)
[1173] „Gestur Jónsson and Ragnar Halldór Hall v. Iceland" (2020)
[1174] „Gestur Jónsson and Ragnar Halldór Hall v. Iceland" (2020)
[1175] „Jussila v. Finland" (2006)

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character;[1176]
- whether the proceedings are instituted by a public body with statutory powers of enforcement;[1177]
- whether the legal rule has a punitive or deterrent purpose;[1178]
- whether the legal rule seeks to protect the general interests of society usually protected by criminal law;[1179]
- whether the imposition of any penalty is dependent upon a finding of guilt;[1180]
- how comparable procedures are classified in other Council of Europe member States.[1181]

The third criterion is determined by reference to the maximum potential penalty for which the relevant law provides.[1182]

The second and third criteria laid down in „Engel and Others v. the Netherlands" (1976) are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.[1183]

The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.[1184]

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.[1185]

## 5.7. Concluding thoughts

The exclusiveness of the indicment as a classical prosecutorial function is showing a decreasing trend, which is also confirmed by the normative material of the CPC and the regulatory solutions of the European procedural codes. The use of alternative procedures requires a serious reflection of the prosecution's office, as the prosecutor must assess, depending on the legal instrument in question, the admissibility of the charge, the interests of simplifying and shortening the proceedings, the complexity of the facts, the availability of evidence and the interests of criminal prosecution.

The decisions in question can be linked to the (intermediate) stage of the criminal proceedings. In this regard, the main problems of the CPC are structural in nature. On the one hand, the legislator does not refer to the separate (intermediate) stage of the criminal proceedings, which, however, must be separated from the investigation stage for the reasons set out above. While the investigative phase only involves the examination of procedural alternatives, including the taking of evidence, which fall within the prosecution's jurisdiction, the subsequent prosecutorial phase involves the taking of various decisions (rulings) and the conduct of the chosen process (e.g. conditional suspension).

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[1176] „Bendenoun v. France" (1994)
[1177] „Benham v. the United Kingdom" (1996)
[1178] „Öztürk v. Germany" (1984); Bendenoun v. France (1994)
[1179] „Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia" (2018)
[1180] „Benham v. the United Kingdom" (1996)
[1181] „Öztürk v. Germany" (1984)
[1182] „Campbell and Fell v. the United Kingdom" (1984)
[1183] „Lutz v. Germany" (1987)
[1184] „Nicoleta Gheorghe v. Romania" (2012)
[1185] „Bendenoun v. France" (1994)

The other codification problem is that the legal provisions relating to confessions of the accused are completely scattered in the current CPC. In this respect, it would have been advisable to introduce a separate chapter in which these rules would have been placed in a uniform manner, for example under the heading „possibilities for cooperation in relation to the accused".

Nevertheless, the advantages of simplify procedures are evident at all procedural stages: the investigation, as a separate stage, is essentially a preparatory stage for the use of alternative prosecution procedures, during which the prosecutor's office seeks to use consensual processes of typical Anglo-Saxon origin. These tendencies fundamentally reduce the classical role of the investigation, since if the conditions for these procedures are met, further investigative acts become „pointless".

Overall, the prosecution (intermediate) stage has become the main arena for „simplifying" or expedited procedures. The filing of an indictment, as a classical prosecutorial function, has become a subsidiary function in cases where the law allows for the use of other procedural options. This approach is also supported by the structure of the CPC, since the legislator has classified the simplifying procedural option before the rules on the indictment.

I would note that in some EU Member States there is now a clear mix of elements of the continental and Anglo-Saxon systems. Rather, the criminal justice systems of countries that have been based on continental legal traditions are gradually adopting the procedural constructs of the US and the UK, mainly with a view to simplifying criminal proceedings. There is no doubt that the role of evidence is diminishing, and the need to establish substantive (material) justice is becoming secondary.[1186] However, as NELKEN puts it, it is simply a matter of understanding the underlying meaning of the different legal institutions and being able to step outside the rigid framework of our current thinking.[1187]

[1186] Thus, Petra BÁRD's approach suggests that the „suspicion" and fear of each other is diminishing. This is a major step forward, given that the US Supreme Court in the 1960s - in its decisions on the prohibition of self-incrimination and the right to remain silent - saw the continental tradition as a clear negative example. In: Petra BÁRD: The Different Conception of Justice in Anglo-Saxon and Continental Criminal Procedure. In: Petra BÁRD – Peter HACK – Katalin HOLÉ (eds.): *Memory of László Pusztai*. Budapest, OKRI, ELTE-ÁJK, 2014. 42.

[1187] David NELKEN: *Comparative criminal justice: making sense of difference.* London, Sage, 2010. 43.

# CHAPTER VI

# PREPARATION OF A TRIAL.
# TRIAL BEFORE COURT OF FIRST INSTANCE

In relation to court proceedings, it is necessary to analyse not only first instance but also appeal proceedings. In the Hungarian legislation (CPC), the legislator has created a number of variations of appeal procedures, which means that first instance decisions can be challenged in many respects. This is both desirable and beneficial in terms of the rule of law and contributes to a more efficient administration of justice. This chapter also covers the ECrHR's case law on judicial proceedings.

## 6.1. Preparation of a trial (CPC)

Within a month of receipt, the court shall examine all case documents with a view to determining if it is necessary or possible to

- transfer the case,
- join or separate the cases,
- suspend the proceeding,
- terminate the proceeding,
- request the prosecution service to remedy any deficiencies of the indictment document,
- pass a decision regarding a coercive measure,
- establish a qualification different from that specified in the indictment document,
- refer the case to a court panel, or
- conduct a proceeding for passing a punishment order.

The court shall hold a session to interview the prosecutor, the accused, the defence counsel or the aggrieved party.[1188]

*a) Transferring a case:*
If adjudicating a case does not fall within the subject-matter or territorial jurisdiction of the proceeding court, it shall transfer the case to a court with subject-matter and territorial jurisdiction over the case.[1189]

*b) Joining and separating cases:*
If a new proceeding is instituted against a person released on probation for a criminal offence committed during the probationary period, or if a proceeding is instituted against a person released on probation before or during the probationary period for a criminal offence committed before the probationary period, the cases shall be joined, and the court with subject-matter and territorial jurisdiction over the new case shall conduct the proceeding.

If the court does not find the accused guilty in the new proceeding, or if the criminal offence was committed before release on probation and the probationary period expired before the cases are adjudicated jointly, the court shall separate the joined cases.[1190]

*c) Suspending a proceeding:*

[1188] CPC 484. §
[1189] CPC 485. §
[1190] CPC 486. §

The court shall suspend its proceeding if the accused is unable to exercise his rights and perform his obligations provided for under this Act due to his permanent and serious illness, or a mental disorder that occurred after the commission of the criminal offence.[1191]

The court may suspend its proceeding if

- the whereabouts of the accused are unknown or he is staying in another country,
- a measure was taken to remedy any deficiencies of the indictment document or to perform a procedural act,
- an authority of another country is to execute a request for legal assistance,
- a decision on a preliminary matter needs to be obtained to conduct the proceeding,
- a consultation procedure, as defined in the Act on cooperation with the Member States of the European Union in criminal matters, is instituted,
- the surrender or extradition of the accused was postponed by an authority of another country pursuant to an international arrest warrant or European arrest warrant,
- an international criminal court, in a case falling within its jurisdiction, requests the Hungarian authority to transfer the criminal proceeding,
- the recognition adaptation of a foreign judgment, or a judgment delivered in a Member State, was initiated, or
- the execution of extradition or surrender of the accused was postponed by a foreign judicial authority having regard to conducting a pending criminal proceeding, or enforcing a sentence of imprisonment imposed, or a custodial measure applied, in the other country.

The court may suspend its proceeding for a period of one year if (1) the behaviour of a defendant following the commencement of the proceeding constitutes a reason for terminating his liability to punishment under the Special Part of the Criminal Code, and (2) his behaviour is expected to serve as a ground for terminating his liability to punishment.[1192]

A court may initiate, ex officio or upon a motion, a proceeding before the Constitutional Court for establishing that a law, provision of law, public law regulatory instrument, or uniformity decision is in conflict with the Fundamental Law or an international treaty pursuant to the Act on the Constitutional Court. A court may initiate, ex officio or upon a motion, a proceeding before the Curia for reviewing a local government decree pursuant to the Act on the organisation and administration of the courts. If initiating a proceeding before the Constitutional Court or the Curia, the proceeding court shall pass a corresponding order and, at the same time, suspend its proceeding.[1193]

A court may initiate, ex officio or upon a motion, a preliminary ruling procedure before the Court of Justice of the European Union pursuant to the provisions of the treaties on which the European Union is founded. If initiating a preliminary ruling procedure, the court shall pass a corresponding order and, at the same time, suspend its proceeding. In its order, the court shall determine the question requiring the preliminary ruling of the Court of Justice of the European Union, and it shall present a summary of the facts of the case and the relevant Hungarian laws to the extent required for answering the question asked. The order of the court shall be served on the Court of Justice of the European Union and, for information purposes, it shall be served on the Minister responsible for justice simultaneously.If dismissing a motion for initiating a preliminary ruling procedure, the court shall pass a corresponding order.[1194]

*d) Terminating a proceeding:*

A court shall terminate its proceeding with a conclusive order if

- the act serving as ground for the indictment does not constitute a criminal offence,

[1191] CPC 487. §
[1192] CPC 488. §
[1193] CPC 489. §
[1194] CPC 490. §

- the accused is not liable to punishment due to infancy,
- the liability to punishment of the accused was terminated by his death, a statute of limitations, a pardon, or on any other grounds specified in an Act,
- the act serving as ground for the indictment has already been adjudicated with final and binding effect,
- the prosecution service abandoned the indictment and neither private prosecution nor substitute private prosecution can be brought, and the aggrieved party did not take action as a private prosecuting party or substitute private prosecuting party,
- it is conducted regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.

The court shall inform any civil party about terminating the proceeding, also advising any such party that he may enforce his civil claim by other legal means.[1195]

*e) Remedying the deficiencies of an indictment document:*
If an indictment document does not contain the statutory elements required under CPC, or contains only some of those, the court, acting ex officio or upon a motion, shall pass an order specifying any deficiencies and calling upon the prosecution service to remedy the specified deficiencies of the indictment document. The prosecution service may remedy the deficiencies of the indictment document within two months after receipt of the order specified.[1196]

*f) Decisions on coercive measures:*
A court shall decide, ex officio or upon a motion, on maintaining, ordering, or terminating a coercive measure affecting personal freedom subject to judicial permission. If a court orders or, where a new circumstance is invoked in a motion as ground for maintaining a measure in comparison to the earlier decision, maintains a coercive measure affecting personal freedom subject to judicial permission, it shall pass its decision in a court session. The period of a coercive measure maintained or ordered by the court that orders the transfer of the case concerned shall last until a decision is passed, in the course of the preparation of a trial, by the court to which the case was transferred.[1197]

*g) Option to establish a qualification different than that specified in the indictment:*
If it is reasonable to assume that a) an act serving as ground for an indictment may constitute a criminal offence that is different than, or additional to, the criminal offence as qualified in the indictment document, or b) that the criminal offence may be qualified as less or more severe than that specified in the indictment document,the court shall pass an order establishing how the act serving as ground for the indictment may be qualified differently. If the court establishes that the act serving as ground for the indictment constitutes a criminal offence subject to private prosecution, a statement from the prosecution service need not be obtained regarding taking over the prosecution.[1198]

*h) Referring a case to a court panel*
Before a preparatory session is concluded, a court shall refer a case to a panel of three professional judges if it considers it necessary due to the complexity of the case, the volume of

[1195] CPC 492. §
[1196] CPC 493. §
[1197] CPC 494. §
[1198] CPC 495. §

case documents, the number of persons participating in the criminal proceeding, orfor any other reason.[1199]

*i) Communicating an indictment document:*
The court shall serve the indictment document on the accused and the defence counsel upon the expiry of a period of one month after the receipt of the case documents by the court. The court shall call upon the accused and the defence counsel to file any motion for taking, or excluding, any piece of evidence during the preparatory session at the latest. [1200]

*j) Measures for performing procedural acts:*
A court shall, ex officio or upon a motion filed by an eligible person, take measures to ensure that all means of evidence specified in a motion for evidence are available at the trial. A court shall obtain data regarding the criminal record of an accused, and data relating to the accused from the infraction records system; the court may also obtain, ex officio, data relating to the accused or the subject matter of the indictment from any other publicly certified register established by law. The court shall ensure the recognition of a judgment delivered in a Member State, or foreign judgment, concerning the suspect, which may be taken into account during the proceeding.[1201]

## 6.2. Preparatory sessions (CPC)

A preparatory session is a public court session held for the purpose of preparing a trial after the indictment is brought, where the accused and the defence counsel may, before the trial, present their position on the indictment and may be involved in setting the further course of the criminal proceeding. A court shall hold a preparatory session within three months after an indictment document is served. If a corresponding motion is filed by a defence counsel within three working days after receipt of an indictment document, the court shall set the date of the preparatory session to a date more than one month after the service of the indictment document. The provisions concerning the date and time of a preparatory session shall not apply if a summons to the preparatory session need to be served on an accused in another country, and the time needed for service does not allow for holding the preparatory session within the applicable time limit. The attendance of a prosecutor and the accused at a preparatory session shall be mandatory. If a defence counsel participates in the proceeding, the preparatory session may not be held in the absence of the defence counsel.[1202]

An accused and a defence counsel shall be summoned to, and the prosecution service shall be notified about the date of, a preparatory session by the court. If there is more than one accused in a case, the court shall notify the co-accused and their defence counsels about the data of the preparatory session. In its summons, the court shall also advise the accused that

- he may confess his guilt of the criminal offence he was indicted for, and he may waive his right to a trial within the scope of his confession of guilt,
- should the court accept his confession of guilt, it shall not examine the validity of the facts presented in the indictment document, or the matter of guilt,
- should he not confess his guilt in line with the indictment document, he may present the facts and the supporting evidence his defence is based on, and he may move for taking or excluding evidence, at the preparatory session.

[1199] CPC 496. §
[1200] CPC 497. §
[1201] CPC 498. §
[1202] CPC 499. §

The court shall notify the aggrieved party about the date of the preparatory session and advise him of the option of filing a civil claim. The summons or the notification shall be issued at a time that allows for it to be served at least fifteen days before the preparatory session.[1203]

If an accused fails to appear at a preparatory session, the court shall take measures to ensure the appearance of the accused as provided for under this Act. If the appearance of an absent accused, defence counsel, or prosecutor may not be ensured within a reasonable time on the due date of a preparatory session, the court shall postpone the preparatory session and schedule a new preparatory session for a date within the following two months.[1204]

If holding a preparatory session is not prevented by any obstacle, the proceeding prosecutor shall, upon an invitation from the court after the commencement of the preparatory session, present a summary of the indictment and specify the means of evidence supporting the indictment; he may also file motions regarding the value or period of a penalty or measure, should the defendant confess to the commission of the criminal offence during the preparatory session.

Presenting the summary of the indictment may be omitted upon a motion by the accused or, with the consent of the accused, his defence counsel. Subsequently, the court shall interrogate the accused taking account of the characteristics of the preparatory session. The court shall appoint a defence counsel and postpone the preparatory session if the accused does not have an authorised defence counsel and the court has any doubt as to whether the accused understood the indictment or the accused moves for the appointment of a defence counsel.

If the indictment document is to be deemed served on the basis of fiction of service, the court shall, upon a motion by the accused or, with consent from the accused, his defence counsel, postpone the preparatory session, with the exception of a case where the accused refused to accept the indictment document.

The proceeding members of the court may ask questions from the prosecutor, the accused, and, with regard to any civil claim, any civil party. The prosecutor, the defence counsel, and, with regard to any civil claim, a civil party may ask the accused questions; the accused and the defence counsel may file motions for questions to be asked from the prosecutor.[1205]

If there is more than one accused in the case and all other conditions of separation are met, the court, with a view to announcing a judgment, may separate, as regards the accused that confessed his guilt, the cases pending before it.[1206]

*a) Proceeding following a confession of guilt:*

If an accused confesses his guilt and waives his right to a trial within the scope of his confession, the court shall decide, on the basis of the above fact, the case documents, and the interrogation of the accused, whether it accepts the confession of guilt by the accused.

Acceptance of a confession of guilt shall be subject to the following conditions:

- the defendant understands the nature of, and the consequences of accepting, the confession,
- there is no reasonable doubt regarding the capacity of the defendant to be held liable for his acts, and the voluntary nature of his confession,
- the defendant’s confession of guilt is clear and supported by the case documents.

If the court finds it possible to adjudicate the matter during a preparatory session, it shall

[1203] CPC 500. §
[1204] CPC 501. §
[1205] CPC 502. §
[1206] CPC 503. §

also interrogate the accused regarding all sentencing factors. After interrogating the accused, first the prosecutor and then the defence counsel may address the court. The court may pass its judgment even during the preparatory session.[1207]

If it is not possible to administer a case during a preparatory session, the accused and the defence counsel may file, without affecting the grounds supporting the facts presented in the indictment document or the matter of guilt, a) motions for taking evidence or performing other procedural acts b) motions for excluding pieces of evidence.

If holding a trial is not prevented by any obstacle, a trial may be held by the court immediately.[1208]

*b) Proceeding without a confession of guilt:*

If an accused does not confess his guilt during a preparatory session, he may still confess his guilt at any later stage of the proceeding. If a court refuses to accept a confession of guilt by an accused, or an accused refuses to answer regarding the confession of his guilt, it shall be assumed that the accused did not confess his guilt. The same procedure shall be followed if an accused confessed his guilt but did not waive his right to a trial within the scope of his confession.

If an accused did not confess his guilt, he may specify the facts he accepts as true from among those stated in the indictment document during his interrogation.

An accused or a defence counsel may present the facts and the supporting evidence underlying the defence; he may also file motions for taking or excluding evidence or performing other procedural acts.[1209]

A court shall exclude a piece of evidence, ex officio or upon a motion, if it is clear from the case documents that using the given piece of evidence would be in conflictwith the provisions of this Act. If, due to the complexity of the case or on the basis of case documents, it is not possible to decide whether to exclude a piece of evidence, the court may examine the piece of evidence to be excluded before passing a decision on the matter. Pieces of evidence excluded and documents containing such pieces of evidence shall be handled among the case documents confidentially.[1210]

On the basis of statements made by the accused and after hearing any observation made by prosecutor, the court may (1) set a date for a trial immediately and the trial may be held immediately unless doing so is prevented by an obstacle, (2) determine the framework and scope of taking evidence, as well as the order of pieces of evidence to be taken, (3) decide not to take evidence regarding facts that are accepted as true by the prosecutor, the accused, and the defence counsel, and regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.[1211]

Within one month after closing the preparatory session, the court shall examine all motions for evidence, set a date for the trial, and make the arrangements necessary for holding the trial and issuing summons and notifications. As a general rule, trials shall be held in the official premises of the court. The court may, if it considers necessary to do so, make different arrangements and set a trial at a venue falling outside its territorial jurisdiction. If it is clear in light of the volume of the evidence to be taken that the case may not be concluded within one day of trial, the court may set more than one date or a single continuous date.[1212]

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[1207] CPC 504. §
[1208] CPC 505. §
[1209] CPC 506. §
[1210] CPC 507. §
[1211] CPC 508. §
[1212] CPC 509. §

The court shall summon to the trial date set all persons whose attendance is mandatory. The court shall notify the prosecution service and, unless an exception is made in this Act, the experts, and all persons who may attend the trial under this Act. If the prosecution service files a motion to terminate the parental custody rights of the accused, the court shallnotify the guardianship authority and the other parent, provided that the other parent also has parental custody rights.

In the summons or notice, the court shall invite the aggrieved party and any party with a pecuniary interest to file their motions for evidence before the trial without delay. At the time of sending out summons and notices, the court shall also inform the prosecution service, the accused and the defence counsel about the taking of evidence the court intends to carry out on the trial date set. A summons shall be served on the accused and the defence counsel at least eight days before the trial. A notification shall be issued at a time that allows for it to be served at least eight days before the trial.[1213]

If a court proceeds as a panel, any decision on the termination of the proceeding or any coercive measure affecting personal freedom subject to judicial permission shall be passed by the panel in the course of the preparation of the trial. The court panel may decide on any matter that falls within the powers of the chair of the panel.

In the course of the preparation of a trial, a junior judge may proceed regarding the following matters:

- transferring a case,
- joining and separating cases,
- remedying the deficiencies of an indictment document,
- suspending a proceeding,
- communicating an indictment document,
- taking measures for performing procedural acts,
- setting or postponing a preparatory session or a trial,
- issuing summons and notifications.[1214]

### 6.3. Trial before court of first instance (CPC)

Once commenced, a trial shall not be interrupted by the court until the case is concluded, if possible. If necessitated by the scope of the case or any other reason, the proceeding single judge or the chair of the panel may interrupt a trial commenced for a period of up to eight days, and the court may postpone the trial for the purpose of taking evidence or other important reason.

A trial may be resumed without any repetition, provided that the composition of the proceeding panel remained unchanged; in any other situation, the trial shall be repeated. If more than six months passed since the last trial date, the trial shall be repeated if a motion to that effect is filed by the prosecutor, the accused or the defence counsel. A trial shall be repeated by having a summary of earlier trial materials presented by the court. After presenting the summary of earlier trial materials, the court shall advise the prosecutor, the accused and the defence counsel that they may make observations regarding the presentation and they may file motions for supplementing the presentation or repeating any procedural act.[1215]

*a) Opening a trial:*

[1213] CPC 510. §
[1214] CPC 512. §
[1215] CPC 518. §

The proceeding single judge or chair of the panel shall open a trial by specifying the subject matter of the indictment, and then he shall advise members of the audience of keeping order and the consequences of any disturbance. He shall state the name of the proceeding members of the court, the keeper of minutes, the prosecutor, and the defence counsel. The proceeding single judge or chair of the panel shall take account of the persons present, and determine if those summoned or notified are present; based on this determination, he shall decide whether it is possible to hold a trial. If the attendance of an accused at a trial is mandatory, but he fails to appear despite being duly summoned, the court shall take measures to ensure the attendance of the accused. If it is reasonable to assume that forced attendance could be successfully enforced on the set trial date within a reasonable time, the proceeding single judge or the chair of the panel shall order, as possible, the forced attendance of any witness who is absent despite being duly summoned. The proceeding single judge or chair of the panel shall call upon the prosecutor or expert, if absent, to appear at the trial. Such a call shall be extended to a prosecutor through the head of his prosecution office.

If holding a trial is not prevented by any obstacle, the proceeding single judge or the chair of the panel shall instruct all witnesses, other than the aggrieved party, to leave the courtroom, also advising them of the consequences of being absent without excuse. An expert shall be instructed to leave the courtroom only if the court considers it necessary to do so; otherwise, an expert may attend a trial from its beginning. The trial need not be postponed for a failure to observe the summons period if the accused and the defence counsel concordantly move for, or agree to, the holding of the trial. If an authorised defence counsel fails to appear at a trial and the participation of a defence counsel is not mandatory in the criminal proceeding, the trial may be postponed, provided that a) a motion to that effect is filed by the accused, and b) the authorised defence counsel was not notified, or it is not possible to determine if he was duly notified. If holding a trial is prevented by any obstacle, the court shall postpone the trial.[1216]

Before the commencement of a trial, the prosecutor, the accused, the defence counsel and the aggrieved party may (1) file a motion for transferring, joining, or separating the case, (2) file a motion for disqualifying the proceeding single judge or chair, or member, of the panel or the keeper of minutes, or (3) invoke any other circumstance that may prevent the trial from being held or should be taken into account before the commencement of the trial. Before the commencement of a trial, the accused, the defence counsel, or the aggrieved party may file a motion for disqualifying the proceeding prosecutor.

*b) Commencement of a trial:*

If the proceeding single judge or the chair of the panel establishes that holding a trial is not prevented by any obstacle, and the witness or expert has left the courtroom, the trial shall be commenced by the court.

When instructed by the proceeding single judge or the chair of the panel, (1) the prosecutor shall present a summary of the indictment, provided that it was not presented during a preparatory session or a corresponding motion was filed by the aggrieved party because he did not attend the preparatory session, (2) the aggrieved party, if present, or his representative shall state whether he intends to enforce any civil claim; if the aggrieved party intends to enforce a civil claim, the proceeding single judge or the chair of the panel shall instruct the aggrieved party to present his claim, and then the aggrieved party, if he is to be interrogated as a witness, shall leave the courtroom.

Presenting the summary of the indictment may be omitted upon a motion by the accused or, with the consent of the accused, his defence counsel. If a statement of confession of guilt was

[1216] CPC 513. §- 515. §

accepted by the court during the preparatory session, the court shall present a summary of its corresponding order in place of the indictment.[1217]

*c) Motions for evidence:*
In the course of taking evidence, motions may be filed and observations may be made by the prosecution service, the accused, the defence counsel, the aggrieved partyand, regarding matters affecting him, any party with a pecuniary interest or any other interested party. The proceeding single judge or the chair of the panel shall decide on any motion for evidence and the sequence of such motions. As a general rule, evidence moved for by the prosecution service shall be taken before evidence moved for by the accused or the defence counsel. A court may refrain from taking evidence regarding (1) facts that are accepted as true by the prosecution service, the accused, and the defence counsel, or (2) a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability.[1218]

After the preparation of a trial, the prosecution service, the accused, or the defence counsel may file a motion for evidence, if (1) the fact or means of evidence underlying the motion came into existence after the preparatory session, or the person filing the motion became aware thereof after the preparatory session through no fault of his own, or (2) the motion is filed to refute the probative value of a means of evidence or the outcome of taking evidence, provided that the method or means of doing so became known to the person filing the motion from the evidentiary procedure. The motion may be filed within fifteen days after becoming aware of the fact or means of evidence underlying the motion; at the same time, the person filing the motion shall substantiate the likely date of becoming aware of such fact or means of evidence and the likelihood of the absence of own fault.[1219]

If a statement of confession of guilt was accepted by the court, no further evidence may be taken regarding the grounds supporting the facts stated in the indictment document or the matter of guilt.[1220]

*d) Interrogating an accused:*
A procedure for taking evidence shall begin by interrogating the accused. If the accused gave a testimony during the preparatory session, his interrogation may be omitted,with consent from his defence counsel, as regards questions already covered by his testimony given during the preparatory session. As a general rule, an accused shall be interrogated in the absence of any co-accused not yet interrogated. Acting ex officio or upon a motion from the prosecutor or, for the safety of the accused, from an accused or his defence counsel, the proceeding single judge or the chair of the panel shall have any co-accused already interrogated removed from the courtroom for the period of the interrogation of the accused if the presence of the co-accused would disturb the accused during his interrogation. An accused may confer with his defence counsel during a trial without disturbing the order of the trial, but he may not do so during his interrogation without permission from the proceeding single judge or the chair of the panel. If an accused made a statement regarding his personal data during the investigation or the court procedure, the data recorded in the case documents may also be verified by a trainee judge, a junior judge, or an administrative court officer outside the trial, with the proviso that the proceeding single judge or the chair of the panel shall record only the fact that verification was performed and any changes that occurred to such data.[1221]

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[1217] CPC 517. §
[1218] CPC 519. §
[1219] CPC 520. §
[1220] CPC 521. §
[1221] CPC 522. §

The proceeding single judge or the chair of the panel shall also advise the accused, in addition to providing him defendant advice, that he may ask questions from other interrogated persons and he may file motions and observations during the procedure for taking evidence. The advice shall also include that the summary of any testimony made by him earlier as defendant may be presented, or read out loud, if he does not testify. If the accused intends to give a testimony after being advised pursuant to these, the proceeding single judge or the chair of the panel shall ask the accused if he confesses his guilt. An accused shall be provided with the possibility to give a testimony regarding the indictment, and also presenting his defence, without interruption. An accused may be asked questions by the proceeding members of the court and then by the prosecutor, the defence counsel, the aggrieved party, and, regarding matters affecting him, any party with a pecuniary interest, in this order. The proceeding single judge or the chair of the panel shall prohibit an accused from answering a question if asking that particular question is prohibited by this Act; answering a question may be prohibited if the question is asked repeatedly regarding the same subject matter. The proceeding single judge or the chair of the panel shall ensure that the method of questioning does not violate the human dignity of the accused.[1222]

If an accused does not wish to give a testimony during trial, or his whereabouts are unknown, the proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the testimony given by the accused during investigation or the preparatory session. A summary of individual parts of a testimony given by an accused, as a suspect or accused, earlier during the proceeding may be presented or read out loud if the testimony of the accused is inconsistent with his earlier testimony. The summary of individual parts of an earlier testimony may not be presented, unless the accused is asked a question regarding any fact or circumstance included in the presentation, or the accused testified regarding any such fact or circumstance during the trial. The proceeding single judge or the chair of the panel shall ensure that the scope of the presentation is sufficient for establishing the facts of the case. If the court decided not to interrogate the accused because he gave a testimony during the preparatory session, the testimony given during the preparatory session shall be presented upon a motion from the prosecutor, the accused, or the defence counsel.[1223]

*e) Interrogating witnesses:*

As a general rule, the aggrieved party shall be interrogated first from among all witnesses. A witness not yet interrogated may not attend the interrogation of another witness. With a view to protecting a witness requiring special treatment and acting ex officio or upon a motion from the prosecutor, the accused, his defence counsel, or the witness, the proceeding single judge or the chair of the panel shall have any accused or audience member removed from the courtroom, provided that the presence of that person would disturb the witness requiring special treatment during his interrogation. A summary of the testimony given by the witness shall be presented by the court to the accused later. A witness may be asked questions by the proceeding members of the court and then by the prosecutor, the accused, the defence counsel and the aggrieved party, and, regarding matters affecting them, any party with a pecuniary interest and an expert, in this order.[1224]

The proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the testimony given by a witness earlier during a

[1222] CPC 523. §
[1223] CPC 524. § - 525. §
[1224] CPC 526. §

proceeding if the witness may not be interrogated during the trial, or doing so is not possible due to the witness staying abroad for a prolonged period.[1225]

The proceeding single judge or the chair of the panel, acting ex officio or upon a motion from the prosecutor, the accused, or the defence counsel, may present individual parts of a testimony given by a witness earlier if the witness does not remember the events or there is any inconsistency between his earlier witness testimony and his witnesstestimony given at trial. Individual parts of an earlier testimony may not be presented, unless the witness is asked a question regarding any fact or circumstance included in the presentation, or the witness testified regarding any such fact or circumstance during the trial. The proceeding single judge or the chair of the panel shall ensure that the scope of the presentation is sufficient for establishing the facts of the case.[1226]

*f) Hearing an expert:*

An expert shall be heard applying the provisions on interrogating a witness accordingly. In the course of his hearing, an expert may use his expert opinion and notes submitted in writing, and he may use tools for demonstration.[1227]

The proceeding single judge or the chair of the panel shall present ex officio or may read out loud, or have the keeper of minutes read out loud, upon a motion from the prosecutor, the accused or the defence counsel a summary of the expert opinion submitted in writing. If, after the summary of the expert opinion is presented or read out loud, the prosecutor, the accused, the defence counsel, or the aggrieved party intends to ask questions from the expert, the trial shall be postponed, and the expert shall be summoned for the trial date set.[1228]

*g) Presenting and reading out loud a summary of a document:*

In the course of a trial, the proceeding single judge or the chair of the panel shall present a summary of documents used as means of evidence. The single judge or the chair of the panel may order, upon a motion from the prosecutor, the defence counsel, or the accused, individual parts of a document to be read out loud in place of presenting the summary of the given document. A document attached or filed during a trial shall be enclosed to the minutes of the trial by the proceeding single judge or the chair of the panel.[1229]

*h) Using a recording of a procedural act:*

In the course of a trial, the proceeding single judge or the chair of the panel may, acting ex officio or upon a motion from the prosecutor, the accused or the defence counsel, present a video recording, sound recording, or audio-visual recording of a procedural act.[1230]

*i) Inspection by a judge:*

In the course of a trial, a means of physical evidence shall be demonstrated by the proceeding single judge or the chair of the panel. If that is not possible, a photograph of the means of physical evidence shall be demonstrated, and a description of the item shall be provided. The court, acting ex officio or upon a motion, shall carry out an inspection during the trial. An inspection shall be carried out by the court or a delegated member of the panel.[1231]

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[1225] CPC 527. §
[1226] CPC 528. §
[1227] CPC 529. §
[1228] CPC 530. §
[1229] CPC 531. §
[1230] CPC 532. §
[1231] CPC 533. §

*j) Taking evidence through a delegate judge or a requested court:*
If taking a piece of evidence is not possible, or would involve extraordinary difficulties, at trial, the proceeding single judge or a member of the panel shall act as delegate judge, or another court of identical subject-matter jurisdiction shall be requested, if necessary. The prosecution service, the accused, his defence counsel, and the aggrieved party shall be notified about the taking of evidence. A requested court shall be informed about the names and contact details of the accused, the defence counsel, and the aggrieved party, the facts to be clarified by the taking of evidence, the names and contact details of the persons to be interrogated, and the circumstances regarding which such persons are to be interrogated. All case documents necessary for carrying out the request for administrative assistance shall be sent, in original or copy, to the requested court.

A requested court shall carry out a request for administrative assistance within one month. If a requested court fails to carry out a request for administrative assistance within one month, it shall inform the requesting court about the reason for its failure. If another court of identical subject-matter jurisdiction has territorial jurisdiction over carrying out parts of a request for administrative assistance, the requested court, after taking the evidence it is tasked with, shall send the case documents to the other court with territorial jurisdiction and shall inform the requesting court accordingly. The minutes of the proceedings of a delegate judge or a requested court shall be read out loud at trial.

*k) Decisions passed outside a trial. Modifying and abandoning an indictment:*
After postponing a trial, a court proceeding as a panel may pass a decision on the following matters even during a panel session, if necessary: (1) transferring the case, (2) joining or separating cases, (3) suspending or terminating the proceeding, or (4) maintaining a coercive measure affecting personal freedom subject to judicial permission. After postponing the trial, the court shall decide on ordering a coercive measure affecting personal freedom subject to judicial permission in a court session.[1232]

If the prosecution service finds, in light of the facts specified in the indictment document and other related facts, that the accused (1) is guilty of another criminal offence or the criminal offence qualified in the indictment document qualifies as a criminal offence of greater or lesser gravity, it shall change the indictment, (2) is also guilty of any criminal offence other than that specified in the indictment, it shall extend the indictment. If an indictment is modified, the prosecution service shall either submit a new motion for imposing a penalty or applying a measure, or maintain its corresponding motion included in the indictment document. The prosecution service may modify the indictment until a conclusive decision is passed at the latest. If an indictment is changed, the court may postpone the trial, provided that a corresponding motion is filed by the prosecutor or, with a view to preparing for a defence, the accused or the defence counsel. If an indictment is extended, the court shall postpone the trial for a period of at least eight days upon a joint motion from the accused and the defence counsel, or it may do so ex officio, or it shall separate the case covered by the extension. A case shall be transferred, if adjudicating the modified indictment exceeds the subjectmatter jurisdiction of the proceeding court, is subject to military criminal proceedings, or another court has exclusive territorial jurisdiction over the case.[1233]

The prosecution service shall abandon an indictment if it is convinced by the evidence taken that (1) the act serving as ground for the indictment does not constitute a criminal offence, (2) the criminal offence was not committed by the accused, or (3) the criminal offence is not subject to public prosecution. The prosecution service may abandon an indictment until a conclusive decision is passed; the reasons for abandoning an indictment shall be stated. If an aggrieved

[1232] CPC 537. §
[1233] CPC 538. §

party may act as a substitute private prosecuting party should the indictment be abandoned, the court shall postpone the trial, and it shall serve on the aggrieved party the statement of the prosecution service on abandoning the indictment within fifteen days. At the time of serving such a statement, the court shall inform the aggrieved party about the possibility of, and conditions for, acting as a substitute private prosecuting party, including the rights and obligations of a substitute private prosecuting party.

*l) Concluding an evidentiary procedure. Closing arguments, addresses, and the right to the last word. Reopening an evidentiary procedure:*

When the taking of evidence is finished, the proceeding single judge or the chair of the panel shall declare the evidentiary procedure to be concluded, and it shall invite all eligible persons to deliver their closing arguments and addresses, provided that no further motion for evidence was filed or all such motions were dismissed by the court.[1234]

Prosecutors and defence counsels shall deliver closing arguments, and accused persons, aggrieved parties, and parties with pecuniary interests may address the court. If an aggrieved party or a party with a pecuniary interest is represented by more than one representative, the court may be addressed by one representative as agreed among themselves. If the defence counsel does not attend the trial, the closing argument may be delivered by the accused. A closing argument may also be filed with the court in writing. In that event, the closing argument shall be served on the prosecution service, the accused, and the defence counsel. If a closing argument is filed in writing, presenting a summary of the closing argument shall suffice when delivering the closing argument orally.[1235]

If a prosecutor finds that the accused can be found guilty, he shall submit a motion to the court, as part of his closing argument and invoking specific laws, for (1) finding the accused guilty of the criminal offence stated on the basis of the facts stated, (2) imposing a penalty or applying a measure, (3) passing any other provision. In his closing argument, a prosecutor may not move for a specific value or period of a penalty or measure. If a statement of confession of guilt was accepted by the court during the preparatory session, the prosecutor, in his closing argument, may not change his motion for imposing a penalty or applying a measure to the detriment of the accused. In his closing argument, a prosecutor shall submit a reasoned motion, invoking specific laws, for acquitting the accused if he finds, on the basis of evidence taken, that a) the commission of the criminal offence, or the fact that is was committed by the accused, is not proven, or b) infancy or any mental disorder, coercion, threat, error, justifiable defence, or necessity that excludes liability to punishment can be established to the benefit of the accused.[1236]

After the prosecutor, aggrieved parties and parties with pecuniary interests may also address the court. An aggrieved party may present his position regarding the subject matter of the indictment, and he may state if he wishes the accused to be found guilty and punished. A civil party may file, and provide reasons for, motions regarding matters concerning his civil claim; in the absence of a civil party, the civil claim he submitted shall be read out loud from the case documents. A party with a pecuniary interest may file motions regarding matters directly affecting his rights or legitimate interests.[1237]

After the addresses, the defence counsel shall deliver his closing argument. If there is more than one accused, the order of closing arguments shall be determined by the proceeding single judge or the chair of the panel. After the closing arguments and addresses, a rejoinder may be delivered in their order. A rejoinder may be delivered to a rejoinder; the last word shall be

[1234] CPC 540. §
[1235] CPC 541. §
[1236] CPC 542. §
[1237] CPC 543. §

granted to the defence counsel or the accused. After the closing arguments, addresses, and rejoinders, a hearing-impaired accused shall be allowed to read the minutes upon request.[1238]

Before a conclusive decision is passed, the accused shall be allowed to exercise his right to the last word.[1239]

If a closing argument or an argument delivered by exercising the right to the last word seeks to protract the proceeding, the proceeding single judge or the chair of the panel may, after warning him once, direct the speaker to discontinue speaking. A closing argument, an address by an aggrieved party, or an argument delivered by exercising a right to the last word may not be interrupted, unless it includes any expression that constitutes a criminal offence or incites disturbance.[1240]

A court shall reopen an evidentiary procedure before passing a conclusive decision if it considers necessary to do so in light of any information expressed in the closing arguments, addresses, or arguments delivered by exercising a right to the last word.[1241] If the court establishes, after the closing arguments, addresses, and last words are delivered, that the qualification of the acts stated in the indictment may differ from the qualification presented in the indictment document, it may postpone the trial to facilitate preparations for the defence, and it shall also obtain the opinion of the prosecutor, the accused, and the defence counsel on this matter.[1242]

*m) Passing and announcing a decision. Legal remedy statements. Decisions on coercive measures. Closure of a trial:*

After the closing arguments, addresses, and last words, the court shall retire for passing a conclusive decision. In passing a decision, the operative part of a decision shall be put in writing and signed by the proceeding members of the court. Once passed, a conclusive decision shall be announced immediately. The operative part of a decision passed in trial, and signed by the proceeding members of the court, shall be handled together with the minutes of the trial. The operative part of a conclusive decision shall be read out loud by the proceeding single judge or the chair of the panel, standing, with all persons present standing and listening. The single judge or the chair of the panel may excuse a person present from this obligation in light of his health. After reading out loud the operative part, the single judge or the chair of the panel shall present a summary of the statement of reasons orally; this includes presenting a summary of the facts of the case as established by the court. In this context, the court may fulfil its obligation to provide reasons also by specifying facts of the case that are different than the facts referred to in the indictment document. After announcement, the proceeding single judge or the chair of the panel shall hand over the operative part of the conclusive decision on all persons who are present and eligible to file an appeal.[1243]

If necessitated by the complexity of a case, the considerable volume of a decision, or any other important reason, the trial may be postponed for eight or, exceptionally, fifteen days for the purpose of passing and announcing a decision. The due date of announcing a decision shall be set at the time of postponing the trial. If an accused or a defence counsel fails to appear at trial despite being duly summoned, the decision may be announced in the absence of the accused or the defence counsel. No application for excuse shall be accepted for such an omission.[1244]

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[1238] CPC 544. §
[1239] CPC 545. §
[1240] CPC 546. §
[1241] CPC 547. §
[1242] CPC 548. §
[1243] CPC 549. §
[1244] CPC 550. §

After announcing a conclusive decision, the proceeding single judge or the chair of the panel shall ask any person who is present and eligible to appeal if (1) he accepts the conclusive decision, (2) he submits an appeal, or (3) he reserves a time limit of three working days for making a statement. The statements shall be made in the following order: statement by the prosecutor, the civil party, the party with a pecuniary interest, the accused, and the defence counsel.[1245]

If a conclusive decision does not become final and binding upon announcement, the court shall decide on any coercive measure affecting personal freedom subject to judicial permission immediately. If the trial may be held in the absence of the accused, the court may order the custody of the accused for the purpose of taking a decision on ordering a coercive measure affecting personal freedom subject to judicial permission. The court shall terminate any coercive measure affecting personal freedom subject to judicial permission and, if the accused is subject to pre-trial detention or preliminary compulsory psychiatric treatment, arrange for the accused to be released immediately if the accused is acquitted, released on probation, ordered to perform reparation work, not sentencedto imprisonment to be served, not sentenced to special education in a juvenile correctional institution, or not subject to compulsory psychiatric treatment if acquitted, or the proceeding is terminated.[1246]

After the legal remedy statements are made and the decision on coercive measures, if any, is passed, the proceeding single judge or the chair of the panel shall close the trial.[1247] Even after a conclusive decision becomes final and binding, the proceeding single judge or the chair of the panel may decide on (1) translating a decision to be served, (2) rectifying a decision, or (3) lifting a sequestration. After a conclusive decision becomes final and binding or a non-conclusive order terminating a proceeding reaches administrative finality, the proceeding single judge or the chair of the panel shall decide on the amount, and bearing, of criminal costs that arose after the adoption of the decision.[1248]

*n) Conclusive decisions of a court of first instance:*

The introductory part of a conclusive decision shall specify the trial dates. The operative part of a conclusive decision shall contain the following: (1) information on any preliminary detention of the accused, (2) name and personal data of the accused, (3) designation of the criminal offence under the Criminal Code with reference to the statutory provision applied, including a reference to the statutory provision defining the simple case of the criminal offence where a qualified case of a criminal offence is established; specification of the criminal offence as a felony or a misdemeanour; specification of the criminal offence as being committed on multiple counts or in a continuous manner, as applicable; if the criminal offence was committed by negligence, a reference to this fact; and the type of perpetrator involvement and stage of commission, (4) any other provision, and (5) provisions on bearing the criminal costs.

The statement of reasons for a conclusive decision shall include the following:

- a reference to the indictment, the qualification stated in the indictment, and a summary of the facts stated in the indictment document, if necessary,
- facts established with regard to the personal circumstances of the accused, and facts relating to any prior conviction of the accused that were relevant at the time of passing the decision,
- facts established by the court,

[1245] CPC 551. §
[1246] CPC 552. §
[1247] CPC 553. §
[1248] CPC 554. §

- pieces of evidence the court relied on when passing its decision, and brief reasons as to why each individual piece of evidence was accepted or not accepted for the purpose of establishing the facts of the case,
- qualification of the act based on the facts established by the court,
- a reasons for any other provisions laid down in the decision and for dismissing any motion, in particular any motion for evidence, with reference to the laws applied.[1249]

The court shall decide on an indictment by passing a judgment if it acquits or finds the accused guilty.[1250]

*Judgments of guilt:*
The court shall declare an accused guilty if it establishes that the accusedcommitted a criminal offence and is liable to punishment. The operative part of a judgment of guilt shall contain the following: (1) decision of the court to hold the accused guilty, (2) penalty imposed or measure applied, as well as any other legal consequence, (3) any other rules of behaviour set by the court, provided that the court subjects the accused to supervision by a probation officer, (4) if the court decides to refrain from imposing punishment, a reference to this fact.

If an accused is found guilty of a criminal offence committed while, or before, being released on probation, the court shall set aside the provision concerning his release on probation, terminate the release on probation, and impose a concurrent sentence.

A statement of reasons for a judgment of guilt shall contain the following: (1) reasons for imposing, or not imposing, a penalty and applying, or not applying, a measure, with reference to the laws applied, (2) if the court took into account the protraction of the criminal proceeding as a mitigating circumstance during sentencing, a reference to this fact.[1251] If a statement of confession of guilt was accepted by the court, the accused shall be found guilty based on his confession of guilt, the acceptance of his confession of guilt, and the case documents of the proceeding.[1252]

*Judgments of acquittal:*
A court shall acquit an accused if (1) the act does not constitute a criminal offence, (2) the criminal offence was not committed by the accused, (3) the commission of the criminal offence is not proven, or it is not proven that the criminal offence was committed by the accused, or (4) a ground excluding the liability for punishment of the accused or the punishability of the act can be established. The operative part of a judgment of acquittal shall contain the decision of the court to acquit the accused. The court shall order the compulsory psychiatric treatment of the accused if the conditions for ordering compulsory psychiatric treatment of an accused acquitted due to mental disorder are met. If acquittal is based on infancy or a mental disorder, the court may order confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible.[1253]

*Orders terminating a proceeding:*
A court shall terminate its proceeding with a conclusive order if (1) the liability to punishment of the accused was terminated due to his death, the statute of limitations, a pardon, or for any other reason specified in a law, (2) the act has been adjudicated with final and binding effect, (3) the prosecution service abandoned the indictment and neither private prosecution nor substitute private prosecution can be brought, or the aggrieved party did not take action as a

[1249] CPC 561. §
[1250] CPC 563. §
[1251] CPC 564. §
[1252] CPC 565. §
[1253] CPC 566. §

private prosecuting party or substitute private prosecuting party, (4) it is conducted regarding a criminal offence that is, in comparison to another criminal offence of greater material gravity also subject to the indictment, not significant for establishing criminal liability, or (5) a private motion is missing and it may not be rectified any longer.

A court shall terminate its proceeding with a non-conclusive order if (1) the indictment was brought by an ineligible person, (2) the indictment document does not contain or imperfectly contain all statutory elements, (3) the criminal proceeding is conducted by an authority of another country due to the transfer of the criminal proceeding or the result of a consultation procedure as defined in the Act on cooperation with the Member States of the European Union in criminal matters, (4) the case does not fall within Hungarian criminal jurisdiction. The operative part of an order terminating a proceeding shall contain the decision of the court to terminate its proceeding. If it becomes known after a conclusive decision is announced, but before it becomes final and binding, that the accused deceased or was granted a procedural pardon, and if no appeal was submitted against the decision, the court shall set aside its conclusive decision that is not final and binding, or the part of its decision relating to the accused concerned, and it shall terminate its proceeding due to the death of, or the procedural pardon granted to, the accused.[1254] If the prosecution service abandoned an indictment and a substitute private prosecuting party may proceed, the fact that the statement made by the prosecution service on abandoning the indictment could not be served on the aggrieved party because his whereabouts were unknown shall not be an obstacle to terminating the proceeding.[1255]

*Ordering electronic data to be rendered permanently inaccessible by preventing access permanently:*
Acting ex officio, or upon a motion by the prosecution service, the court shall order electronic data to be rendered permanently inaccessible by preventing access to such electronic data permanently if access to such electronic data was ordered to be prevented temporarily, and preventing access to such data is still justified.[1256]

*Adjudicating civil claims:*
A court shall decide on the merits of a civil claim by passing a judgment either granting or dismissing the claim. If the court determines, in its judgment, the amount of damages or pecuniary loss caused by committing the criminal offence, or the value affected by the criminal offence, it shall adjudicate the merits of any civil claim submitted up to that amount. The provisions laid down in the Act on the Code of Civil Procedure regarding the limits of a decision on the merits of a claim, the time limit for performance, and the calculation of such a time limit, shall apply when adjudicating a civil claim. A court may declare provisions of its judgment concerning a civil claim to be preliminarily enforceable pursuant to the provisions laid down in the Act on the Code of Civil Procedure regarding preliminary enforceability.[1257]

*Terminating parental custody rights:*
Acting on the basis of a motion filed by the prosecution service, the court may terminate the parental custody rights of an accused pursuant to the provisions laid down in the Act on the Civil Code regarding the termination of parental custody rights, provided that the court finds the accused guilty of an intentional criminal offence against his child. Filing a motion for terminating parental custody rights may be initiated by the child of the accused, or the other parent of the child of the accused, at the proceeding prosecution office. If the prosecution

[1254] CPC 567. §
[1255] CPC 568. §
[1256] CPC 570. §
[1257] CPC 571. §

service does not agree with the initiative, it shall transmit the initiative without delay to the guardianship authority for the purpose of considering the possibility of filing an action for terminating parental custody rights, and it shall inform the initiating person accordingly. A court shall order a claim for terminating parental custody rights to be enforced by other legal means if adjudicating the corresponding motion would delay the conclusion of the criminal proceeding considerably, or adjudicating the merits of the motion during the criminal proceeding is prevented by any other circumstance.[1258]

*Adjudicating infractions:*
If a court finds, in light of the outcome of a trial, that an act stated in the indictment document constitutes an infraction and, as a consequence, it acquits the accused, it shall adjudicate the infraction. If an accused is indicted for more than one criminal offence, and the court establishes that an act stated in the indictment document constitutes an infraction, the court may terminate the proceeding regarding that infraction, provided that the given act is, in comparison to another criminal offence also subject to the indictment, not significant for establishing criminal liability.[1259]

*Bearing the criminal costs:*
A court shall oblige an accused to bear all criminal costs if the accused is found guilty or liable for an infraction. An accused may be obliged to bear criminal costs only if they arose in connection with an act, or an element of the facts of the case, he is found guilty of or liable for. An accused may not be obliged to bear any criminal cost that arose unnecessarily, for a reason other than an omission on his part, or to the bearing of which another person is to be obliged by virtue of an Act. Each accused a court finds guilty shall be obliged to bear criminal costs separately. If the criminal costs, or any criminal cost, may not be broken down into lots that are attributable to individual accused persons who are found guilty, the court shall oblige all accused persons to bear such criminal costs jointly and severally.

If a court acquits an accused, or terminates a proceeding against him, the criminal costs shall be borne by the State. If an accused is acquitted, or the proceeding against him is terminated, he shall still be obliged to bear all costs that arose due to any omission on his part. If a proceeding is terminated, the court may oblige the accused to bear all or some of the criminal costs, provided that the proceeding was terminated because the liability to punishment of the accused was terminated for a reason that depends on the behaviour of the accused and is specified in the Special Part of the Criminal Code. The obligation of the accused shall be determined taking into account the material gravity of the criminal offence and the financial, income and personal situation and lifestyle of the accused.[1260]

The State shall bear (1) all costs an accused is not obliged to bear, and (2) all costs that arose because the accused is hearing-impaired, speech-impaired, blind, or deaf-blind, does not understand the Hungarian language, or used his national minority mothertongue in the course of the proceeding. If prosecution was represented by the prosecution service and the court acquitted the accused, or terminated the proceedings against the accused because the prosecution service abandoned the indictment, the State shall reimburse, in an amount specified by law, the costs incurred by the accused, and the fee and costs of his authorised defence counsel, within one month after the conclusive decision becomes final and binding.[1261]

In its conclusive decision, the court shall, without specifying the amount, or specifying a proportionate part of the fee, determine who shall pay the fee of a legal aid lawyer. A court

[1258] CPC 572. §
[1259] CPC 573. §
[1260] CPC 574. § - 575. §
[1261] CPC 576. §

passing a final and binding conclusive decision shall inform the legal aid service that acted in the matter of the authorisation of legal aid about arrangements for bearing the legal aid lawyer's fee by communicating the below data within eight days: (1) decision on the payment of the legal aid lawyer's fee, (2) name, home address, contact address, actual place of residence, service address, mother's name, and date of birth of the person, or the name, seat, name of registering organ, and registration number of the organisation obliged to pay the legal aid lawyer's fee.[1262]

*o) Appeals:*

Appeals against a conclusive decision passed by a court of first instance may be submitted to a court of second instance. Appeals against a non-conclusive order passed by a court of first instance may be submitted to a court of second instance, unless appealing is prohibited under this Act.[1263]

No appeal shall lie

- against ordering a motion to terminate parental custody rights, or a civil claim, to be enforced by other legal means,
- against dismissing an appeal submitted after a judgment is accepted,
- on the ground that the court passed a conclusive decision in the absence of the accused, provided that the attendance of the accused at trial was not mandatory,
- against a case administration order, or
- against taking a court measure that does not require passing a decision.

If a statement of confession of guilt made by an accused is accepted, by way of an order by the court, no appeal shall lie against the judgment on the ground that a) it establishes guilt, or b) the facts of the case or the qualification thereof are established in line with the indictment. If no appeal lies against an order passed, or measure taken, by a court, a person eligible to appeal against the conclusive decision may challenge the order passed, or measure taken, by the court in an appeal against the conclusive decision.[1264]

An appeal against a judgment of a court of first instance may be filed by

- the accused,
- the prosecution service,
- the defence counsel,
- an heir of the accused with regard to any provision granting a civil claim,
- by the spouse or cohabitant of the accused if compulsory psychiatric treatment is ordered,
- a civil party with regard to any provision on the merits of his civil claim,
- a party with a pecuniary interest with regard to a provision affecting him.[1265]

A person to whom the judgment of a court of first instance is communicated by announcement may submit an appeal immediately or may reserve three working days to do so. No application for excuse shall be accepted for failing to meet this time limit. If a non-conclusive order of a court of first instance is communicated by announcement, appeals shall be submitted at the time of announcement. Appeals against a judgment communicated by service may be filed within eight days. This provision shall also apply where the operative part of a judgment of a court of firstinstance is communicated by service. At a time other than the time of announcement, an appeal shall be filed in writing with, or recorded in minutes at, the court of first instance. The court of first instance shall inform the accused and the defence counsel about any appeal filed by the prosecution service.[1266]

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[1262] CPC 577. §
[1263] CPC 579. §
[1264] CPC 580. §
[1265] CPC 581. §
[1266] CPC 582. §

An appeal may be filed on legal or factual grounds. An appeal may be filed against any provision of, or the statement of reasons for, a judgment. An appeal may also be filed solely against (1) a provision on imposing a penalty or applying a measure, also including a provision on expungement in advance, (2) a judgment provision that is subject to a simplified review procedure, or adjudicates the merits of a motion for terminating parental custody rights or a civil claim, or (3) an element of a statement of reasons for a judgment of acquittal, or an element of a statement of reasons for a terminating decision. An appeal may be filed by the prosecution service either to the detriment or the benefit of an accused, or by an accused or a defence counsel only to the benefit of a defendant; the prosecution service shall indicate in an appeal if it is to the detriment of an accused.[1267]

An appellant shall specify the judgment provision, or the part of the statement of reasons, challenged by the appeal. If a defendant, in a court judgment, is found guilty of, or acquitted from, more than one criminal offence, or a proceeding against him is terminated concerning more than one criminal offence, an appeal shall specify the criminal offence a provision on which is challenged in the appeal.

No new fact or piece of evidence may be invoked in an appeal, unless the appellant substantiates that the fact or means of evidence underlying his appeal arose, or was created, only after the announcement of the judgment, or that he became aware of that fact or means of evidence only after the announcement of the judgment through no fault of his own. In an appeal, a motion for evidence may be submitted, even if it was dismissed by the court of first instance.

The prosecution service or a defence counsel shall provide a written statement of reasons for his appeal. A statement of reasons may be submitted to the court of first or, after the case documents are forwarded, to the court of second instance on the fifteenth day before the panel session of, or the trial held by, the court of second instance at the latest.[1268]

A civil party may amend his civil claim, in an appeal filed against a provision passed by a court of first instance on the merits of his civil claim or during the proceedings of the court of second instance, pursuant to the provisions laid down in the Act on the Code of Civil Procedure regarding the amendment of actions during procedural remedy proceedings and related procedures.[1269]

A person affected by an appeal may make observations concerning the appeal before the court of first instance or, after the case documents are forwarded, before the court of second instance. The prosecution service, an accused affected by an appeal, or his defence counsel, and the appellant may invoke in an observation any issue that the court of second instance revises ex officio, even if he has not filed an appeal or filed an appeal on a ground other than that issue.[1270]

An appellant may withdraw his appeal until a decision is passed by the court of second instance on the appeal. An appeal filed by the prosecution service may be withdrawn, after the case documents are forwarded, by the prosecution office attached to the court of second instance. If an appeal is withdrawn by the prosecution service, and no other appeal was filed, the case documents shall be sent back to the court of first instance with a corresponding statement. An appeal submitted to the benefit of an accused by another person may be withdrawn by the appellant only with the consent of the accused. This provision shall not apply to an appeal by the prosecution service. A withdrawn appeal may not be submitted again.[1271]

An appeal shall be dismissed by the court of first instance if it is prohibitedby law, or it was filed by an ineligible person or late. If an appeal is filed in such a manner repeatedly, it shall be dismissed by the court without stating any reason as to its merits. If the time limit for appeal

[1267] CPC 583. §
[1268] CPC 584. §
[1269] CPC 585. §
[1270] CPC 586. §
[1271] CPC 587. §

expired with respect to all persons entitled to appeal, the single judge or the chair of the panel proceeding at first instance shall forward, through the prosecution office attached to the court of second instance, the case documents to the court of second instance without delay after laying down its conclusive decision in writing. If an appeal is based on a procedural violation of law the circumstances of which are not clear from the case documents, the proceeding single judge or the chair of the panel shall provide information on this matter when forwarding the case documents. The prosecution office attached to the court of second instance shall send the case documents and its motion to the court of second instance within one month or, if the case is particularly complex or extensive, two months. Exceptionally, the head of the prosecution office may extend the time limit by one more month.[1272]

[1272] CPC 588. §

# CHAPTER VII

# COURT PROCEDURE AT SECOND AND THIRD INSTANCE

## 7.1. Introduction

Unless an exception is made in this Act, a court of second instance shall revise a judgment, including the prior court proceeding, challenged by an appeal. Unless otherwise provided in this Act, the court shall revise the grounds of the judgment, all judgment provisions on establishing guilt, qualifying the criminal offence, imposing a penalty, and applying a measure, as well as the correctness of the statement of reasons, and compliance with all procedural rules, regardless to the appellant or the grounds of the appeal. If the judgment of the court of first instance includes provisions on more than one criminal offence, the court of second instance shall revise only the provisions, or parts, of the judgment that concern the criminal offence affected by the appeal.[1273]

A decision of a court of second instance shall be based on facts established by a court of first instance, unless the judgment of the court of first instance is groundless, or any new fact was stated or evidence was invoked in the appeal, as a result of which the court of second instance conducts a procedure to take evidence. A court of second instance shall not examine the grounds of a first instance judgment, and, when passing its decision, it shall rely on the facts established by the court of first instance.[1274]

## 7.2. Groundlessness and its consequences (CPC)

A first instance judgment shall be considered groundless in its entirety if the court of first instance failed to establish the facts of the case, or all facts of the case remain undetected. A first instance judgment shall be considered groundless in part if

- the court of first instance failed to establish all facts of the case,
- some facts of the case remain undetected,
- the facts established are inconsistent with the content of case documents concerning the evidence taken by the court, or
- the court of first instance reached incorrect conclusions regarding a further fact on the basis of the facts established.[1275]

A court of second instance shall eliminate any partial groundlessness of a judgment and, in the course of doing so, it

- supplements or rectifies the facts of the case, provided that the correct facts can be established on the basis of case documents relating to the evidence taken by the court of first instance, of drawing factual conclusions, or of the evidence taken,
- may establish facts that deviate from the facts established by the court of first instance on the basis of case documents relating to the evidence taken by the court of first instance, of drawing factual conclusions, or of the evidence taken, provided that acquitting the accused in full or in part or terminating the proceeding in full or in part is in order,
- may find an accused, originally acquitted by the court of first instance, guilty by establishing facts that deviate from the facts established by the court of first instance on the basis of case documents relating to the evidence taken by the court of first instance, of

[1273] CPC 590. §
[1274] CPC 591. §
[1275] CPC 592. §

drawing factual conclusions, or of evidence taken upon a motion submitted by the prosecution service.

If, when eliminating the partial groundlessness of a judgment, on the basis of taking of evidence for establishing the correct facts of the case, the content of case documents or drawing factual conclusions, the court of second instance establishes facts that are different from those established by the court of first instance, it may evaluate pieces of evidencerelating to these different facts in deviation from the court of first instance. The court of second instance cannot evaluate a piece of evidence in deviation from the court of first instance if it does not relate to a fact established by the court of second instance or it relates to a fact not affected by the groundlessness.

A court of second instance shall revise a first instance judgment on the basis of the corrected, supplemented, or differently established facts of the case.[1276]

In a court proceeding at second instance, evidence may be taken to eliminate any partial groundlessness or procedural violation of law, or if any new fact was stated, or evidence was invoked, in the appeal. A court of second instance shall not take evidence regarding any fact that is irrelevant to establishing guilt, acquitting, terminating a proceeding, qualifying a criminal offence, imposing a penalty, or applying a measure.[1277]

### 7.3. Prohibition of reformatio in peius (CPC)

An accused acquitted by a court of first instance may be found guilty, or a penalty imposed on or a measure applied in place of a penalty against an accused may berendered more severe, only if an appeal is submitted to the detriment of the accused. This provision shall also apply if a criminal offence of greater gravity can be established on the basis of any evidence taken by the court of second instance. An appeal shall be deemed as submitted to the detriment of an accused if it is aimed at finding him guilty, qualifying his criminal offence as one of greater gravity, rendering more severe his penalty, or a measure applied in place of a penalty, or imposing a penalty in place of such a measure. If a court of first instance, in addition to imposing a penalty, or a measure applied in place of a penalty, for committing a criminal offence, acquits an accused from a criminal offence he was indicted for, or terminates a proceeding against him, the penalty, or measure applied in place of a penalty, imposed for committing the criminal offence may not be rendered more severe, provided that an appeal submitted to the detriment of the accused challenges his acquittal or the termination of the proceeding only, unless the appeal against the judgment provision on his acquittal, or on the termination of the proceeding, is successful. Due to the prohibition of reformatio in peius, a court of second instance may not impose, in the absence of an appeal submitted to the detriment of the accused, (1) any penalty on a person the case of whom was adjudicated at first instance by applying a measure that may be applied on its own, (2) imprisonment, even if suspended, in place of any confinement, community service, financial penalty, disqualification from a profession, disqualification from driving a vehicle, ban on entering certain areas, ban on visiting sports events, or expulsion, (3) imprisonment to be served in place of suspended imprisonment, (4) imprisonment for a longer period, even if suspended, in place of imprisonment to be served, (5) any penalty in addition to the number of penalties imposed by the court of first instance, not including any penalty applied in place of imprisonment, (6) any secondary penalty not applied by the court of first instance, (7) imprisonment, even if suspended, in place of demotion or discharge from service. If life imprisonment is imposed as penalty, setting the earliest date of release on parole to a later date or excluding the possibility of release on parole shall be considered rendering a penalty more

[1276] CPC 593. §
[1277] CPC 594. §

severe, and an appeal submitted for such an end shall be deemed as submitted to the detriment of the accused concerned. If a court of first instance, in conflict with the provisions of an Act, did not provide for confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible, the court of second instance may also decide on these even if no appeal was submitted to the detriment of the defendant, provided that the facts of the case contain all data required for passing such a decision. If a court of first instance applied any legal consequence on the ground of committing an infraction, that legal consequence may be rendered more severe in a second-instance proceeding, provided that an appeal is filed for the purpose of challenging the acquitting provision or rendering more severe the legal consequence applied for infraction.[1278]

### 7.4. Preparing for the administration of an appeal. Panel and public session. Trial (CPC)

The chair of a second-instance court panel shall

- take measures, as necessary, to remedy deficiencies, supplement case documents, obtain new case documents, or receive information from the court of first instance,
- send back case documents to the court of first instance if all appeals are withdrawn,
- serve on the accused and the defence counsel any appeal submitted by any other person, or any motion by the prosecution office attached to the court of second instance,
- send to the prosecution office attached to the court of second instance any statement of reasons for an appeal filed by an accused or the defence counsel if it was submitted before the court of second instance and was not yet sent to the prosecution office directly,
- examine if the attendance of a prosecutor or a defence counsel in the second-instance proceeding is mandatory,
- examine if any decision on a coercive measure affecting personal freedom subject to judicial permission needs to be passed.

For the closest possible due date within two months after receipt of the case documents, the chair of the panel shall schedule a panel session, public session, or trial for adjudicating the appeal. A court of second instance may order evidence to be taken before a trial, and the chair of the panel may take measures as necessary to do so.[1279]

A court of second instance shall decide in a panel session

- on dismissing an appeal, transferring, joining or separating a case, or suspending a proceeding,
- on acquitting, or terminating a proceeding against, an accused,
- on acquitting, or terminating a proceeding against, an accused not affected by an appeal, provided that any such provision regarding an accused affected by the same appeal is also passed in a panel session,
- if the court of first instance passed its judgment in violation of a procedural rule,
- if the court of first instance terminated the criminal proceeding,
- if an appeal against a non-conclusive order of the court of first instance may be adjudicated without taking any evidence.

The chair of a panel may schedule a public court session or a trial in a case to be handled in a panel session.[1280]

A court of second instance shall hold a public session to administer an appeal, unless the case is to be administered in a panel session, or a trial is to be held. In a public session, a court of second instance may (1) establish the complete and correct facts of the case where the first

[1278] CPC 595. §
[1279] CPC 596. §
[1280] CPC 598. §

instance judgment is partially groundless, provided that doing so is possible on the basis of factual conclusions or the content of case documents concerning the evidence taken by the court of first instance, (2) interview the accused in the case with a view to clarifying further all sentencing factors. The presentation of the case in a public court session may be omitted, unless a motion for presenting the case is submitted by a person present. An appeal may also be adjudicated in the absence of an accused who was duly summoned if it can be established as a result of the public session that an interview with the accused is not necessary.[1281]

A court of second instance shall hold a trial if (1) a case may not be handled in a panel session, (2) it is necessary to take evidence, (3) a trial is set by the chair of the panel in a case to be handled in a panel session or a public session. Aggrieved parties and appellants shall be notified about a trial. A trial may also be held in the absence of an accused who was duly summoned, and the appeal may be adjudicated, if no appeal was submitted to the detriment of the accused. No application for excuse shall be accepted for failing to appear at trial.[1282]

At trial, the judge designated by the chair of the panel shall present the case. He shall present a summary of the first instance judgment, the appeal, and any observation made concerning the appeal; he shall also present case documents that are necessary for the purpose of revision. Presenting the statement of reasons for the first instance judgment may beomitted if no motion for such a presentation is submitted by the persons present, and the court of second instance considers such a presentation to be unnecessary. The members of the court, the prosecutor, an accused, a defence counsel, or an aggrieved party may request the presentation of the case to be supplemented; subsequently, persons eligible to appeal shall be allowed to present and submit their observations and motions. After the case is presented and evidence is taken, eligible persons may deliver closing arguments or address the court. The appellant shall be the first to deliver a closing argument. If an appeal was filed also by the prosecution service, the prosecutor shall be the first to deliver a closing argument.[1283]

If a judgment of a court of first instance is set aside, the court of second instance, in its setting aside order, shall decide on the matter of any coercive measure affecting personal freedom subject to judicial permission.[1284]

After concluding a court procedure at second instance, the decision shall be served by the court of second instance. An order setting aside a first instance judgment shall be served on the appellant, any aggrieved party, and any person eligible to appeal against the decision of the court of second instance, even if the operative part of the decision has already been communicated to any such person by announcement.A court of second instance shall send back all case documents, together with its decision and the minutes of the trial, to the court of first instance if no appeal is submitted against the second instance decision, or all appeals were dismissed by the court of second instance.[1285]

### 7.4.1. Decisions by courts of second instance

In situations specified in this Act, a court of second instance shall

- uphold a judgment of a court of first instance,
- amend a judgment of a court of first instance, or
- set aside a judgment of a court of first instance, and (1) terminate the proceeding, or (2) instruct the court of first instance to conduct a new proceeding.

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[1281] CPC 599. §
[1282] CPC 600. §
[1283] CPC 601. §
[1284] CPC 602. §
[1285] CPC 603. §

A court of second instance shall decide by passing a judgment if it amends the judgment of a court of first instance, or an order, in any other case. The operative part of a decision shall contain the following: (1) name of the court of first instance that passed the decision challenged in the appeal, and reference number of the decision challenged, (2) decision of the court, (3) personal data. The statement of reasons for the decision shall contain a summary of the operative part of the first instance judgment and the motion filed by the prosecution office attached to the court of second instance; it shall identify the appellant and the ground for his appeal; and it shall describe the reasons for the decision of court.[1286]

*a) Upholding a first instance judgment:*
A court of second instance shall uphold a first instance judgment if an appeal is groundless and there is no other reason to set aside the judgment, or if it is not necessary to amend the judgment, or doing so is not possible due to the prohibition of reformatio in peius. If a court of second instance does not supplement or correct the facts of the case, a penalty imposed in the first instance judgment within the penalty range may not be changed to a minor extent. An order of a court of second instance upholding a first instance judgment shall constitute a conclusive decision. The statement of reasons for a decision shall provide a short description of the reasons for upholding the judgment.[1287]

*b) Amending a first instance judgment:*
If a court of first instance applied the law incorrectly, but it is not necessary to set aside its judgment, the court of second instance shall amend the judgment and pass a decision in compliance with the legal requirements. A court of second instance may also amend a first instance judgment if it eliminated the partial groundlessness of the first instance judgment. If a first instance judgment is based on an accepted confession of guilt by an accused, the court of second instance may not amend the provisions of the appealed judgment with regard to the establishment of guilt or any qualification in line with the indictment document, unless it can be established that acquitting the accused, terminating the proceeding or changing the qualification of the criminal offence would be in order.[1288]

*c) Setting aside a first instance judgment:*
The court of second instance shall set aside the first instance judgment with a non-conclusive order and instruct the court of first instance to conduct a new proceeding if (1) the court panel was not formed in accordance with the law, or not all members of the panel were present during the entire trial, (2) a judge disqualified by an Act participated in the passing of a judgment, (3) the court exceeded its subject-matter jurisdiction, or adjudicated a case that is subject to military criminal proceeding or falls within the exclusive territorial jurisdiction of another court, (4) the trial was held in the absence of a person the attendance of whom was mandatory under an Act, (5) the statement of reasons for the first instance judgment is fully inconsistent with its operative part, etc.[1289]

The court of second instance shall set aside the first instance judgment with a non-conclusive order, and instruct the court of first instance to conduct a new proceeding, if
a procedural violation of law was committed, which could not be remedied in a second-instance proceeding but had a material impact on the course of the proceeding, the establishment of guilt, the qualification of a criminal offence, imposing a penalty or applying a measure. Procedural violations of law shall include, in particular, situations where

[1286] CPC 604. §
[1287] CPC 605. §
[1288] CPC 606. §
[1289] CPC 608. §

- any provision on the legality of taking evidence is violated after the indictment,
- a person participating in a criminal proceeding could not exercise, or was restricted in exercising, any of his statutory rights after the indictment,
- the public was excluded from a trial without a lawful reason,
- the court of first instance failed to perform, in whole or in part, its obligation to state its reasons for establishing guilt, acquitting, terminating a proceeding, qualifying an act pursuant to the Criminal Code, imposing a penalty or applying a measure.

A judgment provision acquitting the accused or terminating the proceeding need not be set aside if a procedural violation of law limited the exercise of a statutory right of the accused or his defence counsel.[1290]

If a first instance judgment is completely groundless, the court of second instance shall pass a non-conclusive order setting aside the first instance judgment and instructing the court of first instance to conduct a new proceeding.[1291]

In a statement of reasons for a setting aside order, the court of second instance shall specify the reason for setting aside and provide guidance regarding the repeated procedure. A court of second instance may order the case to be tried by another panel of the court of first instance or, exceptionally, by another court.[1292]

*d) Provisions concerning other matters:*

If a party with a pecuniary interest submitted an appeal against a provision of a first instance judgment concerning confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible, and the court of second instance did not refrain from applying, on the basis of that or any other appeal, the first instance judgment provision on any confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible affecting an ownership right, asset, or the right to dispose of electronic data, of the party with a pecuniary interest, the court of first instance shall communicate the decision of the court of second instance to the party with a pecuniary interest. If a court of second instance orders any confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible affecting an ownership right of a party with a pecuniary interest, the operative part of its decision shall include information to the party with a pecuniary interest about his right. If deciding on the termination of parental custody rights would delay the conclusion of the criminal proceeding considerably, or adjudicating the merits of the matter during the criminal proceeding is prevented by any other circumstance, the court of second instance shall set aside the provisions passed by the court of first instance regarding this matter, and the motion for terminating parental custody rights shall be ordered to be enforced by other legal means.[1293]

*e) Appeals against decisions by courts of second instance:*

Appeals against a judgment of a court of second instance may be submitted to a court of third instance, provided that the decision of the court of second instance contradicts that of the court of first instance. A contradiction between the relevant decisions exists if the court of second instance a) found an accused guilty or ordered compulsory psychiatric treatment for an accused who was acquitted, or the proceeding against whom was terminated, by the court of first instance, b) acquitted, or terminated the criminal proceeding against, an accused who was found guilty at first instance, c) found the accused guilty of a criminal offence on which the court of first instance did not pass any provision. A contradiction between the relevant decisions cannot be established if an act of the accused constitutes more than one criminal offence and in the

[1290] CPC 609. §
[1291] CPC 610. §
[1292] CPC 611. §
[1293] CPC 612. §

light of this, changing the qualification established by the court of first instance would have been justified in the secondinstance proceeding. An appeal may challenge a contradicting decision. In an appeal, no motion for evidence may be submitted, no new fact may be stated, and no new evidence may be invoked.[1294] An appeal against a judgment passed by a court of second instance may be submitted by the accused, the prosecution service, the defence counsel,the spouse or cohabitant of the accused if compulsory psychiatric treatment is ordered.[1295]

### 7.5. Third-instance court proceedings (CPC)

A court of third instance shall revise

- in a second instance judgment (1) any contradicting decision challenged on appeal, (2) those provisions or parts of the second instance judgment that were passed as a result of revising, in connection with the challenged contradicting decision, the first instance judgment, and
- the first and second-instance court proceeding without taking into account the person of the appellant or the ground for his appeal.

A court of third instance shall decide ex officio on all matters subject to a simplified review, as well as any provision concerning parental custody rights or a civil claim.

A judgment provision on acquittal, or terminating a proceeding, may not be subject to a revision, unless the provision concerned was challenged on appeal.[1296]

*a) The binding effect of facts established in a judgment subject to a revision:*
A decision passed by a court of third instance shall be based on the same facts the court of second instance relied on in its judgment, unless the second instance judgment is groundless as regards the contradicting decision challenged by an appeal. Evidence may not be taken in a third-instance court proceeding. If the second instance judgment is groundless as regards the contradicting decision challenged by the appeal, and the facts may be established correctly on the basis of case documents concerning evidence taken by the court of first or second instance, or if the incorrect factual deduction may be eliminated on the basis of case documents concerning evidence taken by the court of first or second instance, the court of third instance shall supplement or correct the facts of the case ex officio.[1297]

*b) Administering an appeal:*
An appeal shall be adjudicated by a court of third instance in a panel session, or otherwise in a public court session. The participation of a defence counsel in a third-instance court proceeding shall be mandatory. If an accused does not have a defence counsel, the chair of the panel shall appoint a defence counsel without delay after the appeal is received by the court of third instance.[1298]

A court of third instance shall decide in a panel session if (1) an appeal may not be adjudicated because the challenged judgment is groundless, (2) the court of first or second instance passed its judgment in violation of a procedural rule. A court of third instance shall also decide in a panel session if no appeal was submitted against a judgment to the detriment of an accused, and the prosecution service, the accused, the defence counsel, or the appellant did not move for a

[1294] CPC 615. §
[1295] CPC 616. §
[1296] CPC 618. §
[1297] CPC 619. §
[1298] CPC 620. §

public session. If the chair of a panel does not set a public court session ex officio, the information provided on setting a panel session shall also include that a motion for setting a public session may be submitted by the time limit open for filing observations. No application for an excuse shall be accepted for failing to meet this time limit. In a public court session, the attendance of a prosecutor and a defence counsel shall be mandatory.[1299]

If a judgment of a court of first or second instance is set aside, the court of third instance, in its setting aside order, shall decide on the matter of any coercive measure affecting personal freedom subject to judicial permission. After administering an appeal and serving its decision, a court of third instance shall send back all case documents, including its decision and the minutes of the third-instance proceeding, to the court of second instance or the court instructed to conduct a new proceeding.[1300]

7.5.1. Decisions by courts of third instance

*a) Upholding a second instance judgment:*
A court of third instance shall uphold a second instance judgment if an appeal is groundless and there is no other reason to set aside the judgment, and if it is not necessary to amend the judgment, or doing so is not possible due to the prohibition of reformatio in peius.[1301]

*b) Amending a second instance judgment:*
If a court of second instance applied the law incorrectly, but it is not necessary to set aside its judgment, the court of third instance shall amend the judgment and pass a decision in compliance with the legal requirements. A court of third instance may also amend a second instance judgment if it eliminated the partial groundlessness of the second instance judgment.[1302]

*c) Setting aside a second instance judgment:*
A court of third instance shall set aside a second instance judgment, and instruct the court of second instance to conduct a new proceeding, if the court of second instance passed its judgment

- in violation of a procedural rule,
- in violation of the prohibition of reformatio in peius.

In addition to setting aside a second instance judgment, a court of third instance shall also set aside the related first instance judgment, and instruct the court of first instance to conduct a new proceeding, if a procedural violation of law was committed by the court of first instance. A court of third instance shall set aside a second instance judgment, as well as the first instance judgment if necessary, and instruct the court of second or first instance to conduct a new proceeding if it is unable to eliminate the groundlessness of the second instance judgment.[1303]

## 7.6. Right of access to a court (ECrHR)

The „right to a court" is no more absolute in criminal than in civil matters. It is subject to implied

[1299] CPC 621. §
[1300] CPC 622. §
[1301] CPC 623. §
[1302] CPC 624. §
[1303] CPC 625. §

limitations.[1304] However, these limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.[1305]

*a) Limitations 1.: parlaimentary immunity*

The guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task. Without a doubt, inviolability helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings and thereby protecting the opposition from pressure or abuse on the part of the majority.[1306] Furthermore, bringing proceedings against members of parliament may affect the very functioning of the assembly to which they belong and disrupt Parliament's work. This system of immunity, constituting an exception to the ordinary law, can therefore be regarded as pursuing a legitimate aim.

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

*b) Limitations 2.: Procedural rules*

These are, for example, the admissibility requirements for an appeal. Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation.[1307] However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to an applicant an effective right of access to the court.[1308]

Although the right of appeal may of course be subject to statutory requirements, when applying procedural rules the courts must avoid excessive formalism that would infringe the fairness of the proceedings.[1309] The particularly strict application of a procedural rule may sometimes impair the very essence of the right of access to a court,[1310] particularly in view of the importance of the appeal and what is at stake in the proceedings for an applicant who has been sentenced to a long term of imprisonment.

The right of access to a court is also fundamentally impaired by a procedural irregularity, for example where a prosecution service official responsible for verifying the admissibility of

[1304] „Deweer v. Belgium" (1980)
[1305] „Guérin v. France" (1998); „Omar v. France" (1998), citing references to civil cases
[1306] „Kart v. Turkey" (2009), citing references to civil cases
[1307] „Dorado Baúlde v. Spain" (2015)
[1308] „Maresti v. Croatia" (2009); „Reichman v. France" (2016)
[1309] „Walchli v. France" (2007); „Evaggelou v. Greece" (2011)
[1310] „Labergère v. France" (2006)

appeals against fines or applications for exemptions acted ultra vires by ruling on the merits of an appeal himself, thus depriving the applicants of the opportunity to have the „charge" in questiondetermined by a community judge.[1311]

The same applies where a decision declaring an appeal inadmissible on erroneous grounds led to the retention of the deposit equivalent to the amount of the standard fine, with the result that the fine was considered to have been paid and the prosecution was discontinued, making it impossible for the applicant, once he had paid the fine, to contest before a „tribunal" the road-traffic offence of which he was accused.[1312]

A further example: the applicant suffered an excessive restriction of his right of access to a court where his appeal on points of law was declared inadmissible for failure to comply with the statutory time-limits, when this failure was due to the defective manner in which the authorities had discharged their obligation to serve the lower court's decision on the applicant.[1313]

*c) Limitations 3.: Requirement of enforcement of a previous decision*

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

- where an appeal on points of law is declared inadmissible on grounds connected with the applicant's having absconded, this amounts to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society;[1314]
- where an appeal on points of law is declared inadmissible solely because the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired.[1315]

This imposes a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and the exercise of the rights of the defence on the other.

The same applies where the right to appeal on points of law is forfeited because of failure to comply with the obligation to surrender to custody.[1316]

However, the requirement to lodge a deposit before appealing against a speeding fine – the aim of this requirement being to prevent dilatory or vexatious appeals in the sphere of road-traffic offences – may constitute a legitimate and proportionate restriction on the right of access to a court.[1317]

*d) Limitations 4.: Other restrictions in breach of the right of access to a court*

They may occur, for example, where an accused person is persuaded by the authorities to withdraw an appeal on the basis of a false promise of remission of the sentence imposed by the first-instance court;[1318] or where a court of appeal has failed to inform an accused person of a

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[1311] „Josseaume v. France" (2012)
[1312] „Célice v. France" (2012)
[1313] „Davran v. Turkey" (2009); „Maresti v. Croatia" (2009), contrast with „Johansen v. Germany" (2016)
[1314] „Poitrimol v. France" (1993); „Guérin v. France" (1998); „Omar v. France" (1998)
[1315] „Guérin v. France" (1998)
[1316] „Khalfaoui v. France" (1999); „Papon v. France" (2002)
[1317] „Schneider v. France" (2009)
[1318] „Marpa Zeeland B.V. and Metal Welding B.V. v. the Netherlands" (2004)

fresh time-limit for lodging an appeal on points of law following the refusal of his officially assigned counsel to assist him.[1319]

There will also be a restriction on access to court if an applicant is unable to challenge a fine imposed by an administrative authority before a tribunal having sufficient power of review of the administrative decision.[1320]

### 7.7. General guarantees: institutional requirement (ECrHR)

The concept of a „tribunal established by law", together with the concepts of „independence" and „impartiality" of a tribunal, forms part of the „institutional requirements" of Article 6. In the Court's case-law, there is a very close interrelationship between these concepts.[1321]

The Court has held, in particular, that a judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a „tribunal" for the purposes of Article 6. Similarly, when determining whether a tribunal is established by law, the reference to law comprises any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case „irregular".

Moreover, when establishing whether a court can be considered to be „independent" within the meaning of Article 6., the Court has regard, inter alia, to the manner of appointment of its members, which pertains to the domain of the establishment of a "tribunal". Accordingly, while they each serve specific purposes as distinct fair trial guarantees, there is a common thread running through the institutional requirements of Article 6., in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers.

*a) The notion of a „tribunal":*

In the Court's case-law a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6. In addition, it is inherent in the very notion of a tribunal that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law.[1322]

Thus, for instance, conferring the prosecution and punishment of minor "criminal" offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.[1323] Therefore, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6. of the Convention must be subject to subsequent review by a „judicial body that has full jurisdiction". The defining characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below:[1324] for instance, administrative courts carrying out a

[1319] „Kulikowski v. Poland" (2009)
[1320] „Julius Kloiber Schlachthof GmbH and Others v. Austria" (2013)
[1321] „Guðmundur Andri Ástráðsson v. Iceland" (2020)
[1322] „Guðmundur Andri Ástráðsson v. Iceland" (2020)
[1323] „Öztürk v. Germany" (1984); „A. Menarini Diagnostics S.R.L. v. Italy" (2011); „Flisar v. Slovenia" (2018)
[1324] „Schmautzer v. Austria" (1995); „Gradinger v. Austria" (1995); „Grande Stevens and Others v. Italy (2014)

judicial review that went beyond a „formal" review of legality and included a detailed analysis of the appropriateness and proportionality of the penalty imposed by the administrative authority.[1325] Similarly, a judicial review may satisfy Article 6 requirements even if it is the law itself which determines the sanction in accordance with the seriousness of the offence.[1326]

The power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of „tribunal".

*b) Tribunal established by law:*

Under Article 6 § 1 of the Convention, a tribunal must always be established by law. This expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols.[1327] Indeed, an organ not established according to the legislation would be deprived of the legitimacy required, in a democratic society, to hear individual complaints.

„Law", within the meaning of Article 6., comprises in particular the legislation on the establishment and competence of judicial organs but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case unlawful. The phrase „established by law" covers not only the legal basis for the very existence of a tribunal, but also compliance by the tribunal with the particular rules that govern it, and the composition of the bench in each case. Moreover, having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the Court has found that the process of appointing judges necessarily constitutes an inherent element of the concept of the "establishment" of a court or tribunal „by law".

Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of

The object of the term "established by law" in Article 6 „is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament". Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation.

In principle, a violation of the domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6. The Court is therefore competent to examine whether the national law has been complied with in this respect. However, in general, having regard to the general principle that it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court will not question their interpretation unless there has been a flagrant violation of domestic law. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction.

The Court has further explained that the examination under the „tribunal established by law" requirement must not lose sight of the common purpose of the institutional requirements of Article 6. and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind,

[1325] „A. Menarini Diagnostics S.R.L. v. Italy" (2011), in respect of a fine imposed by an independent regulatory authority in charge of competition

[1326] „Malige v. France" (1998), in respect of the deduction of points from a driving licence

[1327] „Jorgic v. Germany" (2007)

which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.

In this context, the Court has also noted that a finding that a court is not a "tribunal established by law" may have considerable ramifications for the principles of legal certainty and irremovability of judges. However, upholding those principles at all costs, and at the expense of the requirements of „a tribunal established by law", may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying the departure from the principle of legal certainty and the force of res judicata and the principle of irremovability of judges, as relevant, in the particular circumstances of a case.

As regards the alleged breaches of the "tribunal established by law" requirement in relation to the process of appointing judges, the Court has devised the following criteria which, taken cumulatively, provide a basis to guide its assessment:

- In the first place, there must, in principle, be a manifest breach of domestic law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose;
- Secondly, only those breaches that relate to the fundamental rules of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the „established by law" requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold;
- Thirdly, the review by domestic courts, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

In a legal case, the Court found that the very essence of the applicant's right to a „tribunal established by law" had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. As to the third criteria, the Supreme Court had failed to carry out a Convention compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers.

*c) Examples:* Examples where the Court found that the body in question was not „a tribunal established by law":

- the Court of Cassation which tried co-defendants other than ministers for offences connected with those for which ministers were standing trial, since the connection rule was not established by law;[1328]
- a court composed of two lay judges elected to sit in a particular case in breach of the statutory requirement of drawing of lots and the maximum period of two weeks' service per year;[1329]
- a court composed of lay judges who continued to decide cases in accordance with established tradition, although the law on lay judges had been repealed and no new law had been enacted;[1330]
- a court whose composition was not in accordance with the law, since two of the judges were disqualified by law from sitting in the case;[1331]

The Court found that the tribunal was „established by law" in the following cases:

- a German court trying a person for acts of genocide committed in Bosnia and Herzegovina;[1332]
- a special court established to try corruption and organised crime;[1333]
- where a single-judge was seconded from a higher court to hear the applicants' case;[1334]
- reassignment of a case to a specialised court done in accordance with the law and without an indication of intention to affect the outcome of the case.[1335]

### 7.8. Pre-trial. Prejudicial publicity (ECrHR)

As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole, including the pre-trial stage of the proceedings. In its early jurisprudence, the Court stressed that some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them. Although investigating judges do not determine a „criminal charge", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6. might not apply.[1336]

The Court has held that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, the jurors called upon to decide the guilt of an accused.[1337]

In this way, a virulent press campaign risks having an impact on the impartiality of the court under Article 6. § (1) as well as the presumption of innocence enshrined in Article 6. § (2).[1338]

At the same time, press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention.[1339] If there is a virulent press campaign surrounding

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[1328] „Coëme and Others v. Belgium", 2000.
[1329] „Posokhov v. Russia", 2003.
[1330] „Pandjikidze and Others v. Georgia", 2009.
[1331] „Lavents v. Latvia", 2002.
[1332] „Jorgic v. Germany", 2007.
[1333] „Fruni v. Slovakia", 2011.
[1334] „Maciszewski and Others v. Poland", 2020.
[1335] „Bahaettin Uzan v. Turkey", 2020.
[1336] https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng (14.03.2024.)
[1337] „Akay v. Turkey" (2002) and „Craxi v. Italy" (2002)
[1338] „Ninn-Hansen v. Denmark" (1999) and „Anguelov v. Bulgaria" (2004)
[1339] „Bédat v. Switzerland" (2016)

a 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 or her fears can be held to be objectively justified.[1340]

Some of the factors identified in the case-law as relevant to the Court's assessment of the impact of such a campaign on the fairness of the trial include: the time elapsed between the press campaign and the commencement of the trial, and in particular the determination of the trial court's composition; whether the impugned publications were attributable to, or informed by, the authorities; and whether the publications influenced the judges or the jury and thus prejudiced the outcome of the proceedings.[1341]

Moreover, in the context of a trial by jury, the content of any directions given to the jury is also a relevant consideration.[1342] National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence.[1343]

### 7.8.1. The presumption of innocence - statements by judicial authorities (ECrHR)

The presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. In this connection, the lack of intention to breach the right to the presumption of innocence cannot rule out a violation of Article 6 § 2 of the Convention.[1344]

It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.[1345] A premature expression of such an opinion by the tribunal itself will inevitably fall foul of this presumption.[1346] Thus, an expression of "firm conviction that the applicant had again committed an offence" during the proceedings for suspension of a prison sentence on probation violated Article 6 § 2.[1347]

However, in a situation where the operative part of a judicial decision viewed in isolation is not in itself problematic under Article 6 § 2, but the reasons adduced for it are, the Court has recognised that the decision must be read with and in light of that of another court which has later examined it.

Where such a reading demonstrated that the individual's innocence was no longer called into question, the domestic case was considered to have ended without any finding of guilt and there was no need to proceed with any hearing in the case or examination of evidence for domestic proceedings to be found to be in accordance with Article 6 § 2.[1348]

What is important in the application of the provision of Article 6 § 2 is the true meaning of the statements in question, not their literal form.[1349] Even the regrettable use of some unfortunate language does not have to be decisive as to the lack of respect for the presumption of innocence, given the nature and context of the particular proceedings.[1350] Thus, a potentially

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[1340] „Włoch v. Poland" (2000); „Daktaras v. Lithuania" (2000); „G.C.P. v. Romania" (2011)
[1341] „Beggs v. the United Kingdom" (2012); „Abdulla Ali v. the United Kingdom" (2015); „Paulikas v. Lithuania" (2017)
[1342] „Beggs v. the United Kingdom" (2012)
[1343] „Mircea v. Romania" (2007)
[1344] „Avaz Zeynalov v. Azerbaijan" (2021)
[1345] „Minelli v. Switzerland" (1983); „Nerattini v. Greece" (2008); „Didu v. Romania" (2009); „Gutsanovi v. Bulgaria" (2013)
[1346] „Nešťák v. Slovakia (2007)
[1347] „El Kaada v. Germany" (2015)
[1348] „A.v. Norway" (2018)
[1349] „Lavents v. Latvia" (2002)
[1350] „Lähteenmäki v. Estonia" (2016)

prejudicial statement cited from an expert report did not violate the presumption of innocence inproceedings for a conditional release from prison when a close reading of the judicial decision excluded an understanding which would touch upon the applicant's reputation and the way he is perceived by the public. However, the Court stressed that it would have been more prudent for the domestic court to either clearly distance itself from the expert's misleading statements, or to advise the expert to refrain from making unsolicited statements about the applicant's criminal liability in order to avoid the misconception that questions of guilt and innocence could be in any way relevant to the proceedings at hand.[1351]

The fact that the applicant was ultimately found guilty cannot vacate his initial right to be presumed innocent until proved guilty according to law.[1352] However, the higher court may rectify the impugned statements made by the lower courts by correcting their wording so as to exclude any prejudicial suggestion of guilt.[1353]

### 7.8.2. The publicity of court hearings (ECrHR)

The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.[1354]

While the overall fairness of the proceedings is the overarching principle under Article 6 of the Convention, the (non-)violation of the defendant's right to a public hearing vis-à-vis the exclusion of the public and the press does not necessarily correlate with the existence of any actual damage to the defendant's exercise of his other procedural rights, including those protected under paragraph 3 of Article 6. Thus, even where an applicant would be afforded otherwise an adequate opportunity to put forward a defence with due regard to his right to an oral hearing and the principles of equality of arms and adversarial procedure, the authorities must show that the decision to hold a hearing in camera is strictly required in the circumstances of the case.[1355]

The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments.[1356]

*a) The right to an oral hearing and presence at the hearing:*
The entitlement to a „public hearing" in Article 6 § 1 necessarily implies a right to an „oral hearing."[1357] The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In light of the broadening notion of a "criminal charge" to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are „criminal charges" of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the

[1351] „Müller v. Germany" (2014)
[1352] „Nešťák v. Slovakia" (2007), concerning decisions prolonging the applicants' detention on remand; see also „Vardan Martirosyan v. Armenia" (2021), where the Court laid emphasis on the fact that the relevant higher court had made no attempt to rectify the prejudicial statement.
[1353] „Benghezal v. France" (2022)
[1354] „Riepan v. Austria" (2000); „Krestovskiy v. Russia" (2010); „Sutter v. Switzerland" (1984)
[1355] „Kilin v. Russia" (2021)
[1356] „Tierce and Others v. San Marino" (2000)
[1357] „Döry v. Sweden" (2002)

criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head yet not carrying any significant degree of stigma.[1358]

Nevertheless, refusing to hold an oral hearing may be justified only in exceptional cases.[1359] The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses, and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy.[1360] However, in cases where the impugned offence has been observed by a public officer, an oral hearing may be essential for the protection of the accused person's interests in that it can put the credibility of the officers' findings to the test.[1361]

Moreover, in some instances, even where the subject matter of the case concerns an issue of a technical nature, which could normally be decided without an oral hearing, the circumstances of the case may warrant, as a matter of fair trial, the holding of an oral hearing.[1362]

In any event, when dispensing with the oral hearing in a case, the domestic courts must provide a sufficient reasoning for their decision.[1363]

The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance.[1364]

Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, namely the right to „defend himself in person", „to examine or have examined witnesses" and „to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6.[1365]

Moreover, the right to be present at the hearing allows the accused to verify the accuracy of his or her defence and to compare it with the statements of victims and witnesses.[1366] Domestic courts must exercise due diligence in securing the presence of the accused by properly summoning him or her[1367] and they must take measures to discourage his unjustified absence from the hearing.[1368]

While Article 6 § 1 cannot be construed as conferring on an applicant the right to obtain a specific form of service of court documents such as by registered post, in the interests of the administration of justice, the applicant should be notified of a court hearing in such a way as to

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[1358] „Jussila v. Finland" (2006)
[1359] „Grande Stevens and Others v. Italy" (2014)
[1360] Suhadolc v. Slovenia" (2011); „Sancaklı v. Turkey" (2018)
[1361] „Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia" (2018)
[1362] „Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey" (2017)
[1363] „Mtchedlishvili v. Georgia" (2021), concerning the absence of an oral hearing at the appellate stage despite certain questions requiring, as a matter of fair trial, a direct assessment of the evidence given in person by the individuals concerned.
[1364] „Igor Pascari v. the Republic of Moldova" (2016), concerning the applicant's exclusion from the proceedings in which his guilt for a road traffic accident had been determined.
[1365] „Hermi v. Italy" (2006); „Sejdovic v. Italy" (2006); „Arps v. Croatia" (2016)
[1366] „Medenica v. Switzerland" (2001)
[1367] „Colozza v. Italy" (1985); „M.T.B. v. Turkey" (2018)
[1368] „Medenica v. Switzerland" (2001)

not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing.[1369]

A hearing may be held in the accused's absence, if he or she has waived the right to be present at the hearing. Such a waiver may be explicit or implied thorough one's conduct, such as when he or she seeks to evade the trial.[1370] However, any waiver of guarantees under Article 6 must satisfy the test of a "knowing and intelligent" waiver as established in the Court's case-law.[1371]

Relatedly, the Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from one's status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that the defendant had waived the right to appear at trial and defend oneself. Moreover, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control. In any event, objective factors need to be shown to conclude that an accused could have been deemed to have had effective knowledge of the proceedings against him or her.

The Court has also held that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution, or miscarriage of justice.[1372] Thus, holding a hearing in an accused's absence is not in itself contrary to Article 6. However, when domestic law permits a trial to be held notwithstanding the absence of a person „charged with a criminal offence" who is in the applicant's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.[1373]

Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial. This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6.[1374]

In „Sanader v. Croatia" (2015) the Court held that the requirement that an individual tried in absentia, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction in absentia. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would

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[1369] „Vyacheslav Korchagin v. Russia" (2018)
[1370] „Lena Atanasova v. Bulgaria" (2017); „Chong Coronado v. Andorra" (2020)
[1371] „Sejdovic v. Italy" (2006)
[1372] „Colozza v. Italy" (1985)
[1373] „Sanader v. Croatia" (2015)
[1374] „Stoichkov v. Bulgaria" (2005)

need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of „relevant and sufficient reasons" for his detention (see, by contrast, Chong Coronado v. Andorra, 2020, where the detention was not mandatory in the context of a retrial).

Lastly, an issue with regard to the requirement of presence at the hearing arises when an accused is prevented from taking part in his trial on the grounds of his improper behaviour.[1375]

In this context, the Court has held that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can, nor should, be tolerated. However, when an applicant's behaviour might be of such a nature as to justify his removal and the continuation of his trial in his absence, it is incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to the decision to order his removal from the courtroom.[1376] Moreover, the relevant consideration is whether the applicant's lawyer was able to exercise the rights of the defence in the applicant's absence[1377] and whether the matter was addressed and if appropriate remedied in the appeal proceedings.[1378]

*b) Exceptions to the rule of publicity:*

A trial complies with the requirement of publicity if the public is able to obtain information about its date and place, and if this place is easily accessible to the public.[1379] The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that „the press and public may be excluded from all or part of the trial {...} where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case.[1380]

If there are grounds to apply one or more of these exceptions, the authorities are not obliged, but have the right, to order hearings to be held in camera if they consider that such a restriction is warranted.[1381] Moreover, in practice, the Court, in interpreting the right to a public hearing, has applied a test of strict necessity whatever the justification advanced for the lack of publicity.[1382]

Although in criminal proceedings there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.[1383]

Security problems are a common feature of many criminal proceedings, but cases in which security concerns alone justify excluding the public from a trial are nevertheless rare.[1384] Security measures should be narrowly tailored and comply with the principle of necessity. The judicial authorities should consider all possible alternatives to ensure safety and security in the courtroom and give preference to a less strict measure over a stricter one when it can achieve

[1375] „Idalov v. Russia" (2012); „Marguš v. Croatia" (2014); „Ananyev v. Russia" (2009)
[1376] „Idalov v. Russia" (2012)
[1377] „Marguš v. Croatia" (2014)
[1378] „Idalov v. Russia" (2012)
[1379] „Riepan v. Austria" (2000)
[1380] „Welke and Białek v. Poland" (2011)
[1381] „Toeva v. Bulgaria" (2004)
[1382] „Yam v. the United Kingdom" (2020)
[1383] „B. and P. v. the United Kingdom" (2001)
[1384] „Riepan v. Austria" (2000)

the same purpose.[1385] Thus, for instance, the mere presumed possibility that some members of an illegal armed group have not been arrested cannot justify the exclusion of the public from the overall proceedings for safety purposes.[1386]

Considerations of public order and security problems may justify the exclusion of the public in prison disciplinary proceedings against convicted prisoners.[1387]

The holding of a trial in ordinary criminal proceedings in a prison does not necessarily mean that it is not public. However, in order to counter the obstacles involved in having a trial outside a regular courtroom, the State is under an obligation to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.[1388]

The mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest.[1389] Moreover, a theoretical possibility that the classified information might be examined at some point during the proceedings cannot justify the exclusion of the public from the proceedings.[1390]

The Court's usual approach in these cases is to analyse the reasons for the decision to hold a hearing in camera and assess, in the light of the facts of the case, whether those reasons appear justified. However, the application of a strict necessity test can present particular challenges when the ground invoked for holding part of a trial in camera concerns national security. The sensitive nature of national security concerns means that the very reasons for excluding the public may themselves be subject to confidentiality arrangements and respondent Governments may be reluctant to disclose details to this Court. Such sensitivities are, in principle, legitimate and the Court is ready to take the necessary steps to protect secret information disclosed by the parties during proceedings before it. However, even such confidentiality guarantees may be considered insufficient in some cases to mitigate the risk of serious damage to fundamental national interests should information be disclosed. The Court can therefore be required to assess whether the exclusion of the public and the press met the strict necessity test without itself having access to the material on which that assessment was made at the domestic level.[1391]

In this connection, the Court is not well-equipped to challenge the national authorities'judgment that national security considerations arise. However, even where national security is at stake, measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision. In cases where the Court does not have sight of the national security material on which decisions restricting human rights are based, it will therefore scrutinise the national decision-making process to ensure that it incorporated adequate safeguards to protect the interests of the person concerned. It is also relevant, when determining whether a decision to hold criminal proceedings in camera was compatible with the right to a public hearing under Article 6, whether public interest considerations were balanced with the need for openness, whether all evidence was disclosed to the defence and whether the proceedings as a whole were fair.

Lastly, when deciding to hold a hearing in camera, the domestic courts are required to provide sufficient reasoning for their decision demonstrating that closure is strictly necessary within the

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[1385] „Krestovskiy v. Russia" (2010)
[1386] „Kartoyev and Others v. Russia" (2021)
[1387] „Campbell and Fell v. the United Kingdom" (1984)
[1388] „Riepan v. Austria" (2000)
[1389] „Belashev v. Russia" (2008)
[1390] „Kartoyev and Others v. Russia" (2021)
[1391] „Yam v. the United Kingdom" (2020)

meaning of Article 6 § 1.[1392]

### 7.8.3. Public pronouncement of judgments (ECrHR)

The Court has not felt bound to adopt a literal interpretation of the words „pronounced publicly."[1393] Despite the wording, which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publication of the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 § 1 in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial. In making this assessment, account must be taken of the entirety of the proceedings.[1394] Thus, providing the judgment in the court's registry and publishing in official collections could satisfy the requirement of public pronouncement.

Complete concealment from the public of the entirety of a judicial decision cannot be justified. Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others.[1395]

The right to a public hearing and the right to public pronouncement of a judgment are two separate rights under Article 6. The fact that one of these rights is not violated does not in itself mean that the other right cannot be breached. In other words, public pronouncement of the sentence is incapable of remedying the unjustified holding of hearings in camera.[1396]

## 7.9. Reasoning of judicial decisions (ECrHR)

According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.[1397]

Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. National courts should indicate with sufficient clarity the grounds on which they base their decision. The reasoned decision is important so as to allow an applicant to usefully exercise any available right of appeal.[1398] However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case.

Thus, for instance, in the context of the dismissal of a criminal appeal, consequent on a tie vote which existed as a possibility in the domestic order, the Court stressed that a tied vote did not constitute per se a violation of Article 6. In each case it was necessary to examine whether, in the particular circumstances of the case, the judgments resulting in the dismissal of the applicant's appeal were reasoned enough to allow the applicant to understand why the dismissal

[1392] „Chaushev and Others v. Russia" (2016)
[1393] „Sutter v. Switzerland" (1984); „Campbell and Fell v. the United Kingdom" (1984)
[1394] „Welke and Białek v. Poland" (2011), where limiting the public pronouncement to the operative part of the judgments in proceedings held in camera did not contravene Article 6.
[1395] „Raza v. Bulgaria" (2010)
[1396] „Artemov v. Russia" (2014)
[1397] „Moreira Ferreira v. Portugal" (2017)
[1398] „Hadjianastassiou v. Greece" (1992)

was the result of the operation of the relevant domestic law, and whether that decision was clear enough as to its conclusion and outcome.

While courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case.[1399]

Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical. In sum, an issue with regard to a lack of reasoning of judicial decisions under Article 6. of the Convention will normally arise when the domestic courts ignored a specific, pertinent and important point raised by the applicant.[1400]

With regard to the manner in which the domestic judicial decisions are reasoned, a distinct issue arises when such decisions can be qualified as arbitrary to the point of prejudicing the fairness of proceedings. However, this will be the case only if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a „denial of justice".[1401]

### 7.9.1. Reasons for decisions given by juries (ECrHR)

The Court has noted that several Council of Europe member States have a lay jury system, which is guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. However, there is no right under Article 6. of the Convention to a jury trial. Juries in criminal cases rarely give reasoned verdicts and the relevance of this to fairness has been touched upon in a number of cases, first by the Commission and latterly by the Court.

The Convention does not require jurors to give reasons for their decision and Article 6. does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[1402]

In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions. In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction.[1403] Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.[1404] Where an assize court refuses to put distinct questions in respect of each defendant as to the existence of aggravating circumstances, thereby denying the jury the possibility of determining the applicant's individual criminal responsibility the Court has found a violation of Article 6.[1405]

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[1399] „S.C. IMH Suceava S.R.L. v. Romania" (2013)
[1400] „Rostomashvili v. Georgia" (2018)
[1401] „Navalnyy v. Russia" (2018)
[1402] „Legillon v. France" (2013)
[1403] „Lhermitte v. Belgium" (2016)
[1404] „Papon v. France" (2001)
[1405] „Goktepe v. Belgium" (2005)

In „Bellerín Lagares v. Spain" (2003), the Court observed that the impugned judgment – to which a record of the jury's deliberations had been attached – contained a list of the facts which the jury had held to be established in finding the applicant guilty, a legal analysis of those facts and, for sentencing purposes, a reference to the circumstances found to have had an influence on the applicant's degree of responsibility in the case at hand. It therefore found that the judgment in question had contained sufficient reasons for the purposes of Article 6 § 1 of the Convention. In Matis v. France (2015), the Court held that a document that gave reasons for the judgment (feuille de motivation) by setting out the main charges which were debated during the proceedings, developed during the deliberations and ultimately formed the basis for the finding of guilt satisfied the requirements of sufficient reasoning.

Regard must be had to any avenues of appeal open to the accused.[1406] In this case only four questions were put as regards the applicant; they were worded in identical terms to the questions concerning the other co-accused and did not allow him to determine the factual or legal basis on which he was convicted. Thus, his inability to understand why he was found guilty led to an unfair trial.

In „Judge v. the United Kingdom" (2011), the Court found that the framework surrounding a Scottish jury's unreasoned verdict was sufficient for the accused to understand his verdict. Moreover, the Court was also satisfied that the appeal rights available under Scots law would have been sufficient to remedy any improper verdict by the jury. Under the applicable legislation, the Appeal Court enjoyed wide powers of review and was empowered to quash any conviction which amounts to a miscarriage of justice. By contrast, in another case the Court found that, in one of the first cases following a cardinal reform of the criminal procedure introducing jury trials in the domestic order, the appellate court needed to address the specific procedural complaints raised by the applicant and could not reject his appeal on points of law without providing any reasons. In this connection, the Court stressed that, having regard to the lack of reasons in jury verdicts, the role that an appellate court plays was crucial, as it was up to it to examine whether the various procedural safeguards functioned effectively and properly and whether a presiding judge's handling of a jury trial resulted in unfairness.

In „Lhermitte v. Belgium" (2016) the Court noted the following factors on the basis of which it found no violation of Article 6 § 1: procedural safeguards put in place during the trial (in particular, the applicant's effective participation in the examination of evidence and the fact that the questions put by the president to the jury had been read out and the parties had been given a copy), the combined impact of the facts set out in the indictment and the nature of the questions put to the jury, the proper presentation of the sentencing judgment, and the limited impact of the expert opinions which had been at odds with the jury's findings.

Similarly, in „Ramda v. France" (2017), concerning the reasoning of a judgment delivered by a special anti-terrorist assize court, the Court found no violation of Article 6. in light of the combined examination of the three carefully reasoned committal orders, the arguments heard both at first instance and on appeal, as well as the many detailed questions put to the Assize Court, which allowed the applicant to understand the guilty verdict against him.

### 7.9.2. Reasons for decisions given by superior courts

In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision.[1407] With regard to the decision of an appellate court on whether to grant

[1406] „Taxquet v. Belgium" (2010)
[1407] „García Ruiz v. Spain" (1999)

leave to appeal, the Court has held that Article 6. cannot be interpreted as requiring that the rejection of such leave be subject itself to a requirement to give detailed reasons.[1408]

Nevertheless, when an issue arises as to the lack of any factual and/or legal basis of the lower court's decision, it is important that the higher court gives proper reasons of its own. Moreover, in case of an explicit objection to the admissibility of evidence, the higher court cannot rely on that evidence without providing a response to such an argument.[1409]

In „Baydar v. the Netherlands" (2018), in the context of a decision by the domestic superior court refusing to refer a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling, the Court had regard to the principle according to which courts of cassation comply with their obligation to provide sufficient reasoning when they base themselves on a specific legal provision, without further reasoning, in dismissing cassation appeals which do not have any prospects of success.[1410] The Court concluded that a reference to the relevant legal provision by the superior court, with an indication that there was no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined, provided for an implied acknowledgment that a referral to the CJEU could not lead to a different outcome in the case. The Court thus considered that this satisfied the requirement of a sufficient reasoning under Article 6.

### 7.10. Administration of evidence (ECrHR)

While Article 6. guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.[1411]

It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.[1412] This involves an examination of the alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found. Thus, for instance, the Court criticised the approach taken by the domestic courts to give decisive weight to the statements of the arresting police officers concerning the charges of rebellion against the applicant where the Government themselves recognised (in an unilateral declaration) that the circumstances of the arrest had been contrary to the prohibition of degrading treatment under Article 3 of the Convention.

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

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[1408] „Sawoniuk v. the United Kingdom" (2001)
[1409] „Shabelnik v. Ukraine" (2017)
[1410] „Talmane v. Latvia" (2016)
[1411] „Schenk v. Switzerland" (1998)
[1412] „Ayetullah Ay v. Turkey" (2020)

As to the examination of the nature of the alleged unlawfulness in question, the above test has been applied in cases concerning complaints that evidence obtained in breach of the defence rights has been used in the proceedings. This concerns, for instance, the use of evidence obtained through an identification parade, an improper taking of samples from a suspect for a forensic analysis, exertion of pressure on a co-accused (including the questioning of a co-accused in the absence of a lawyer), use of planted evidence against an accused, unfair use of other incriminating witness and material evidence against an accused, use of self-incriminating statements in the proceedings, and use of expert evidence in the proceedings.

The same test has been applied in cases concerning the question whether using information allegedly obtained in violation of Article 8 as evidence rendered a trial as a whole unfair under the meaning of Article 6. This concerns, for instance, cases related to the use of evidence obtained by secret surveillance, search and seizure operations.[1413]

However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.[1414]

Therefore, the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6. The same principles apply concerning the use in criminal proceedings of statements obtained as a result of ill-treatment by private parties.[1415]

This also holds true for the use of real evidence obtained as a direct result of acts of torture. The admission of such evidence obtained as a result of an act classified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6 if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned. In particular, the Court has found that the use in a trial of evidence obtained by torture would amount to a flagrant denial of justice even where the person from whom the evidence had thus been extracted was a third party.[1416]

In this connection, it should be noted that the Court has held that the absence of an admissible Article 3 complaint does not, in principle, preclude it from taking into consideration the applicant's allegations that the police statements had been obtained using methods of coercion or oppression and that their admission to the case file, relied upon by the trial court, therefore constituted a violation of the fair trial guarantee of Article 6.[1417] Similar considerations apply where an applicant complains about the use of evidence allegedly obtained as a result of ill-treatment, which the Court could not establish on the basis of the material available to it (no substantive violation of Article 3 of the Convention). In such instances, in so far as the applicant made a prima facie case about the real evidence potentially obtained through ill-treatment, the domestic courts have a duty to elucidate the circumstances of the case and their failure to do so may lead to a violation of Article 6.[1418]

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[1413] „Prade v. Germany" (2016)
[1414] „Mehmet Ali Eser v. Turkey" (2019)
[1415] „Ćwik v. Poland" (2020)
[1416] „Kormev v. Bulgaria" (2017)
[1417] „Mehmet Duman v. Turkey" (2018)
[1418] „Bokhonko v. Georgia" (2020)

In „Sassi and Benchellali v. France" (2021), the Court examined the applicants'complaint about a lack of fairness of the criminal proceedings against them in France relating to the use of statements they had given to certain French authorities on a US base at Guantánamo. While the Court had previously noted allegations of ill-treatment and abuse of terrorist suspects held by the US authorities in this context, in the present case the applicants' Article 3 complaint in respect of the French agents had been declared inadmissible. The Court, nevertheless, considered that it wasrequired to examine, under Article 6, whether and to what extent the domestic courts had taken into consideration the applicants' allegations of ill-treatment, even though it had allegedly been sustained outside the forum State, together with any potential impact on the fairness of the proceedings. In particular, the Court had to examine whether the domestic courts had properly addressed the objections raised by the applicants as to the reliability and evidential value of their statements and whether they had been given an effective opportunity to challenge the admissibility of those statements and to object to their use. On the facts, the Court found this to be the case. Noting also that the impugned statements had not been used as a basis either for the bringing of criminal proceedings against the applicants or for their conviction, the Court found no violation of Article 6. of the Convention.

An issue related to the administration of evidence in the proceedings arises also with regard to the admission of evidence provided by witnesses cooperating with the prosecution. In this connection, the Court has held that the use of statements made by witnesses in exchange for immunity or other advantages may put in question the fairness of the hearing granted to an accused and is capable of raising delicate issues since, by their very nature, such statements are open to manipulation and may be made purely in order to obtain advantages or for personal revenge. However, use of this kind of statement does not in itself suffice to render the proceedings unfair.[1419] In each case, in making its assessment, the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims in the proper prosecution of the crime and, where necessary, to the rights of witnesses.[1420]

In „Adamčo v. Slovakia" (2019), concerning the conviction based to a decisive degree on statements by an accomplice arising from a plea-bargaining arrangement, the Court found a violation of Article 6 of the Convention having regard to the following considerations: the statement constituted, if not the sole, then at least the decisive evidence against the applicant; the failure by the domestic courts to examine the wider context in which the witness obtained advantages from the prosecution; the fact that the plea-bargaining agreement with the prosecution was concluded without the judicial involvement; and the domestic courts' failure to provide the relevant reasoning concerning the applicant's arguments.

By contrast, in Kadagishvili v. Georgia (2020), the Court did not consider that the reliance on the statements of suspects, who had concluded plea-bargaining agreements with the prosecution, rendered the trial as a whole unfair. The Court laid emphasis on the fact that the pleabargaining procedure had been carried out in accordance with the law and was accompanied by adequate judicial review. Moreover, the witnesses concerned gave statements to the trial court in the applicants' case, and the latter had ample opportunity to cross-examine them. It was also important for the Court that no finding of fact in the plea-bargaining procedure was admitted in the applicants' case without full and proper examination at the applicants' trial.

Lastly, it should be noted that in some instances, a positive obligation may arise on the part of the authorities to investigate and collect evidence in favour of the accused. In „V.C.L. and A.N. v. the United Kingdom" (2021), concerning a case of human trafficking where the victims of trafficking were prosecuted for drug-related offences (committed in relation to their trafficking), the Court stressed that evidence concerning an accused's status as a victim of

[1419] „Verhoek v. the Netherlands" (2004)
[1420] „Habran and Dalem v. Belgium" (2017)

trafficking should be considered as a „fundamental aspect" of the defence which he or she should be able to secure without restriction. In this connection, the Court referred to the positive obligation on the State under Article 4 of the Convention to investigate situations of potential trafficking. In the case at issue, the Court considered that the lack of a proper assessment of the applicants' status as victims of trafficking prevented the authorities from securing evidence which may have constituted a fundamental aspect of their defence.

### 7.11. Legal certainty and divergent case-law (ECrHR)

The principle of legal certainty requires domestic authorities to respect the binding nature of a final judicial decision. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings under Article 6.[1421]

However, the requirements of legal certainty are not absolute. In criminal cases, they must be assessed in the light of, for example, Article 4 § 2 of Protocol No. 7, which expressly permits a State to reopen a case due to the emergence of new facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case. Nevertheless, compliance with Article 4 of Protocol No. 7 is not in itself sufficient to establish compliance with the requirements of a fair trial under Article 6.[1422]

Certain special circumstances of the case may reveal that the actual manner in which the procedure for reopening of a final decision was used impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct such a procedure was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.

The principle of legal certainty also guarantees certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law. However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law, and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.[1423]

In its assessment of whether conflicting decisions of domestic superior courts were in breach of the fair trial requirement enshrined in Article 6 § 1, the Court applies the test first developed in civil cases,[1424] which consist of establishing whether „profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides tools for overcoming these inconsistencies, whether such tools have been applied, and, if appropriate, to what effect.

Lastly, an issue of legal certainty may also arise in case of a legislative intervention in the pending criminal proceedings. In „Chim and Przywieczerski v. Poland" (2018), relying on its case-law under Article 7 of the Convention, the Court found no violation of Article 6 § 1 with respect to legislative amendments extending the duration of the limitation periods to the case against the applicant.

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[1421] „Bratyakin v. Russia" (2006)
[1422] „Nikitin v. Russia" (2004)
[1423] „Borg v. Malta" (2016)
[1424] „Nejdet Şahin and Perihan Şahin v. Turkey" (2011)

## 7.12. Presence at the appeal hearing (ECrHR)

The principle that hearings should be held in public entails the right of the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights.[1425]

Thus, when an accused provides justification for his or her absence from an appeal hearing, the domestic courts must examine that justification and provide sufficient reasons for their decision.[1426]

However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.[1427]

Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance.[1428]

Even where the court of appeal has jurisdiction to review the case both as to the facts and as to the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person.[1429] In order to decide this question, regard must be had to the
specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it.[1430]

However, where the appellate court is competent to modify, including to increase, the sentence imposed by the lower court and when the appeal proceedings are capable of raising issues involving an assessment of the accused's personality and character and his or her state of mind at the time of the offence, which make such proceedings of crucial importance for the accused, it is essential to the fairness of the proceedings that he or she be enabled to be present at the hearing and afforded the opportunity to participate in it.[1431] This is particularly so where the appellate court is called upon to examine whether the applicant's sentence should be increased.[1432] In this context, where the issues at stake in the proceedings require an applicant's personal presence, he or she may need to be invited to the hearing even without his or her specific request to that effect.[1433]

As a rule, when an appellate court overturns an acquittal at first instance, it must take positive measures to secure the possibility for the accused to be heard.[1434] In the alternative, the appeal court must limit itself to quashing the lower court's acquittal and referring the case back for a retrial.[1435] In this connection, a closely related issue to the presence of an accused at the trial arises also with respect to the necessity of a further examination of evidence relied upon for the

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[1425] „Tierce and Others v. San Marino" (2000)
[1426] „Henri Rivière and Others v. France" (2013)
[1427] „Hermi v. Italy" (2006)
[1428] „Monnell and Morris v. the United Kingdom" (1985), as regards the issue of leave to appeal; „Sutter v. Switzerland" (1984), as regards the court of cassation.
[1429] „Fejde v. Sweden" (1991)
[1430] „Seliwiak v. Poland" (2009); „Sibgatullin v. Russia" (2009)
[1431] „Dondarini v. San Marino" (2004); „Popovici v. Moldova" (2007); „Lacadena Calero v. Spain" (2011).
[1432] „Zahirović v. Croatia" (2013); „Hokkeling v. the Netherlands" (2017)
[1433] „Mirčetić v. Croatia" (2021)
[1434] „Botten v. Norway" (1996); „Dănilă v. Romania" (2007); „Gómez Olmeda v. Spain" (2016)
[1435] „Júlíus Þór Sigurþórsson v. Iceland" (2019)

applicant's conviction.[1436] This may concern, where relevant, the necessity to question witnesses.[1437]

However, an accused may waive his right to participate or be heard in the appeal proceedings, either expressly or by his conduct. Nevertheless, a waiver of the right to participate in the proceedings may not, in itself, imply a waiver of the right to be heard in the proceedings. In each case it is important to establish whether the relevant court didall what could reasonably be expected of it to secure the applicant's participation in the proceedings. Questioning via video-link could be a measure ensuring effective participation in the proceedings.

The Court's case-law on this matter seems to draw a distinction between two situations: on the one hand, where an appeal court, which reversed an acquittal without itself hearing the oral evidence on which the acquittal was based, not only had jurisdiction to examine points of fact and law but actually proceeded to a fresh evaluation of the facts; and, on the other hand, situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/orits application to the established facts, even if it also had jurisdiction in respect of the facts. For example, in the case of „Igual Coll v. Spain" (2008), the Court considered that the appeal court had not simply given a different legal interpretation or made another application of the law to facts already established at first instance, but had carried out a fresh evaluation of facts beyond purely legal considerations.[1438] Similarly, in „Marcos Barrios v. Spain" (2010), the Court held that the appeal court had expressed itself on a question of fact, namely the credibility of a witness, thus modifying the facts established at first instance and taking a fresh position on facts which were decisive for the determination of the applicant's guilt.

By contrast, in „Bazo González v. Spain" (2008) the Court found that there had not been a violation of Article 6 § 1 on the ground that the aspects which the appeal court had been called on to analyse in order to convict the applicant had had a predominantly legal character, and its judgment had expressly stated that it was not for it to carry out a fresh evaluation of the evidence; rather, it had only adopted a legal interpretation different to that of the lower court. Similarly, in „Ignat v. Romania" (2021), where the first-instance and final-instance courts disagreed over the manner of assessing the available documentary evidence, the Court did not considered that the final-instance court was required to directly hear witness evidence.

However, as explained by the Court in „Suuripää v. Finland" (2010), it should be taken into account that the facts and the legal interpretation can be intertwined to an extent that it is difficult to separate the two from each other.

[1436] „Marilena-Carmen Popa v. Romania" (2020)
[1437] „Dan v. the Republic of Moldova" (2020)
[1438] „Spînu v. Romania" (2008)

# CHAPTER VIII

# EVIDENCE IN CRIMINAL PROCEEDINGS

Evidence in criminal proceedings starts during the investigation and continues until the case is closed in court. Methods of proof are very varied but their types are regulated in a similar way in different European laws.

In Hungarian law, there is no difference between the types of evidence that can be used in an investigation and in court proceedings. It is therefore up to the law enforcement authorities alone to choose the most appropriate procedures, with the obvious aim of bringing the case to a conclusion as quickly as possible.

It should be noted that certain acts of evidence may seriously infringe the personal liberty or even the property of the parties to the proceedings. For this reason, some evidentiary acts require special judicial authorisation, and some evidentiary activities cannot be carried out. These rules are essentially the prohibitions on evidence. In the following, I will give an overview of the methods of evidence available under Hungarian law, and I will also refer to the relevant decisions of the ECrHR with regard to certain acts.

## 8.1. Aquisition of data (CPC)

### 8.1.1. Data request

In the criminal proceeding, the court, the prosecution service, and the investigating authority or, in cases specified in an Act, the organ conducting a preparatory proceeding may request any organ, legal person, or other organisation without a legal personality to provide data.

After the indictment, the prosecution service may request the provision of data with a view to submitting a motion for evidence or locating or securing a means of evidence. Within the framework of a data request,

- the transfer of data that is relevant to the criminal proceeding and is in the possession of the organisation,
- the transfer of electronic data or documents that are relevant to the criminal proceeding and are in the possession of the organisation, or
- the provision of information relevant to the criminal proceeding that can be provided by the organisation may be requested.

A data request may also be aimed at the transfer or receipt of data processed in a register of the State or a local government.

The following shall be specified in a data request:

- the conditions and purpose of the data request pursuant to this Act,
- data identifying the subject matter of the data request, which is required for compliance with the data request, such as, in particular, data on the person, object, or service concerned,
- the scope of data to be provided, and
- the method and time limit for data provision.[1439]

The investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may not request data without the permission of the prosecution service from an electronic communications service provider, a

[1439] CPC 261. §

postal service provider or a person or organisation pursuing the activities of a postal contributor, an organisation processing data constituting bank, payment, securities, fund or insurance secret, pertaining to such data and an organisation processing health data and personal data as defined in the Act on the processing and protection of health data and related personal data, pertaining to such data. The case documents justifying the data request shall be attached to the motion for the permission required for the data request.

If obtaining permission for a data request would cause any delay that would significantly jeopardise the purpose of the data request, data provision may be requested even without a permission. Data provision may not be refused on the ground that the permission of a prosecutor is missing. In such a situation, the permission of the prosecution service shall be obtained ex-post without delay. If the prosecution service does not permit the data request, data obtained in this manner may not be used as evidence and shall be deleted without delay.[1440]

If permitted by an Act, an organ requesting data shall receive the necessary data by accessing the records or data files directly and may make use, for requesting data, of the assistance of the national security service designated by the Act on national security service for the performance of such services.

A time limit of 1. at least one and up to thirty days if the data is to be provided by electronic means, 2. at least eight and up to thirty days if the data is to be provided by any other means, may be set for the provision of the requested data. Unless otherwise provided by an Act, the organ requested to provide data shall comply with the request within the set time limit or indicate a detected obstacle, if any, without delay. A data request shall be performed even if only incomplete or partial data can be provided. The organ requested to provide data shall comply with the request free of charge, including in particular the processing, as well as the recording and transfer of the data in writing or by electronic means.

If the data has been encrypted or otherwise rendered inaccessible, it shall be restored by the organ requested to provide data into its original condition, or it shall be rendered accessible to the organ requesting the data prior to disclosure or provision. The volume and extent of any personal data requested under a data request shall be limited to data that is indispensable for achieving the purpose of the data request.

If, as a result of a data request, any personal data that is not relevant for the data request is disclosed to the organ requesting the data, it shall be deleted without delay. If the data to be deleted is contained in an original document, an extract of the personal data that is relevant for the data request shall be produced, and the original document shall be returned to the organ requested to provide data.

Any original document acquired by the organ requesting the data shall be returned to the organ requested to provide data by the completion of the proceeding at the latest.

If providing any information about the data request would jeopardise the success of the criminal proceeding, the organ requested to provide data, if specifically instructed by the organ requesting the data, may not provide any information to any other person or entity about, and shall ensure the secrecy of, the request, its content, or any data transferred in the course of complying with the request. If a person affected by the request requests information concerning the processing of his own personal data, he shall be provided with information that does not reveal that his personal data were transferred for the purpose of a data request. The organisation requested to provide data shall be advised about this provision in the data request.

A disciplinary fine may be imposed on the organisation requested to provide data if it fails to comply with the request within the time limit specified in the request, refuses to comply without reason or violates its obligation. In addition to a disciplinary fine, another coercive measure specified in this Act may also be applied where the applicable conditions are met. If an

[1440] CPC 262. §

organisation requested to provide data fails to comply with the request because doing so is prohibited by an Act, no further procedural act may be taken concerning the requested organisation to obtain data held by the requested organisation.[1441]

### 8.1.2. Conditional data request

Should a specified condition be met, a State organ, a local government organ, an organ of a national minority self-government, a budgetary organ or a statutory professional body may be requested to provide data by 1. the prosecution service, or 2. the investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ, subject to the permission of the prosecution service.

A conditional data request may be issued for a period of up to three months, which may be extended repeatedly for an additional period of three months each time. The total period of a conditional data request may not exceed one year.

If the condition is not met during the period of the conditional data request, the organisation requested to provide data under the conditional data request shall erase the data indicated in the request of the organ requesting the data.

The following shall be specified in a conditional data request:

- the conditions and purpose of the data request under this Act,
- data identifying the subject matter of the data request, which is required for compliance with the data request, such as, in particular, data on the person, object, or service concerned,
- the scope of data to be provided,
- the period of the conditional data request,
- the method and time limit for data provision, and
- the condition, the occurrence of which makes data provision mandatory.

In other respects, the provisions on data requests shall apply to conditional data requests, with the provison that, under a conditional data request, the data may be requested to be provided without delay when the specified condition is met.[1442]

### 8.1.3. Data collection

The prosecution service, the investigating authority, the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may collect data to establish the suspicion of a criminal offence or whether there are any means of evidence and where they are located.

After the indictment, the prosecution service may collect data and may also make use of an investigating authority and the asset recovery organ of the investigating authority to submit a motion for evidence, to locate or secure a means of evidence and to detect and secure things or assets that may be confiscated or are subject to forfeiture of assets.

In the course of data collection,

- data may be collected from the registers specified in the Act on the prosecution service, the Act on the police, and the Act on the National Tax and Customs Administration,
- data may be collected from a data file or source prepared for publication or published in a lawful manner,
- information may be requested from any person,

[1441] CPC 263. § - 265. §
[1442] CPC 266. §

- the selection or identification of a person or object may be requested by presenting an image, sound, or audio-visual recording, and
- the scene of a criminal offence may be inspected.

A member of the authority carrying out a data collection shall draw up a memorandum of the data collection. A statement recorded in the memorandum of a data collection may be used as a testimony, provided that the person who made that statement maintains his statement during his interrogation as a defendant or witness.[1443]

### 8.1.4. Other activities to acquire data

The court, the prosecution service, and the investigating authority may issue, by adopting a decision, a search warrant for

- a thing that serves as a means of evidence, to determine the location of a thing at an unknown location or to identify a thing of an unknown source,
- a thing that may be subject to confiscation or forfeiture of assets, to determine the location of the thing at an unknown location or to identify a thing of an unknown source,
- a witness or a person reasonably suspected of having committed a criminal offence if his identity is unknown,
- a witness, a person reasonably suspected of having committed a criminal offence or a defendant, whose whereabouts are unknown, to determine his contact details,
- a corpse, or part of a corpse, that serves as a means of evidence, to identify the corpse or part of a corpse concerned.

The court, prosecution office, or investigating authority of the proceeding shall decide on withdrawing or amending a search warrant. A search warrant issued by an investigating authority before the indictment may also be withdrawn or amended by the prosecution service.

If the court, prosecution office, or investigating authority that issued the arrest warrant is not the same as that of the proceeding, or if the proceeding court, prosecution office, or investigating authority changes during the proceeding, while the conditions of the search warrant are still met, the proceeding court, prosecution office, or investigating authority shall not withdraw the search warrant, but take action, in justified cases, to have the change entered into the search warrant register.

No legal remedy shall lie against the issuance, withdrawal or amendment of a search warrant.

The prosecution service, the investigating authority, or the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may

- request data to be transferred from the register of criminal and policing biometric data as provided for by an Act,
- make use the facial image analysis activities of an organ responsible for keeping the register of facial image analyses and operating the system of facial image analysis as provided for by an Act, and
- order the placement of an alert for checking the person or object concerned in the Schengen Information System as provided for by an Act.

The prosecution service, the investigating authority, or the police organ performing internal crime prevention and crime detection activities, and the counter-terrorism police organ may use a consultant if specialised knowledge is needed to detect, search for, acquire, collect, or record a means of evidence. After the indictment, the prosecution service may make use of a consultant for submitting a motion for evidence or locating or securing a means of evidence.

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[1443] CPC 267. §

If an act affecting the inviolability of the subject's body needs to be carried out in the course of the proceedings of a consultant, the prosecution service or the proceeding investigating authority shall issue orders on the matter separately.
The provisions pertaining to the disqualification of a prosecutor, or a member of theinvestigating authority shall also apply, as appropriate, to the disqualification of a consultant. The fact of using a consultant, as well as the method and extent of his involvement, shall be indicated in the minutes or memorandum of the given procedural act. A consultant may be interrogated as a witness regarding a procedural act carried out with his involvement.[1444]

## 8.2. Covert means (CPC)

The use of covert means means a special activity carried out by authorised organs in the criminal proceedings without the knowledge of the persons concerned, as such means restrict the fundamental rights of persons to the privacy of homes, personal secrets, the confidentiality of correspondence, and the protection of personal data.

Covert means may be used by authorised organs to carry out their law enforcement tasks, as specified in applicable legislation, only according to the rules laid down in this CPC. This rule shall not affect any secret information gathering carried out by national security services and the counter-terrorism police organ for their law enforcement tasks according to the Act on national security services.

Covert means that are

a) not subject to permission of a judge or a prosecutor,

b) subject to permission of a prosecutor, or

c) subject to permission of a judge

may be used in a criminal proceeding.

A covert means may be used if 1. it is reasonable to assume that a piece of information or evidence to be acquired is indispensable for achieving the purpose of a criminal proceeding, and it cannot be acquired by other means, 2. its use does not restrict any fundamental right of the person concerned, or any other person, in a disproportional manner considering the attainable law enforcement goal, and 3. it is likely that information or evidence relating to a criminal offence may be obtained by its use.[1445]

### 8.2.1. Covert means not subject to persmission of a judge or a prosecutor

a) The organ authorised to use covert means may use persons cooperating in secret to acquire information regarding a criminal offence.

b) A member of the organ authorised to use covert means may collect and verify information relating to a criminal offence while keeping the actual purpose of his proceeding secret.

c) The organ authorised to use covert means may use a trap not causing injury or damaging health to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence.

d) A member of the organ authorised to use covert means may, to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence, replace an aggrieved party or another person to protect his life and physical integrity.

e) The organ authorised to use covert means may covertly surveil a person, home, other room, fenced area, public area, premises open to the public, orvehicle, or an object serving as means

[1444] CPC 268. § - 270. §
[1445] CPC 214. §

of physical evidence, that are associated with the criminal offence, and it may collect information on events taking place, and it may use technical means to record such events (hereinafter: "covert surveillance"). For the purpose of covert surveillance, the organ authorised to use covert means may also use persons cooperating in secret.

f) The organ authorised to use covert means may, to interrupt a criminal offence, identify the perpetrator of a criminal offence, or take evidence, disclose false or misleading information to the person involved in the use of covert means by concealing the source of information. The organ authorised to use covert means may also use persons cooperating in secret to transfer such information. This may not be used during the interrogation of a defendant or witness or during an evidentiary act, contain any promise that is inconsistent with the law, or constitute a threat or instigation, and it may not drive the person concerned towards the commission of a criminal offence, the gravity of which is greater than that of the criminal offence he initially planned to commit.

g) The organ authorised to use covert means may secretly acquire, using technical means, the data necessary for interrupting the criminal offence, identifying the perpetrator of the criminal offence or, for the purpose of taking of evidence, establishing that communication was carried out using an electronic communications network or device or through an information system or identifying the electronic communications device or information system or determining the location thereof.[1446]

### 8.2.2. Covert means subject to permission of a prosecutor

The prosecution service shall decide on granting permission to use covert means upon a corresponding motion submitted by an authorised senior official of an organ authorised to use covert means within seventy-two hours after the prosecution service receives the motion.

The following shall be stated or provided in the course of filing a motion:

- the name of the organ authorised to use covert means, the date of ordering the preparatory proceeding or investigation, and the case number,
- the qualification under the Criminal Code and a short description of the facts of the criminal offence underlying the proceeding and the data serving as a ground for suspecting, or suggesting the possibility of, a criminal offence,
- all data confirming that the statutory conditions of using such means are met,
- the designation of the covert means to be used, and data required for granting permission to use such means, and
- the decision underlying the permission of a prosecutor.

If granting permission to use a covert means subject to a permission of a prosecutor would significantly jeopardise the objective of using covert means due to the delay involved, an authorised senior official of the organ authorised to use covert means may begin using the covert means until the prosecution service makes a decision. In the event of beginning to use a covert means in this way, an authorised senior official of the organ authorised to use covert means shall file a motion with the prosecution service for ex-post permission within seventy-two hours after the decision on beginning the use of a covert means was made. The prosecution service shall decide on the motion within one hundred and twenty hours after the decision on beginning the use of a covert means was made.

In the course of a preparatory proceeding conducted by the prosecution office, or of a prosecutorial investigation, the superior prosecution office shall carry out the tasks relating to granting permission to use a covert means subject to a permission of a prosecutor.[1447]

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[1446] CPC 215. §

[1447] CPC 228. § - 230. §

*a) Surveillance of payment transactions:*

The organ authorised to use covert means may order, subject to the permission of the prosecution service, an organisation providing financial services or supplementary financial services as defined in the Act on credit institutions and financial undertakings (hereinafter "service provider"), to record, keep, and transmit data pertaining to payment transactions, as defined in the Act on providing payment services, to the ordering entity during a specified period.

In particular, the surveillance of payment transactions may be aimed at the recording and transmission of data pertaining to 1. all payment transactions relating to a payment account as defined in the Act on providing payment services, 2. payment transactions meeting pre-determined criteria.

The ordering entity may order the specified data to be transmitted without delay or within a set time limit. The surveillance of payment transactions may be ordered for a maximum period of three months, with the proviso that the surveillance period, subject to the permission of the prosecution service, may be extended once for an additional period of three months.

The following shall be specified in a decision ordering the surveillance of payment transactions:

- data that are suitable for identifying the payment account concerned,
- the starting and finishing date, specified in days, of the surveillance of payment transactions,
- the exact scope of data to be transmitted,
- the applicable conditions, if the ordering entity set any condition for recording or transmitting the data,
- the method of, and time limit for, transmitting the data.

In the course of the surveillance of payment transactions, the service provider shall record and transmit the data specified in the ordering decision in the manner, and by the time limit, specified in the decision.

Within the framework of the surveillance of payment transactions, the ordering entity may also order a service provider to suspend the execution of payment transactions between certain payment accounts and persons, or payment transactions that meet certain conditions.

The period of suspending the execution of payment transactions may last for up to four working days following the notification of the ordering organ; this period may be extended once by up to three working days subject to the permission of the prosecution service.

During the suspension of the payment transaction, the ordering entity shall examine whether the suspended payment transaction can be connected to a criminal offence. If the suspension of the payment transaction is unnecessary, the service provider shall be notified that the payment transaction may be executed. If further follow-up of a suspended payment transaction is necessary, the ordering entity, subject to the permission of the prosecution service, may also order other service providers to monitor the payment transactions, and then it shall notify the service provider that the suspended payment transaction may be executed.

If the ordering entity establishes that the conditions for the seizure or sequestration of scriptural money or electronic money involved in the payment transaction are met, it shall order the seizure or sequestration.

A service provider shall not inform any person about the surveillance of payment transactions, the content of the ordering decision, the content of data transfers completed, or the suspension of executing a payment transaction, and it shall ensure that such information is kept secret. If a person affected by the surveillance of payment transactions requests information concerning the processing of his own personal data, he shall be provided with information that does not reveal that his personal data were transferred for the surveillance of payment transactions. The

service provider shall be advised about this provision when the surveillance of payment transactions is ordered.[1448]

*b) The prospect of avoiding the establishment of criminal liability:*
The organ authorised to use covert means may, with permission from the prosecution service, enter into an agreement with the perpetrator of a criminal offence, offering that no criminal proceeding would be instituted against him or a pending criminal proceeding would be terminated, if he provided information and evidence for detecting and proving the case, or another criminal case, provided that the national security or law enforcement interest that may be realised through such an agreement exceeds the interest in establishing the criminal liability of the perpetrator. When outlining the prospect of avoiding the establishment of criminal liability, it may be set out as a condition that the perpetrator pays, in whole or in part and through the State, damages and grievance awards he is liable to pay under civil law.

No agreement may be concluded if a criminal proceeding is to be conducted against a perpetrator due to a criminal offence involving the intentional killing of another person or causing any permanent disability or serious degradation of health intentionally. An agreement shall be terminated if the organ authorised to use covert means learns that the person providing information committed any such criminal offence.

An agreement offering avoidance of the establishment of criminal liability shall specify 1. data that are suitable for identifying the perpetrator of the criminal offence, 2. the qualification under the Criminal Code and a short description of the facts of the criminal offence, the prospect of avoiding the establishment of criminal liability for which is outlined, 3. the qualification under the Criminal Code and a short description of the facts of the criminal offence, concerning which the perpetrator agrees to provide information and evidence, 4. the commitment to provide information and evidence, including the method thereof, and 5. details of paying any damages or grievance award if doing so is part of the agreement.

If the perpetrator of the criminal offence performs the agreement, no criminal proceeding may be instituted against him, and any pending criminal proceeding against him shall be terminated. If no criminal proceeding is instituted against the perpetrator, or any pending criminal proceeding is terminated, due to an agreement, the State shall pay the damages or grievance award the perpetrator is liable to pay under civil law, provided that the perpetrator has not paid it. To pay any damages or grievance award, the organ authorised to use covert means may initiate the conclusion of a confidentiality agreement with the aggrieved party, and it may draft documents that are necessary for doing so.[1449]

*c) Consented surveillance*:
Subject to the permission of the prosecution service and the written consent of the aggrieved party, the organ authorised to use covert means may use surveillance
regarding 1. a criminal offence of usury, domestic violence, or harassment, or 2. any criminal offence committed by threat.

Subject to the permission of the prosecution service and the written consent of the person who was invited, or sought to be induced, the organ authorised to use covert means may use surveillance

- regarding an invitation to commit a criminal offence, provided that preparation constitutes a punishable act under the Criminal Code, or inviting another person to commit a given criminal offence constitutes a criminal offence, or
- if seeking to induce to the act constitutes a criminal offence.[1450]

[1448] CPC 216. § - 218. §
[1449] CPC 219. §
[1450] CPC 220. §

*d) Simulated purchases:*
Subject to the permission of the prosecution service, sham contracts

- on acquiring things or samples, or using services that are presumably related to a criminal offence,
- on acquiring a thing or using a service that would provide a means of physical evidence regarding a criminal offence, in order to reinforce trust in the seller,
- on acquiring a thing or using a service, to apprehend the perpetrator of a criminal offence or secure a means of physical evidence,

may be concluded and performed.[1451]

*e) Using undercover investigators:*
Subject to the permission of the prosecution service, an organ authorised to use covert means may use, in a criminal proceeding, members who conceal their identity and association with the organ permanently and are employed for such tasks specifically (hereinafter: "undercover investigator").

An undercover investigator may be used to

- infiltrate a criminal organisation,
- infiltrate a terrorist group or an organisation that provides or collects material means to arrange the conditions that are necessary to commit terrorist acts, or supports the commission of terrorist acts or the operations of a terrorist group by providing material means or in any other way,
- carry out simulated purchases,
- carry out secret surveillance,
- transfer information, or
- acquire information and evidence relating to the criminal offence.

The undercover investigator may be used for a period required to achieve the purpose of his use, but not exceeding six months. If the conditions of ordering the use of an undercover investigator are still met, the use of an undercover investigator may be extended repeatedly, subject to the permission of the prosecution service, by up to six months each time.

Under the provisions on using covert means subject to permission of a judge or prosecutor, an undercover investigator may be used in combination with other covert means subject to permission of a judge or prosecutor, or to enable the use of other covert means subject to permission of a judge or prosecutor.

The undercover investigator may not be punished for a criminal offence, infraction, or a violation punishable by an administrative fine that he committed while being used as an undercover investigator if committing the offence, infraction or violation

- is necessary for the success, or to achieve the law enforcement objective, of using an undercover investigator, and the law enforcement interest to be achieved through using him exceeds the interest in holding the undercover investigator liable,
- is necessary to ensure the safety, and prevent the exposure, of the undercover investigator, and the interest in ensuring the safety, and preventing the exposure, of the undercover investigator exceeds the interest in holding the undercover investigator liable or
- is necessary to prevent or interrupt the commission of another criminal offence, and the interest in preventing or interrupting the other criminal offence exceeds the interest in holding the undercover investigator liable.

[1451] CPC 221. §

If a criminal offence, infraction, or violation punishable by an administrative fine needs to be foreseeably committed for an undercover investigator to be successful, this shall be specified in the decision on using the undercover investigator.

The undercover investigator may not commit any criminal offence that involves the intentional killing of another person or causing permanent disability or serious degradation of health intentionally.

The undercover investigator may not induce another person to commit a criminal offence, and he may not drive a person concerned towards the commission of a criminal offence the gravity of which is greater than that of the criminal offence initially planned. Making a simulated purchase shall not constitute inducement in and of itself.[1452]

*f) Simulated purchases by members of organs authorised to use covert means and persons cooperating in secret:*
To make a simulated purchase, a member of an organ authorised to use covert means may be used, and an organ authorised to use covert means may also use a person cooperating in secret. An organ authorised to use covert means may use a person cooperating in secret to make a simulated purchase if the objective of making a simulated purchase may not be achieved, or may be achieved only with a significant delay, by using an undercover investigator or a member of the organ authorised to use covert means. The provisions on undercover investigators shall apply as appropriate to the use of members of organs authorised to use covert means and persons cooperating in secret for making simulated purchases.[1453]

*g) Cover deeds, cover institutes, and cover data:* Subject to the permission of the prosecution service, the organ authorised to use covert means may, in the course of using another covert means,

- produce or use deeds or public deeds containing false data, facts, or statements (hereinafter: "cover deed") to detect and prove a criminal offence,
- establish and maintain an organisation by applying the provisions on cover institutions as laid down in applicable Acts, to detect and prove a criminal offence, or
- have false data (hereinafter: "cover data") entered in publicly certified registers to detect and prove a criminal offence, and to protect a cover deed or an organisation.

Cover deeds shall be destroyed, and cover data shall be erased from publicly certified registers when they are not needed in a criminal proceeding any longer.[1454]

### 8.2.3. Covert means subject to permission of a judge

In a criminal proceeding, the following covert means may be used subject to permission of a judge: 1. secret surveillance of an information system, 2. secret search, 3. secret surveillance of a locality, 4. secret interception of a consignment, 5. interception of communications.

- In the course of *secret surveillance of an information system*, the organ authorised to use covert means may, with permission from a judge, secretly access, and record by technical means, data processed in an information system. For that purpose, any necessary electronic data may be placed in an information system, while any necessary technical device may be placed at a home, other room, fenced area, vehicle, or other object used by the person concerned, except for public areas, premises open to the public, and means of public transport.

[1452] CPC 222. § - 225. §
[1453] CPC 226. §
[1454] CPC 227. §

- In the course of a *secret search*, the organ authorised to use covert means may, with permission from a judge, secretly search a home, other room, fenced area, vehicle, or other object used by the person concerned, except for public areas, premises open to the public, and means of public transport; it may also record its findings by technical means.
- In the course of *secret surveillance of a locality*, the organ authorised to use covert means may, with permission from a judge, secretly surveil and record events taking place at a home, other room, fenced area, or vehicle, except for public areas, premises open to the public, and means of public transport. For that purpose, any necessary technical means may be placed at the place of operation.
- In the course of *secret interception of a consignment*, the organ authorised to use covert means may, with permission from a judge, secretly open, and intercept, verify, and record the contents of a postal item or other sealed consignment.
- In the course of *interception of communications*, the organ authorised to use covert means may, with permission from a judge, intercept and record communications conducted through an electronic communications network or device, using an electronic communications service, or an information system.

Any technical means used, or electronic data placed in an information system, in the course of using a covert means subject to permission of a judge shall be removed without delay after finishing the use of the given covert means. If an obstacle prevents such removal, the technical means or electronic data concerned shall be removed without delay after the obstacle is eliminated. To place or remove a technical means or data used in the course of using a covert means subject to permission of a judge, the organ authorised to use covert means may use covert means not subject to permission of a judge, and the organ performing the use of a covert means may engage in secret information gathering under the Act applicable to that organ.

Covert means subject to permission of a judge may be used regarding intentional criminal offences punishable by imprisonment for five years or more.

Covert means subject to permission of a judge may also be used regarding the following intentional criminal offences punishable by imprisonment for three years:

- criminal offences committed on a commercial basis or in a criminal conspiracy,
- abuse of drug precursors, counterfeiting of medicinal products, abuse of performanceenhancing substance, counterfeiting of medical products,
- sexual abuse, procuring, facilitating prostitution, living on the earnings of prostitution, exploitation of child prostitution, child pornography,
- damaging the environment, damaging natural values, game poaching, organising illegal animal fights, violation of waste management regulations,
- criminal offences against justice, except for breach of seal,
- corruption criminal offences, except for failure to report a corruption criminal offence,
- criminal offence against the order of election, referendum and European citizens' initiative, illegal employment of a third-country national, organising illegal gambling,
- insider trading and illegal market manipulation.

Covert means subject to permission of a judge may also be used regarding any intentionally committed misuse of classified data, abuse of office, violence against a public officer, violence against an internationally protected person, counterfeiting non-cash payment instruments, unauthorised financial activity, or organising a pyramid scheme.[1455]

*a) Granting permission to use covert means subject to permission of a judge:*

Covert means that are subject to permission of a judge may be used on the basis of, and within the limits specified in, a permission granted by a court. The covert means subject to the

[1455] CPC 231. § - 234. §

permission of a judge that may be used against the person concerned shall be specified in the court's permission. The court may extend the period of its permission, withdraw its permission, extend the scope of its permission to other covert means, and prohibit any further use of a covert means already covered by a permission.

The court shall decide on granting permission to use any covert means subject to permission of a judge upon a motion submitted by the prosecution service. Such a motion shall include the following:

- the name of the organ authorised to use covert means, the date of ordering the preparatory proceeding or investigation, and the case number,
- available data identifying the person concerned,
- the planned date and time, indicated in days and hours, of starting and finishing the use of the covert means subject to permission of a judge against the person concerned,
- detailed reasons confirming that the conditions of permitting the use of the covert means subject to permission of a judge are met, including the following: 1. the qualification under the Criminal Code and a short description of the facts of the criminal offence underlying the proceeding, and the data serving as a ground for suspecting, or suggesting the possibility of, a criminal offence, 2. the purpose of using covert means subject to permission of a judge, 3. the designation of the covert means to be used, 4. data clearly identifying the information system subject to secret surveillance; the room, vehicle, or object subject to a secret search; the room or vehicle subject to secret surveillance of a locality; the place of posting and receipt, and the sender or recipient in case of the secret interception of a consignment; the electronic communications service or device, or information system subject to interception of communications.

A motion shall be accompanied by documents serving as a ground for the content of the motion.

The court shall decide within seventy-two hours after the filing of the motion. On the basis of a motion, the court shall grant a permission, in whole or in part, or dismiss the motion.

A permission shall be granted by the court in part, if it permits the use of covert means subject to permission of a judge, but dismisses any part of the motion regarding the use of certain covert means in its decision.

If the court permits, in whole or in part, the use of covert means, it shall specify the following in its corresponding decision: 1. available data identifying the person concerned, 2. the date and time, indicated in days and hours, of starting and finishing the use of the covert means subject to permission of a judge, 3. the relevant criminal offence and the purpose of use, indicating the qualification under the Criminal Code and a short description of the facts of the criminal offence, and 4. the covert means subject to permission of a judge for which permission is granted.[1456]

*b) Ex-post permission:*

If granting or extending a permission to use a covert means subject to permission of a judge would significantly jeopardise the objective of using covert means due to the delay involved, the prosecution service may order a secret search or the use of a covert means until the court adopts its decision, but no longer than one hundred and twenty hours.

If the court dismisses a motion for ex-post permission to use covert means or certain means specified in the motion, the result of using any non-permitted covert means may not be used as evidence, and all data acquired in such a manner shall be erased without delay.[1457]

*c) The period and extension of use:*

[1456] CPC 235. § - 237. §
[1457] CPC 238. §

Permission to use covert means subject to permission of a judge may be granted for a period of up to ninety days; this period may be extended repeatedly by up to ninety days each time. In a criminal proceeding, the total period of using a covert means subject to permission of a judge against a person concerned may not exceed three hundred and sixty days.

Not later than five days before the expiry of the permitted period, the prosecution service may move for the extension of the period of using a covert means; the court shall decide on the motion within seventy-two hours after it is filed. The court shall either extend the period of use or dismiss the motion. If the period of use is extended, the court shall prohibit the use of any covert means concerning which the statutory conditions of use are not met. If the period of using a covert means is extended, the finishing date of use shall be calculated from the finishing date specified in the previous permission. Any document produced since the previous permission shall be attached at the time of submitting a motion.[1458]

*d) Extending the scope of use:*
The scope of use may be extended if, before the date of finishing the use of covert means as specified in the permission, it is necessary to use a covert means 1. not covered by the permission, or 2. already included in the permission concerning another information system subject to secret surveillance; another room, vehicle, or object subject to a secret search; another room or vehicle subject to secret surveillance of a locality; another place and another sender or recipient subject to the secret interception of a consignment; another electronic communications service or device, or information system subject to interception of communications against the person concerned.[1459]

*e) Withdrawing a permission and prohibiting the use of covert means:*
Upon a call from the court, the organ authorised to use covert means shall present all data available to it at the time of such call and acquired during the use of a covert means subject to permission of a judge. The court shall also examine the legality of using covert means when deciding on a motion to extend the period or scope of use. The court shall prohibit the use of any covert means concerning which the statutory conditions of use are not met. If the court 1. withdraws its permission to use a covert means, all data acquired during its use, 2. prohibits the use of a covert means, all data acquired using the prohibited covert means shall be erased without delay.[1460]

### 8.2.4. Common rules of using covert means

*a) Implementing the use of covert means:*
The use of covert means shall be recorded in minutes or memorandum. The minutes or memorandum of the proceeding of an undercover investigator shall be signed by an authorised senior official of the organ authorised to employ undercover investigators. The minutes or memorandum shall be drafted in a way that it does not allow for any conclusion regarding the identity of an undercover investigator. The organ authorised to use covert means shall implement the use of a covert means itself, or with assistance from a police organ designated to assist in the implementation of the use of covert means, or by engaging a national security service designated to perform such services by the Act on national security services.

In the course of a preparatory proceeding or investigation conducted regarding a criminal offence falling within its subject-matter competence under the Act on the police, the police

[1458] CPC 239. § - 240. §
[1459] CPC 241. §
[1460] CPC 242. §

organ performing internal crime prevention and crime detection tasks, or the counterterrorism police organ, shall assist, upon request, in implementing the use of a covert means used by an investigating authority. Upon invitation, the following shall participate in implementing the use of a covert means used by the prosecution service: 1. the investigating authority or the police organ performing internal crime prevention and crime detection activities, or 2. the counter-terrorism police organ in a proceeding conducted for a criminal offence within its subject-matter competence under the Act on the police.

If the preparatory proceeding is conducted by the police organ performing internal crime prevention and crime detection activities, or the counter-terrorism police organ, and the investigation is ordered while covert means are already in use, the organ conducting the preparatory proceeding shall assist in implementing the use of covert means until instructed otherwise by the investigating authority or the prosecution service.

If a covert means subject to permission of a judge or a prosecutor is used in the course of a preparatory proceeding or investigation conducted against a member of the professional personnel of national security services, or the counter-terrorism police organ, for committing a criminal offence, the national security service, or the counter-terrorism police organ concerned shall assist, upon invitation, in implementing the use of the covert means.

An organisation providing electronic communications services or engaged in the transfer, technical processing or processing of postal items, other sealed consignments, or data stored in information systems shall be obliged to enable the use of covert means and cooperate with organs authorised to use such means.[1461]

*b) Terminating the use of covert means:*

The head of the organ authorised to use covert means, or the prosecution service, shall terminate the use of covert means, or certain covert means, if

- it is clear that no result may be expected from any further use, including situations where extending the scope of use would be in order, but the data necessary to do so are not available,
- it is clear that the use of a covert means may not be continued any longer within the limits specified in the corresponding permission,
- the purpose specified in the permission is achieved,
- the period set or extended in the permission expired,
- the motion for ex-post permission is dismissed by the court or the prosecution service,
- the time limit for a preparatory proceeding expired during a use ordered in a preparatory proceeding, without an investigation being ordered, or
- the proceeding has been terminated or the time limit for an investigation expired.[1462]

8.2.5. Common rules concerning data acquired during the use of convert

*a) Erasing data acquired during the use of covert means:*

Within thirty days after the use of a covert means is terminated, the following data shall be erased from among data acquired during the use of the covert means: 1. data that are not related to the purpose of using covert means, 2. all personal data that are not necessary for the criminal proceeding, 3. data that may not be used as evidence in the criminal proceeding. [1463]

*b) The confidentiality of data acquired during the use of covert means:*

[1461] CPC 243. § - 244. §
[1462] CPC 245. §
[1463] CPC 246. §

In the course of permitting and implementing the use of covert means, or using any data generated as a result of such use, it shall be ensured that no unauthorised person may access, or get informed of, any measure or data. If the organ authorised to use covert means classified any data related to the use of a covert means in accordance with the rules laid down in the Act on the protection of classified data, the review provided for under the Act shall be carried out immediately after terminating the use of the covert means and every two years thereafter. If data related to the use of covert means are processed as classified data in the criminal proceeding, the court, the prosecution service, or the investigating authority may initiate the review or revision of classification.[1464]

*c) Handling case documents produced in the course of using covert means:*
Pursuant to the provisions of CPC, the case documents of a proceeding include 1. means of evidence produced during the use of covert means, including, in particular, data recorded by technical means, and 2. any permission to use covert means. Unless ordered otherwise by the prosecution service, means of evidence produced by using a covert means, including, in particular, data recorded by technical means and any permission to use a covert means, shall not form part of the case documents of a proceeding before finishing the use of the covert means concerned. Before finishing the use of a covert means, a means of evidence or document specified may be inspected only by a member of the organ authorised to use covert means, the prosecutor, the senior official of the prosecution service, or the judge or the senior court official who proceeds concerning the use of the covert means.

If doing so does not jeopardise the success of another criminal proceeding or any secret information gathering carried out under the Act on the prosecution service, the Act on the police, the Act on the National Tax and Customs Administration, or the Act on national security services, a person concerned specified in a permission from a judge shall be informed about the fact of the use of covert means subject to permission of a judge 1. after the completion of a preparatory proceeding, if no investigation is launched, or 2. after the completion of an investigation, if the person concerned is neither interrogated as a suspect nor indicted. A person concerned may not be informed about any other data relating to the use of a covert means subject to permission of a judge. A request for information regarding such data shall be denied in writing and with reference to this provision.[1465]

### 8.2.6. The result of using covert means

The result of using a covert means subject to permission of a judge may be used to prove a criminal offence, because of which, and against the person concerned, as regards whom the court permitted the use of the covert means. As regards whom a court permitted the use of covert means subject to permission of a judge, the result of such use may also be used to prove a criminal offence not specified in the permission, provided that the conditions for using such means, as specified in CPC, are met with regard to the latter criminal offence as well. Where the court permitted the use of a covert means subject to permission of a judge to prove a criminal offence, the result of such use may be used against all perpetrators. In these situations, the result of using a covert means may be used where the organ authorised to use covert means orders or initiates launching a preparatory proceeding or investigation, or using such a result in the pending criminal proceeding, regarding the person or criminal offence not specified in the permission within thirty days after finishing the use of a covert means subject to permission of a judge. The organ authorised to use covert means shall, through the prosecution service, notify

[1464] CPC 247. § - 248. §
[1465] CPC 249. § - 251. §

the court that granted permission to use the covert means about doing so. If the organ authorised to use covert means does not use the covert means itself, the time limit specified shall be calculated from the day when every data-storage medium document or an extract thereof containing the results of using the covert means arrives at the organ authorised to use covert means after the use of covert means has been terminated.

Concerning a criminal offence not specified in the permission committed by a person not specified in the permission, the result of using a covert means subject to permission of a judge may only be used to prove a criminal offence involving the intentional killing of a person; kidnapping; a criminal offence against the State under Chapter XXIV of the Criminal Code that is punishable by five or more years of imprisonment; a terrorist act; terrorism financing; or causing public danger intentionally, provided that

- the other conditions of using such means as specified in this Act are met,
- the organ authorised to use covert means orders or initiates a preparatory proceeding or investigation to be launched regarding a criminal offence not specified in the permission committed by a person not specified in the permission, or orders or initiates using such data in a pending criminal proceeding, within eight days after acquiring the data to be used in a criminal proceeding, and
- the court permits the result of using covert means to be used concerning the criminal offence not specified in the permission committed by the person not specified in the permission.

The organ authorised to use covert means shall initiate that the use of the result of using covert means be permitted by the prosecution service within three working days after a preparatory proceeding or investigation or after using such a result in a pending criminal proceeding. The prosecution service shall file a motion with the court for permission to use the result of using covert means within seventy-two hours after such initiative. The court shall decide within seventy-two hours after the filing of the motion.

When using an undercover investigator, a memorandum of implementation and a permission from a prosecutor to use an undercover investigator shall be attached to the case documents of a proceeding. The undercover investigator may be interrogated as a witness only after obtaining the position of the organ employing the undercover investigator. After the indictment, the undercover investigator may be interrogated as a witness, and any other evidentiary act requiring his presence in person may be carried out only upon a motion filed by the prosecution service and subject to the condition that his testimony may not be substituted by any other means. If it is necessary to interrogate an undercover investigator as a witness or to carry out any other evidentiary act requiring his presence in person, the undercover investigator shall be considered a specially protected witness without any decision by the court. The court may not cancel the status of an undercover investigator as a specially protected witness without the consent of the organ employing the undercover investigator concerned. The attendance of the undercover investigator at a procedural act may be ensured using a telecommunication device only with consent from the organ employing the undercover investigator. If consent is granted, the organ employing the undercover investigator shall specify the following to ensure the attendance of the undercover investigator: 1. whether distorting by technical means the individual identifying characteristics of the person concerned is to be omitted, 2. the separate location where the undercover investigator is to be present. In the course of using the result of using an undercover investigator as evidence, all necessary measures shall be taken to keep the identity of the undercover investigator secret and ensure his security.[1466]

[1466] CPC 252. § - 255. §

### 8.2.7. Legal assessment of entrapment by the ECrHR

The Court has recognised the need for the authorities to have recourse to special investigative methods, notably in organised crime and corruption cases. It has held, in this connection, that the use of special investigative methods – in particular, undercover techniques – does not in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits.[1467]

While the rise of organised crime requires the States to take appropriate measures, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience. In this connection, the Court has emphasised that the police may act undercover but not incite.[1468]

Moreover, while the Convention does not preclude reliance, at the preliminary investigation stage and where this may be warranted by the nature of the offence, on sources such as anonymous informants, the subsequent use of such sources by the trial court to found a conviction is a different matter. Such a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question. As to the authority exercising control over undercover operations, the Court has considered that, while judicial supervision would be the most appropriate means, other means may be used provided that adequate procedures and safeguards are in place, such as supervision by a prosecutor.[1469]

While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as this would expose the accused to the risk of being definitely deprived of a fair trial from the outset. The undercover agents in this context may be the State agents or private parties acting under their instructions and control. However, a complaint related to the incitement to commit an offence by a private party, who was not acting under the instructions or otherwise control of the authorities, is examined under the general rules on the administration of evidence and not as an issue of entrapment.[1470]

The prohibition of entrapment extends to the recourse to operation techniques involving the arrangement of multiple illicit transactions with a suspect by the State authorities. The Court has held that such operation techniques are recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise. However, in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement. Accordingly, when State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of agents provocateurs. Moreover, any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger

[1467] „Ramanauskas v. Lithuania" (2008)
[1468] „Khudobin v. Russia" (2006)
[1469] „Bannikova v. Russia" (2010) and „Tchokhonelidze v. Georgia" (2018)
[1470] „Shannon v. the United Kingdom" (2004)

criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime.[1471]

In particular, as a result of improper conduct of undercover agents in one or more multiple illicit transactions or involvement in activities enlarging the scope or scale of the crime, the State authorities might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Should it be established that this was the case, the relevant inferences in accordance with the Convention must be drawn either with regard to the particular illicit transaction effected by means of improper conduct of State authorities or withregard to the arrangement of multiple illicit transactions as a whole. As a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit. Thus, although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of State authorities.

The Court's case-law on entrapment also concerns instances of indirect entrapment. This is a situation where a person is not directly in contact with the police officers working undercover but was involved in the offence by an accomplice who had been directly incited to commit an offence by the police. In this connection, the Court set out the following test for its assessment: (a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence; (b) whether that person's activities were also determined by the conduct of the police officers; and (c) whether the persons involved were considered as accomplices in the offence by the domestic courts.[1472]

In its case-law on the subject of entrapment, the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court has explained that whereas it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement.[1473]

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

In deciding whether the investigation was "essentially passive" the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out. In particular, it will determine whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence.[1474]

In its assessment the Court takes into account a number of factors. For example, in the early landmark case of „Teixeira de Castro v. Portugal" (1998) the Court took into account, inter alia, the fact that the applicant had no criminal record, that no investigation concerning him hadbeen opened, that he was unknown to the police officers, that no drugs were found in his home and that the amount of drugs found on him during arrest was not more than the amount requested by the undercover agents. It found that the agents' actions had gone beyond those of undercover agents because they had instigated the offence and there was nothing to suggest that without their intervention the offence in question would have been committed.

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[1471] „Grba v. Croatia" (2017)
[1472] „Akbay and Others v. Germany" (2020)
[1473] „Matanović v. Croatia" (2017)
[1474] „Bannikova v. Russia" (2010)

A previous criminal record is not by itself indicative of a predisposition to commit a criminal offence. However, the applicant's familiarity with the modalities of the offence and his failure to withdraw from the deal despite a number of opportunities to do so or to report the offence to the authorities, have been considered by the Court to be indicative of pre-existing criminal activity or intent.[1475]

Another factor to be taken into account is whether the applicant was pressured into committing the offence in question. Taking the initiative in contacting the applicant in the absence of any objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence, reiterating the offer despite the applicant's initial refusal, insistent prompting, raising the price beyond average and appealing to the applicant's compassion by mentioning withdrawal symptoms[1476] have been regarded by the Court as conduct which can be deemed to have pressured the applicant into committing the offence in question, irrespective of whether the agent in question was a member of the security forces or a private individual acting on their instructions.

A further question of importance is whether the State agents can be deemed to have „joined"or „infiltrated" the criminal activity rather than to have initiated it. In the former case the action in question remains within the bounds of undercover work. In „Milinienė v. Lithuania" (2008) the Court considered that, although the police had influenced the course of events, notably by giving technical equipment to the private individual to record conversations and supporting the offer of financial inducements to the applicant, their actions were treated as having "joined" the criminal activity rather than as having initiated it as the initiative in the case had been taken by a private individual. The latter had complained to the police that the applicant would require a bribe to reach a favourable outcome in his case, and only after this complaint was the operation authorised and supervised by the Deputy Prosecutor General, with a view to verifying the complaint.

The manner in which the undercover police operation was launched and carried out is relevant in assessing whether the applicant was subjected to entrapment. The absence of clear and foreseeable procedures for authorising, implementing and supervising the investigative measure in question tips the balance in favour of finding that the acts in question constitute entrapment: see, for example, Teixeira de Castro v. Portugal (1998), where the Court noted the fact that the undercover agents' intervention had not taken place as part of an official anti-drug-trafficking operation supervised by a judge; Ramanauskas v. Lithuania (2008), where there was no indication of what reasons or personal motives had led the undercover agent to approach the applicant on his own initiative without bringing the matter to the attention of his superiors; and Tchokhonelidze v. Georgia (2018), where there was no formal authorisation and supervision of the undercover operation in question.

In „Vanyan v. Russia" (2005), where the Court noted that the police operation had been authorised by a simple administrative decision by the body which later carried out the operation, that the decision contained very little information as to the reasons for and purposes of the planned test purchase, and that the operation was not subject to judicial review or any other independent supervision. In this connection, the „test purchase" technique used by the Russian authorities was closely scrutinised in the case of Veselov and Others v. Russia (2012), where the Court held that the procedure in question was deficient and that it exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them.

It further found that the domestic courts had also failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants vis-à-vis the applicants.

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[1475] „Gorgievski v. the former Yugoslav Republic of Macedonia" (2009)

[1476] „Vanyan v. Russia" (2005)

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

If a plea of entrapment is made and there is certain prima facie evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention. The mere fact that the applicant pleaded guilty to the criminal charges does not dispense the trial court from the duty to examine allegations of entrapment. Indeed, the Court has held that the defence of entrapment necessarily presupposes that the accused admits that the act he or she is charged with was committed but claims that it happened due to unlawful incitement by the police.[1477]

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

Where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply.[1478] This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards. In such a system the judicial examination of an entrapment plea provides the only effective means of verifying the validity of the reasons for the undercover operations and ascertaining whether the agents remained „essentially passive" during those operations.[1479] It is also imperative that the domestic courts' decisions dismissing an applicant's plea of entrapment are sufficiently reasoned.

If the available information does not enable the Court to conclude whether the applicant was subjected to entrapment, the judicial review of the entrapment plea becomes decisive in accordance with the methodology of the Court's assessment of entrapment cases.[1480]

In the application of the substantive and procedural tests of entrapment, the Court must first satisfy itself that the situation under examination falls prima facie within the category of „entrapment cases". If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6.

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[1477] „Berlizev v. Ukraine" (2021)
[1478] „Akbay and Others v. Germany" (2020)
[1479] „Lagutin and Others v. Russia" (2014)
[1480] „Ali v. Romania" (2010)

However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events, or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement contrary to Article 6., it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement. The Court has explained that it applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts, and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention. The proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence for which he or she was convicted, and the domestic courts did not appropriately address the allegations of incitement.[1481]

## 8.3. Taking of evidence (CPC)

8.3.1. The general rules of taking evidence

*a) The subject matter of taking of evidence:*
Evidence shall be taken concerning facts that are relevant to the application of substantive and procedural criminal law. Evidence may also be taken concerning facts that are significant to adjudicating matters that are ancillary to the criminal proceeding.

In a criminal proceeding, the court, prosecution service, or investigating authority shall decide on the basis of real facts.

During sentencing, the court shall establish the facts of the case within the limits of the indictment.

No evidence shall be required concerning facts that are (1) commonly known, (2) officially known to the proceeding court, prosecution office, or investigating authority, or (3) accepted as real by the prosecutor, the defendant, and the defence counsel jointly in the given case.

The prosecutor shall be responsible for discovering all facts required to prove the indictment, and making available, or moving to acquire, all supporting means of evidence.

In the course of clarifying the facts of the case, a court shall acquire pieces of evidence on the basis of motions.

In the absence of a motion, the court shall not be obliged to acquire or examine any pieces of evidence.[1482]

*b) Means of evidence:*
The following means shall be accepted as evidence:
- witness testimonies,
- defendant testimonies,
- expert opinions,
- opinions by a probation officer,
- means of physical evidence, including documents and deeds, and
- electronic data.[1483]

*c) The lawfulness of taking of evidence:*

[1481] „Virgil Dan Vasile v. Romania" (2018)
[1482] CPC 163. § - 164. §
[1483] CPC 165. §

Any means of evidence shall be detected, collected, secured, and used in compliance with the provisions of the CPC. The manner of performing and conducting evidentiary acts, and examining and recording means of evidence may be specified by law.[1484]

*d) The assessment of pieces of evidence:*
Any means of evidence or evidentiary act specified in this Act may be used or applied freely in the criminal proceeding. The CPC may also order the use of certain means of evidence.

Any means of physical evidence produced or acquired by an authority before, or at the time of, instituting the criminal proceeding in the course of carrying out its statutory tasks may be used in the criminal proceeding.

The probative value of individual means of evidence shall not be determined in advance by an Act.

The court, the prosecution service, and the investigating authority shall assess pieces of evidence freely both individually and in their totality, and it shall determine the outcome of taking evidence according to its resulting conviction.

A fact originating from a means of evidence may not be taken into account as evidence if the court, the prosecution service, the investigating authority, or another authority referred to in paragraph (2) acquired the given means of evidence by way of a criminal offence, a material violation of the procedural rights of a person participating in the criminal proceeding, or in any other prohibited manner.[1485]

### 8.3.2. Witness testimony

A person may be interrogated as a witness if he may have knowledge concerning a fact to be proven. A witness shall be obliged to testify unless an exception is made in the CPC. The proceeding court, prosecution office, or investigating authority shall establish and reimburse, upon a motion by the witness, the costs incurred by the appearance of the witness in person to the extent set out by law. The witness shall be informed about this option in his summons or at the end of his interrogation. An authorised attorney-at-law may act for the witness if the witness considers it necessary to receive information regarding his rights. The witness shall be informed about this option in his summons.[1486]

*a) Impediments to providing testimony:*
The following shall be recognised as impediments to providing witness testimony: (1) prohibition of providing testimony, (2) refusal to provide testimony.

An impediment to providing witness testimony shall be taken into account if it applied at the time of the commission of the criminal offence and also if it applies at the time of the interrogation.

A testimony by a witness whose interrogation took place in violation of the provisions on impediments to providing testimony may not be taken into account as a means of evidence unless an exception is made in the CPC.[1487]

*b) Prohibition of giving testimony:*
The following persons shall not be interrogated as a witness:

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[1484] CPC 166. §
[1485] CPC 167. §
[1486] CPC 168. §
[1487] CPC 169. §

- the defence counsel concerning any fact he learned or communicated to the defendant in his capacity as defence counsel,
- the church personnel or members of a religious association who perform on a professional basis religious rites concerning any fact covered by their professional obligation of confidentiality,
- any person who clearly is unlikely to testify correctly due to his physical or mental condition,
- a person who has not been discharged from his obligation of confidentiality concerning any classified data.[1488]

*c) Refusal to give testimony:*

- Relatives of the defendant may refuse to give witness testimony.[1489]
- A person who would incriminate himself or a relative of his of committing a criminal offence may refuse to give witness testimony regarding related matters.
- A person who is under an obligation of confidentiality due to his profession or public mandate, not including an obligation of confidentiality concerning classified data, may refuse to give witness testimony if he would breach his obligation of confidentiality by giving witness testimony, unless, in line with applicable legislation, (1) he was discharged from his obligation by the authorised person or entity, or (2) an organ requested to provide data is obliged to transfer the data covered by its obligation of confidentiality upon request by the court, the prosecution service, or the investigating authority. An obligation of confidentiality shall remain in effect during the period specified by law unless the witness was discharged from his obligation of confidentiality.[1490]
- If a media content provider, or a person who is in an employment relationship or another employment-related relationship with a media content provider, would reveal the identity of a person who provided him with information in relation to media content provision activities by giving witness testimony, he may refuse to give witness testimony concerning any related matter unless he was ordered by the court to reveal the identity of the person providing the information. The court may order a media content provider, or a person who is in an employment relationship or another employment-related relationship with a media content provider, to reveal the identity of a person who provided him with information in relation to media content provision activities if (1) identifying the person providing the information is indispensable for detecting an intentional criminal offence punishable by imprisonment for three years or more, (2) the evidence expected from doing so may not be replaced in any other way, and (3) the interest in detecting that criminal offence is so significant, in particular, due to the material gravity of the criminal offence, that it clearly exceeds the interest in keeping the source of information secret.[1491]

The proceeding court, prosecution office, or investigating authority shall decide on the lawfulness of a refusal to give witness testimony. If a witness refuses to testify by invoking an impediment to testifying, any legal remedy sought against a decision dismissing the refusal shall have a suspensory effect. If a witness lawfully refuses to testify, he may not be confronted or asked any further question, unless he decides to testify.[1492]

*d) Witness advice:*

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[1488] CPC 170. §
[1489] CPC 171. §
[1490] CPC 172. § - 173. §
[1491] CPC 174. §
[1492] CPC 175. §

The witness shall be advised at his first interrogation during the investigation or a first or second-instance court procedure that (1) he may refuse to give witness testimony if the grounds for his refusal exist or existed at the time of his interrogation or the commission of the criminal offence, (2) if he testifies, he is obliged to tell the truth to the best of his knowledge and in good conscience, (3) perjury and unlawful refusal to give witness testimony in court constitute punishable acts under the Criminal Code, and (4) if he testifies, his testimony may be used in the given or any other case as means of evidence, even if he subsequently refuses to testify.

If the witness advice or the response thereto is not recorded in the minutes, statements made by the witness may be taken into account as a witness testimony, provided that the witness maintains his statements after he is provided witness advice. A witness may not withdraw such a statement.

A witness testimony provided by a witness in the case earlier, or in another case, may be used as a means of evidence, even if the witness subsequently refuses to testify. Doing so shall be subject to the condition that the witness advice and the response by the witness thereto are clearly reflected in the minutes recording his witness testimony.

If a witness was interrogated as a defendant in the case earlier or in another case, his testimony provided as a defendant may be used as means of evidence, provided that defendant advice and his response thereto is clearly reflected in the minutes recording his testimony. In this case, the testimony provided by the witness earlier as a defendant may be used, even if the witness subsequently refuses to testify.[1493]

*e) Interrogating the witness:*

Witnesses shall be interrogated one by one. The identity of the witness shall be established at the commencement of his interrogation. To this end, the witness shall provide the following information:

- name, birth name,
- place and date of birth,
- mother's name,
- nationality,
- identity document number,
- home address, contact address, actual place of residence,
- service address, phone number,
- profession.

If the witness is interrogated continuously at the same stage of the proceeding, his personal data need not be recorded each time, provided that they remain unchanged.[1494]

After a witness is identified, any possible impediment to him testifying and any circumstance indicating his bias or interest in the case shall be clarified. The witness shall be obliged to answer these questions, even if there is an obstacle to him testifying, or he invokes such an obstacle.

The witness shall be provided witness advice and he shall be informed of his rights concerning interrogation.

An attorney-at-law acting in his interests may attend the interrogation of the witness; such an attorney-at-law may provide the witness with information about his rights, but he may not carry out any other activity or influence the testimony. After the interrogation, he may inspect the minutes of the interrogation and make observations in writing or orally.[1495]

During his interrogation, the witness shall provide his testimony without interruption, and then he shall answer questions. During the interrogation of the witness, it shall also be clarified,

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[1493] CPC 176. § - 177. §
[1494] CPC 178. §
[1495] CPC 179. §

with due regard to the provisions on protecting witnesses, how the witness learned the information he provided in his testimony.

If the testimony of the witness differs from an earlier testimony of the same witness, the reason for the differences shall be clarified.

At a motion by the witness, individual parts of his witness testimony shall be recorded verbatim in the minutes.

A witness may not be asked a question that (1) includes the answer or contains any guidance regarding the answer, (2) contains any promise that is inconsistent with the law, or (3) includes a false statement of fact.[1496]

*f) Written witness testimony*

The court, the prosecution service, or the investigating authority may allow the witness to provide a testimony in writing after, or in place of, being interrogated orally.

If testifying in writing is permitted, the witness shall (1) write down and sign his testimony in his own hands, (2) sign his testimony with a qualified electronic signature or an advanced electronic signature based on a qualified certificate, (3) provide his testimony by means of electronic communication, or (4) have his testimony authenticated by a judge, notary, or another person specified by law.

Where the witness provides testimony in writing, it must be clear from the written testimony that the witness made his testimony being aware of the impediments to testifying and of the witness advice.

Providing witness testimony in writing does not exclude the witness from being summoned by the court, the prosecution service, or the investigating authority for interrogation, if necessary.[1497]

*g) Measures against witnesses failing to perform their obligations:*

If a witness refuses, without being authorised to do so, to assist in a procedural act, or to testify, even after being advised of the consequences, a disciplinary fine may be imposed on him and he shall be obliged to reimburse any criminal cost caused.[1498]

### 8.3.3. Defendant testimony

Any statement of fact made in the criminal proceeding orally or in writing before, or addressed to, the court, prosecution service, or investigating authority by the defendant after he was advised as a defendant regarding the subject matter of taking evidence shall be considered a defendant testimony. If the defendant wishes to give a testimony, he shall be granted an opportunity to do so. Defendants shall be interrogated one by one. Even if the defendant confesses his guilt, further pieces of evidence shall also be acquired, unless otherwise provided in the CPC.[1499]

*a) Establishing the identity of a defendant:*

The interrogation of the defendant shall begin with establishing and verifying the identity and contact details of the defendant. In the course of establishing his identity, the defendant shall state the following data to identify himself and enable communication with him:

- name, birth name,

[1496] CPC 180. §
[1497] CPC 181. §
[1498] CPC 182. §
[1499] CPC 183. §

- place and date of birth,
- mother's name,
- nationality,
- identity document number,
- home address, contact address, actual place of residence,
- service address, phone number.[1500]

*b) Defendant advice:*
After the defendant is identified, he shall be informed about his rights and advised that (1) he is not obliged to give a testimony; he may refuse to testify and to answer any question at any time during the interrogation; but he may decide to testify at any time, even if he refused to do so earlier, (2) refusing to testify does not hinder the continuation of the proceeding or affect the right of the defendant to ask questions, make observations, or file motions, (3) if he testifies, anything he says or makes available may be used as evidence, (4) he may not accuse falsely another person of having committed a criminal offence, and he may not violate any right to respect for the deceased by stating any false fact.

The defendant shall be provided defendant advice at his first interrogation during the investigation and the first or second-instance court procedure.

The defendant advice and the response given by the defendant to the advice shall be recorded in the minutes. If the defendant advice and the response thereto are not recorded in the minutes, the defendant testimony may not be used as a means of evidence, with the exception as fallows: if the defendant advice and the response thereto is not recorded in the minutes, a statement made by the defendant may be taken into account as a testimony, if the defendant (1) was already advised as a defendant during the proceeding, and his defence counsel attended his continuous interrogation, or (2) maintains his statement after he is provided defendant advice.[1501]

*c) Giving a testimony:*
If the defendant wishes to give a testimony, he shall be asked, after being provided defendant advice, about his
- profession,
- place of work,
- level of education,
- family situation,
- health,
- income,
- financial situation,
- military rank, honorary rank, and distinctions.

The defendant shall be granted an opportunity to give his testimony without interruption, and then he may be asked questions. If the testimony of the defendant differs from his earlier testimony, the reason for such differences shall be clarified.

A defendant may not be asked a question that (1) includes the answer or contains any guidance regarding the answer, (2) contains any promise that is inconsistent with the law, or (3) includes a false statement of fact.

If the defendant gives a testimony after refusing to do so, he may be asked questions.[1502]

A testimony given by the defendant as a witness in the case earlier, or in another case, may be used as a means of evidence, provided that the witness advice and his response thereto is clearly reflected in the minutes recording his witness testimony. A testimony provided by the

[1500] CPC 184. §
[1501] CPC 185. §
[1502] CPC 186. §

defendant in another case may be used as a means of evidence, provided that the defendant advice and his response thereto are clearly reflected in the minutes recording his testimony.[1503]

### 8.3.4. The expert opinion

If specialised expertise is required to establish or assess a fact to be proven, an expert shall be employed. In the criminal proceeding, an expert opinion may be provided by an expert or ad hoc expert in accordance with the Act on judicial experts. A law may specify the technical matters regarding which only a specific expert shall be entitled to deliver an opinion.[1504]

*a) The expert:*
The expert shall be employed by way of an appointment unless otherwise provided by an Act. No legal remedy shall lie against the decision on the appointment of the expert. If a partial examination needs to be carried out urgently to provide an expert opinion, this examination may be carried out on the basis of an oral order by the prosecution service or the investigating authority without a decision on the appointment. The prosecution service or the investigating authority shall send such an order to the expert concerned within fifteen days in writing.

The head of an expert institution or institute, or a company, or the president of an expert body, as defined in the Act on judicial experts, shall notify the entity that arranged for the appointment about the acting expert, or members of the ad hoc committee, within eight days following receipt of the decision on the appointment.

An entity that arranged for the appointment shall inform defendants, defence counsels, parties with a pecuniary interest, and other interested parties, and, if the expert was appointed by a court, the prosecution service about the acting expert, or members of the ad hoccommittee, within eight days after the date of the decision on the appointment or, in a situation specified in paragraph (3), of the receipt of the notification.

The proceeding court, prosecution office, or investigating authority may discharge an expert for a material reason by way of a decision. No legal remedy shall lie against such a decision.

The period taken to submit an expert opinion, other than the opinion of a party-appointed expert, may not exceed two months. This time limit may be extended once by up to one month upon a request submitted by the expert before the expiry of the time limit.[1505]

The defendant and the defence counsel may move for the appointment of an expert, and the expert may be specified in the corresponding motion. The proceeding court, the prosecution office, or the investigating authority shall decide on the motion. No legal remedy shall lie against the decision.

The defendant and the defence counsel may mandate an expert to provide an opinion as a party-appointed expert if (1) the court, the prosecution service, or the investigating authority dismissed their motion to appoint an expert, or (2) the prosecution service or the investigating authority decided to appoint an expert other than the one specified in the motion.

The defendant and the defence counsel may mandate only one expert to provide an opinion on the same technical matter. The defendant or the defence counsel shall notify, within eight days, the proceeding court, prosecution office, or investigating authority of mandating a party-appointed expert to provide an opinion, the termination of such a mandate, the mandated expert, and the time limit for providing the expert opinion. The time limit for notification shall be calculated from the date of the mandate or its termination.[1506]

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[1503] CPC 187. §
[1504] CPC 188. §
[1505] CPC 189. §
[1506] CPC 190. §

*b) Disqualification of the expert:*
A person shall not act as an expert if

- he participates or participated in the case as a defendant, person reasonably suspected of having committed a criminal offence, defence counsel, aggrieved party, party with a pecuniary interest, party reporting a crime, an aide to any such person, or he is a relative of any such person,
- he proceeds or proceeded in the case as a judge, a prosecutor, or a member of the personnel carrying out investigation tasks of an investigating authority, or he is a relative of such a person,
- he participates or participated in the case as a witness or an aide to a witness,
- in the context of exhumation or examination of the cause and circumstances of death, he is a doctor who treated the deceased person directly before his death or established his death,
- he is an expert of an expert institution or organisation, or a member of an expert body, provided that the head of the expert institution, organisation,
- he was used in the case as a consultant,
- he is unlikely to provide an unbiased expert opinion for any other reason.

The expert shall submit a notice of a ground for disqualification against himself to the entity that arranged for the appointment without delay. If an appointment is for a company or expert institution, organisation, or body, the notice shall be submitted through the head of the appointed company or organ.

The proceeding court, prosecution office, or investigating authority shall decide on the matter of disqualifying an expert.

The provisions on impediment to testifying as a witness shall also apply to experts accordingly.[1507]

*c) Expert examination:*
An expert shall be obliged and entitled to access any data that is necessary for the performance of his task; to this end, he may

- inspect case documents of the proceeding, except for documents specified by an Act,
- attend procedural acts,
- request information from defendants, aggrieved parties, witnesses, parties with a pecuniary interests, other interested parties, and experts appointed in the proceeding,
- request further data, case documents, and information from the entity that arranged for the appointment,
- inspect, examine, and sample, subject to an authorisation by the entity that arranged for the appointment, means of physical evidence or electronic data that was not handed over to him.

During an examination, the expert may inspect and examine persons, means of physical evidence or electronic data, and he may question persons.

If the expert examines a means of physical evidence or electronic data that changes or gets destroyed during the examination, part of the examined means of evidence or data shall be retained by the expert in its original condition, if possible, in a way that allows for its identification and the establishment of its origin.

The entity that arranged for the appointment may specify certain examinations the expert is to carry out in the presence of the entity that arranged for the appointment.

[1507] CPC 191. §

If more than one expert carries out expert examination in the criminal proceeding, the experts shall notify each other about the examination they wish to carry out, and the notified expert may attend the examination carried out by the other expert.[1508]

When the party-appointed expert prepares his opinion, the expert shall provide his opinion on the basis of data, case documents, and objects provided by his principal, but he may only examine a person if the person concerned consents.

The proceeding of an expert mandated to provide an opinion as a party-appointed expert may not delay or disproportionally protract any examination to be carried out by the appointed expert.[1509]

*d) Obligation to cooperate during the procedure of an expert:*

No expert examination affecting the inviolability of the subject's body may be carried out without a specific instruction by the entity that arranged for the appointment. The defendant, the aggrieved party, and the witness shall be obliged to subject themselves to the examination or intervention of the expert, except for surgeries and examination procedures qualifying as surgery. The aggrieved party and the witness shall be obliged also to facilitate the completion of an expert examination in other ways. On the basis of a specific instruction by the entity that arranged for the appointment, the defendant, the aggrieved party, the witness, and the holder of an inspection object shall tolerate that the expert examines the object in his possession, even if the object is damaged or destroyed during the examination. Pursuant to the applicable legislation, recompense may be claimed for any damage caused during an expert examination. If he fails to fulfil his obligation to cooperate, (1) the defendant may be subjected to forced attendance and the use of physical force, (2) the aggrieved party and the witness may be subjected to forced attendance and a disciplinary fine, (3) the defendant, the aggrieved party, and the witness shall be obliged to reimburse all criminal costs caused.[1510]

*e) Observation of mental condition:*

If the expert opinion concludes that observing the mental condition of the defendant for an extended period by an expert is necessary, the court may, before the indictment only upon a motion by the prosecution service, may order the observation of the mental condition of the defendant. If observation of mental condition is ordered, the detained defendant shall be referred to a forensic psychiatric and mental institution, while the defendant at liberty shall be referred to a psychiatric in-patient institute specified by law. The observation period may last up to one month; this time limit may be extended by the court by up to one month on the basis of an opinion by the institute performing the observation.

If the observation of mental condition is ordered, no legal remedy sought shall have suspensory effect, unless the defendant is at liberty.

During the observation of the mental condition of the defendant at liberty, the personal freedom of the defendant may be restricted as provided for by the Act on healthcare.

If the defendant does not subject himself to the observation of his mental condition, the psychiatric institute shall notify the court that ordered the observation of his mental condition without delay.[1511]

*f) Submitting the expert opinion:*

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[1508] CPC 192. §
[1509] CPC 193. §
[1510] CPC 194. §
[1511] CPC 195. §

If more than one expert participated in the examination, the expert opinion shall specify which expert performed which examination.

Before an expert opinion is submitted orally, the identity of the expert shall be verified, and it shall be clarified that he is not affected by a ground for disqualification. The expert shall be advised of the consequences of giving a false expert opinion. The advice and the response given by the expert to the advice shall be recorded in the minutes. The expert may be asked questions after he submitted his expert opinion.

A statement made by the defendant, the witness, and the aggrieved party before an expert may not be used as evidence if it relates to data concerning the subject matter of the examination, any examination procedure or instrument, or any change to the examined object, or the act underlying the proceeding.

The defendant or the defence counsel shall decide whether an opinion by a party-appointed expert sis to be submitted.[1512]

*g) Assessing an expert opinion and using another expert:*

If an expert opinion may not be accepted without any reservation due to any deficiency and, in particular, if (1) it does not contain the mandatory statutory elements of an expert opinion, (2) it is not clear, (3) it is inconsistent with itself or any data provided to the expert, or (4) there is a serious doubt regarding its correctness, the expert shall provide clarification, or supplement his expert opinion if called upon to do so by the court, the prosecution service, or the investigating authority.

If the clarification or supplemented expert opinion requested from the expert does not produce any result, another expert shall be appointed. The concerns relating to the acceptability of the previous expert opinion shall be specified in a motion for the appointment of an expert or the decision on the appointment.

If the opinions provided by the experts differ, the differences shall be clarified by hearing the experts in the presence of each other.

After this measures, a new expert may be appointed if any unresolvable difference continues to remain regarding a technical matter, which is key to deciding the case, between the expert opinions prepared on the basis of the same examination material regarding the same fact to be proven. The expert appointed in such an event shall provide an opinion on the ground for such differences between the expert opinions and the possible need to supplement any of the expert opinions or to obtain a new expert opinion in the case.

The expert opinion prepared on the same technical matter by an expert appointed in another proceeding may be taken into account as an expert opinion in the criminal proceeding.[1513]

If an opinion by a party-appointed expert qualifies as an expert opinion and is submitted orally, or if a clarification is provided, the expert opinion is supplemented orally, or experts are heard in the presence of each other on the basis of a mandate, the expert shall be obliged to also answer questions asked by the court, the prosecution service, or the investigating authority.[1514]

*h) The expert's fee:*

An expert shall be entitled to (1) a fee for carrying out the tasks of an expert, and appearing before the court, the prosecution service, or the investigating authority when summoned, and (2) reimbursement for all costs incurred in relation to his proceeding. The amount of the expert fee shall be determined based on a fee information document, filed by the expert, in a decision after the expert opinion is received or the expert is heard, if applicable, but no later than one month. The decision determining the amount of the expert fee shall be communicated to the

[1512] CPC 196. §
[1513] CPC 197. §
[1514] CPC 198. §

expert concerned, the defendant and the defence counsel; if a court adopted the decision, it shall also be communicated to the prosecution service. These persons or entities may seek legal remedy against the decision on an expert fee. The expert fee shall be advanced by the court, the prosecution office, or the investigating authority, as specified by law. The defendant or the defence counsel shall advance the expert fee and costs of a party-appointed expert mandated to provide an opinion.[1515]

*i) Consequences of violating the expert's obligations:*
A disciplinary fine may be imposed on the expert, and he shall be obliged to reimburse all criminal costs caused if he (1) refuses to provide assistance or an opinion without being entitled to do so even after he was advised of the consequences of refusal, (2) fails to meet the time limit for submitting his expert opinion, or (3) protracts the proceeding by violating any other obligation. If the expert designated by the head of the appointed company or organisation fails to submit an expert opinion, the disciplinary fine and the obligation to reimburse all criminal costs caused shall be imposed on the appointed company or expert institution, organisation, or body. If an expert refuses to provide an opinion by invoking an obstacle to testifying as a witness, he shall not be obliged to assist until any legal remedy sought against a decision dismissing such refusal is adjudicated.[1516]

*j) The interpreter*
The provisions on experts shall also apply accordingly to interpreters, with the proviso that (1) the provisions on party-appointed experts shall not apply, (2) to the inspection of a case document translated by an interpreter, the provisions on the original case document shall apply, (3) a decision on the appointment or discharge of the interpreter shall be served only on the interpreter, (4) a decision determining the fee of the interpreter shall be communicated to the interpreter and a decision by the court shall be communicated also to the prosecution service.A person may be used as an interpreter if he meets all conditions specified by law. If that is not possible, a person with adequate language competence may also be appointed as an ad hoc interpreter. Interpreters shall be construed to mean also specialised translators. An interpreter shall be advised of the consequences of interpreting falsely at the time of his appointment. Persons attending a procedural act where an interpreter is used may move for the appointment of another interpreter due to the inadequate quality of interpreting.[1517]

### 8.3.5. The opinion by a probation officer

The court and the prosecution service may order that an opinion be sought from a probation officer before (1) imposing a penalty or applying a measure, (2) applying conditional suspension by the prosecutor, or (3) referring a case to a mediation procedure.

Obtaining the opinion of a probation officer may be mandatory under an Act. It shall be the responsibility of the probation officer to give an opinion. The probation officer shall be obliged and entitled to access all data that is needed for giving an opinion; to this end, he may inspect case documents of the proceeding, and he may request information from the defendant, the aggrieved party, the witness, and any other person involved in the proceeding. He may also request further data, case documents, and information from the prosecution service or the court if doing so is necessary for performing his task.[1518]

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[1515] CPC 199. §
[1516] CPC 200. §
[1517] CPC 201. §
[1518] CPC 202. §

The opinion by the probation officer shall describe the facts and circumstances characterising the personality and living conditions of the defendant, in particular his family situation, health, any addiction, housing situation, education, qualification, workplace or, in the absence of a workplace, data on his occupation, financial situation and assets; it shall also present any relationship between the discovered facts, circumstances, and the commission of the criminal offence, as well as the risk of reoffending, and the needs of the defendant.

In the opinion, the probation officer shall provide information on employment possibilities that would be suitable for the defendant considering his skills, as well as healthcare and social care options available to him; he may suggest individual rules of behaviour, or obligations, to be imposed on a defendant, as well as interventions to be taken to mitigate the risk of reoffending.

If instructed by the court or the prosecution service, the opinion by the probation officer shall cover whether the defendant is willing and capable of complying with any foreseen rule of behaviour or obligation and if the aggrieved party consents to any reparation to be provided to him.[1519]

### 8.3.6. Means of physical evidenc, electronic data

Means of physical evidence means objects, including documents and deeds, that are suitable for proving any fact to be proven, including, in particular, objects that

- carry marks of a criminal offence or a perpetrator in relation to a criminal offence,
- were created by way of committing a criminal offence,
- were used as a means of committing a criminal offence, or
- were the subject of a criminal offence.

Document means all means of physical evidence that carries data by technical, chemical, or any other method, including, in particular, texts, drawings, and illustrations recorded in a paper-based form or as electronic data.

Deed means a document that was produced and is suitable for proving that a fact or data is true, an event occurred, or a statement was made. The provisions on deeds shall also apply to extracts of deeds.[1520]

Electronic data means any representation of facts, information, and terms that is suitable for being technically processed by an information system, including any program that implements a function of an information system.[1521]

### 8.3.7. Evidentiary acts

An evidentiary act means, in particular, an inspection, on-site interrogation, reconstruction of a criminal offence, presentation for identification, confrontation, and instrumental credibility examination of a testimony.[1522]

*a) The inspection:*

The court, the prosecution service, or the investigating authority may order and carry out an inspection if a person, object, or site needs to be inspected, or an object or site needs to be observed, to discover or establish a fact to be proven.

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[1519] CPC 203. §
[1520] CPC 204. §
[1521] CPC 205. §
[1522] CPC 206. §

In the course of an inspection, means of physical evidence shall be located and collected, and arrangements shall be made for the proper preservation of such evidence. In the course of an inspection, circumstances that are relevant to the taking of evidence shall be recorded in detail, including, in particular, the course, method, location, and status of locating and collecting the inspection object. In the course of locating, recording, and securing means of physical evidence, measures shall be taken to ensure that compliance with rules of procedure can be verified subsequently. An image, sound or audio-visual recording, drawing, or sketch shall be taken of the object of inspection, if possible and necessary, and it shall be attached to the minutes.

If the object of inspection cannot be inspected on-site, or such inspection would cause considerable difficulties or costs, the inspection shall be carried out before the organ that ordered the inspection.

Experts may be used during inspections.

If for the identification of the perpetrator biometric sample needs to be captured in the course of the criminal proceeding, the prosecution service and the investigating authority may capture biometric sample from persons who came into contact with the person, object, location or other means of physical evidence concerned in order to be able to exclude the accidental contamination of another biometric sample.[1523]

*b) On-site interrogations:*

The court, the prosecution service, or the investigating authority may interrogate the defendant and the witness on-site if it is necessary to give testimony at the scene of the criminal offence or another location related to the criminal offence or to present the place where the criminal offence was committed, another location related to the criminal offence, a means of physical evidence, or the progress of the criminal offence.

Before conducting an on-site interrogation, the defendant or the witness shall be interrogated regarding the circumstances under which he detected a given location, act, or means of physical evidence, as well as the marks he would rely on for identification.[1524]

*c) The reconstruction of a criminal offence:*

The court, the prosecution service, or the investigating authority may order and carry out a reconstruction of a criminal offence if it needs to be established or verified whether a given event or phenomenon could have happened at a specific time or location, in a specific manner or under specific circumstances.

If possible, a criminal offence shall be reconstructed under circumstances that are identical to the circumstances under which the given event or phenomenon happened or may have happened.[1525]

*d) The presentation for identification:*

The court, the prosecution service, or the investigating authority may order and carry out a presentation for identification if doing so is necessary for the identification of a person or object. At least three persons or objects shall be presented to the defendant or the witness for identification. A person or object may be presented to the defendant or the witness for identification by way of an image, sound or audio-visual recording if no other option is available.

Before a presentation for identification, the person expected to identify shall be interrogated in detail regarding the circumstances under which he detected the given person or object, as well as his relationship to, and any known distinctive mark of, that person or object.

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[1523] CPC 207. §

[1524] CPC 208. §

[1525] CPC 209. §

When presenting persons for identification, the person in question shall be presented in a group of other persons who are not related to the case, unknown to the recognising person, and similar to the person concerned in terms of the prominent distinctive marks specified by the identifying person, in particular in terms of sex, age, build, colour, hygiene, and clothing.

When presenting objects for identification, an object concerned shall be presented among similar objects. The placement of a person or object concerned may not be considerably different from that of other persons or objects in the same group, and may not be prominent in any way.

If there is more than one identifying person, the presentation for identification shall be carried out separately, in the absence of the other identifying persons.

If it is necessary for the protection of the witness, presentation for identification shall be carried out in a manner that prevents the person concerned from recognising or detecting the witness. If personal data of the witness were ordered to be processed confidentially, such processing shall also be ensured in the event of a presentation for identification.[1526]

*e) Confrontation:*

If the testimonies of the defendants, the witnesses, or the defendant and the witness contradict each other, the court, the prosecution service, or the investigating authority may clarify the contradiction by way of a confrontation. During a confrontation, each person shall state his testimony orally in front of the other confronted person, and subsequently, each confronted person may be permitted to ask questions from the other confronted person. Confrontation of the witness or the defendant shall be dispensed with if doing so is necessary to treat carefully or protect the witness or the defendant.[1527]

*f) Instrumental credibility examination of testimonies:*

In the course of the investigation, the prosecution service or the investigating authority may undertake an instrumental credibility examination of the testimony of the witness and the suspect. Such verification shall be subject to the consent of the witness or the suspect concerned.

In the course of instrumental credibility examination, using a consultant shall be mandatory; the consultant used may subsequently be interrogated as a witness regarding the procedure and his findings.[1528]

*g) Common provisions:*

The rules on inspection shall apply to reconstructions of criminal offences and presentations for identification accordingly. In order to carry out an inspection, reconstruction of a criminal offence, or presentation for identification, the court and the prosecution service may also make use of the investigating authority. The defendant, the witness, and another person, including in particular a person disposing of or possessing the subject of the inspection, shall subject himself to an inspection, reconstruction of a criminal offence, or presentation for identification, and he shall make the object in his possession available for inspection, reconstruction of a criminal offence, or presentation for identification. To enforce compliance with such obligations, the defendant may be subject to coercion, or the aggrieved party, the witness, and another person may be subject to coercion and a disciplinary fine. The inspection, the reconstruction of a criminal offence, and the presentation for identification shall be recorded using an audio-visual recording, if possible.[1529]

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[1526] CPC 210. §
[1527] CPC 211. §
[1528] CPC 212. §
[1529] CPC 213. §

### 8.4. Disclosure of evidence (ECrHR)

As a rule, Article 6. requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused. In this context, the relevant considerations can also be drawn from Article 6., which guarantees to the applicant „adequate time and facilities for the preparation of his defence."

An issue with regard to access to evidence may arise under Article 6. insofar as the evidence at issue is relevant for the applicant's case, specifically if it had an important bearing on the charges held against the applicant. This is the case if the evidence was used and relied upon for the determination of the applicant's guilt or it contained such particulars which could have enabled the applicant to exonerate oneself or have the sentence reduced. The relevant evidence in this context is not only evidence directly relevant to the facts of the case, but also other evidence that might relate to the admissibility, reliability and completeness of the former.[1530]

The accused may, however, be expected to give specific reasons for his or her request for access to evidence, and the domestic courts are entitled to examine the validity of these reasons. In any case, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6.[1531]

However, the entitlement to disclosure of relevant evidence is not an absolute right. In criminal proceedings there may be competing interests, such as national security or the need to protect witnesses who are at risk of reprisals or to keep secret the methods used by the police to investigate crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6.[1532] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

In many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused without having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.[1533]

In making its assessment of the relevant procedural guarantees, the Court must also have regard to the importance of the undisclosed material and its use in the trial, where the non-disclosed information could not have been in itself of any assistance to the defence). It must in particular satisfy itself that the domestic procedure allowed that the impact of the relevant material on the safety of the conviction be considered in the light of detailed and informed argument from the defence.

For instance, in Rowe and Davis v. the United Kingdom (2000), the Court found a violation of Article 6. on account of the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure, thereby depriving the

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[1530] „Rowe and Davis v. the United Kingdom" (2000)
[1531] „Matanović v. Croatia" (2017)
[1532] „Paci v. Belgium" (2018)
[1533] „Dowsett v. the United Kingdom" (2003)

applicants of a fair trial. However, in Jasper v. the United Kingdom [GC], 2000 (§ 58), the Court found no violation of Article 6., relying on the fact that the material which was not disclosed formed no part of the prosecution case whatsoever, and was never put to the jury. In Edwards and Lewis v. the United Kingdom (2004), the applicants were denied access to the evidence, and hence it was not possible for their representatives to argue the case on entrapment in full before the judge. TheCourt accordingly found a violation of Article 6. because the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused.

In the context of disclosure of evidence, complex issues may arise concerning the disclosure of electronic data, which may constitute a certain mass of information in hands of the prosecution. In such a case, an important safeguard in the sifting process is to ensure that the defence is provided with an opportunity to be involved in the laying-down of the criteria for determining what might be relevant for disclosure. Moreover, as regards identified or tagged data, any refusal to allow the defence to have further searches of such data carried out in principle raises an issue with regard to the provision of adequate facilities for the preparation of the defence. [1534]

A breach of the right to an adversarial trial has also been found where the parties had not received the reporting judge's report before the hearing, whereas the advocate-general had, nor had they had an opportunity to reply to the advocate-general's submissions.[1535]

### 8.5. Burden of proof. Presumptions of fact and of law. Examination of witnesses (ECrHR)

The requirements related to the burden of proof from the perspective of the principle of the presumption of innocence provide inter alia, that it is for the prosecution to inform the accused of the case that will be made against him or her, so that he or she may prepare and present his or her defence accordingly, and to adduce evidence sufficient to convict him or her.[1536]

The presumption of innocence is violated where the burden of proof is shifted from the prosecution to the defence.[1537] However, the defence may be required to provide an explanation after the prosecution has made a prima facie case against an accused.[1538] Thus, for instance, the drawing of adverse inferences from a statement by an accused which is found to be untrue does not raise an issue under Article 6 § 2.[1539]

The Court has also held that the in dubio pro reo principle (doubts should benefit the accused) is a specific expression of the presumption of innocence.[1540] An issue from the perspective of this principle may arise if the domestic courts' decisions finding an applicant guilty are not sufficiently reasoned,[1541] or if an extreme and unattainable burden of proof was placed on the applicant so that his or her defence does not have even the slightest prospect of success.[1542]

The burden of proof cannot be reversed in compensation proceedings following a final decision to discontinue the proceedings.[1543] Exoneration from criminal liability does not

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[1534] „Sigurður Einarsson and Others v. Iceland" (2019)
[1535] „Reinhardt and SlimaneKaïd v. France" (1998)
[1536] „Janosevic v. Sweden" (2002)
[1537] „Telfner v. Austria" (2001)
[1538] „Poletan and Azirovik v. the former Yugoslav Republic of Macedonia" (2016)
[1539] „Kok v. the Netherlands" (2000)
[1540] „Tsalkitzis v. Greece" (2017)
[1541] „Melich and Beck v. the Czech Republic" (2008)
[1542] „Nemtsov v. Russia" (2014); „Topić v. Croatia" (2013); „Frumkin v. Russia" (2016)
[1543] „Capeau v. Belgium" (2005)

preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.[1544]

A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention.[1545] In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.[1546]

However, Article 6 § 2 requires States to confine these presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[1547]

In employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.[1548]

The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision, and the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses.[1549]

*a) Autonomous meaning of the term „witness":*

The term „witness" has an autonomous meaning in the Convention system, regardless of classifications under national law.[1550] Where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply.[1551] This may Guide on Article 6 of include, for instance, evidence provided by a person in the context of an identification parade or face-to-face confrontation with a suspect.[1552] The term includes a co-accused,[1553] victims,[1554]

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[1544] „Ringvold v. Norway" (2003)

[1545] „Falk v. the Netherlands" (2004), concerning a fine on a registered car owner who had not been the actual driver at the time of the traffic offence.

[1546] „Salabiaku v. France" (1988), concerning a presumption of criminal liability for smuggling inferred from possession of narcotics; „Janosevic v. Sweden" (2002), concerning tax surcharges on the basis of objective grounds and enforcement thereof prior to a court determination; „Busuttil v. Malta" (2021), concerning the presumption of responsibility of a director for any act which by law must be performed by the company.

[1547] „Radio France and Others v. France" (2004), concerning the presumption of criminal liability of a publishing director for defamatory statements made in radio programmes; „Västberga Taxi Aktiebolag and Vulic v. Sweden" (2002), concerning objective responsibility for tax surcharges; „Klouvi v. France" (2011), regarding inability to defend a charge of malicious prosecution owing to a statutory presumption that an accusation against a defendant acquitted for lack of evidence was false; „Iasir v. Belgium" (2016), concerning substantive presumptions on participation in an offence by co-accused; „Zschüschen v. Belgium" (2017), concerning money laundering proceedings.

[1548] „Janosevic v. Sweden" (2002)

[1549] „Schatschaschwili v. Germany" (2015)

[1550] „Damir Sibgatullin v. Russia" (2012)

[1551] „Kaste and Mathisen v. Norway" (2006)

[1552] „Vanfuli v. Russia" (2011)

[1553] „Trofimov v. Russia" (2008)

[1554] „Vladimir Romanov v. Russia" (2008)

expert witnesses,[1555] and police officers.[1556] Article 6 § 3 (d) may also be applied to documentary evidence,[1557] including reports prepared by an arresting officer.[1558]

*b) General principles:*

Given that the admissibility of evidence is a matter for regulation by national law and the national courts, the Court's only concern under Articles 6 §§ 1 and 3 (d) of the Convention is to examine whether the proceedings have been conducted fairly.[1559]

Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence.[1560]

Pursuant to Article 6 § 3 (d), before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[1561] These principles particularly hold true when using witness statements obtained during police inquiry and judicial investigation at a hearing.[1562]

As for applicability in the diverse legal systems of Contracting States, and in particular in the context of both common-law and continental-law systems, the Court has stressed that while it is important for it to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Articles 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates.[1563]

*c) Non-attendance of witnesses at trial:*

Considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied.[1564] Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial.[1565]

In „Al-Khawaja and Tahery v. the United Kingdom" (2011), the Court clarified the principles to be applied when a witness does not attend a public trial. These principles may be summarised as follows:[1566]

- The Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

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[1555] „Doorson v. the Netherlands" (1996)
[1556] „Ürek and Ürek v. Turkey" (2019)
[1557] „Mirilashvili v. Russia" (2008)
[1558] „Butkevich v. Russia" (2018)
[1559] „Al-Khawaja and Tahery v. the United Kingdom" (2011)
[1560] „Thomas v. the United Kingdom" (2005)
[1561] „Hümmer v. Germany (2012); „Lucà v. Italy" (2001); „Solakov v. the former Yugoslav Republic of Macedonia" (2001)
[1562] „Schatschaschwili v. Germany" (2015)
[1563] „Al-Khawaja and Tahery v. the United Kingdom" (2011); , „Schatschaschwili v. Germany" (2015)
[1564] „Van Mechelen and Others v. the Netherlands" (1997)
[1565] „Tarău v. Romania" (2009)
[1566] „Seton v. the United Kingdom" (2016); „Dimović v. Serbia" (2016); „T.K. v. Lithuania" (2018)

- When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;
- Admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings;
- According to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;
- However, as Article 6 § 3 of the Convention should be interpreted in a holistic examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;
- In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.

The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

These principles have been further clarified in „Schatschaschwili v. Germany" (2015, in which the Court confirmed that the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d). Furthermore, The Courtexplained that given that its concern was to ascertain whether the proceedings as a whole were fair, it should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or the decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was sole or decisive but nevertheless was satisfied that it carried significant weight and its admission might have handicapped the defence.

*Good reason for non-attendance of a witness:*

The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. When witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified.[1567] In this context, although it is not the Court's function to express an opinion on the relevance of the evidence produced, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial.[1568]

[1567] „Al-Khawaja and Tahery v. the United Kingdom" (2011)
[1568] „Bocos-Cuesta v. the Netherlands" (2005)

Moreover, the applicant is not required to demonstrate the importance of personal appearance and questioning of a prosecution witness.[1569] In principle, if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by the court to support a guilty verdict, it must be presumed that his or her personal appearance and questioning are necessary.[1570]

However, as explained in „Schatschaschwili v. Germany" (2015) [GC], lack of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3(d).

Article 6 § 1 taken together with § 3 requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him.[1571]

In the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence.[1572]

It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable. However, it is clear that they must have actively searched for the witness with the help of domestic authorities including the police and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness.[1573]

However, impossibilium nulla est obligatio, provided that the authorities cannot be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution.[1574] Moreover, in cases where a witness has gone into hiding and has been evading justice the domestic courts face a situation where, in practical terms, they have no means to locate a witness and it would be excessive and formalistic to compel the domestic courts to take steps in addition to the efforts already made by the respective authorities within a special legal framework for the search of persons evading justice. In such cases the trial court, prior to concluding that there is good reason for the non-attendance of a witness, must satisfy itself, in the first place, that the witness is evading justice, and, secondly, that the defendant is informed thereof in a way affording a possibility to comment on the measures taken.[1575]

Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence.[1576]

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[1569] „Süleyman v. Turkey" (2020)
[1570] „Keskin v. the Netherlands" (2021)
[1571] „Trofimov v. Russia" (2008); „Sadak and Others v. Turkey" (2001); „Cafagna v. Italy" (2017)
[1572] „Karpenko v. Russia" (2012); „Damir Sibgatullin v. Russia" (2012); „Pello v. Estonia" (2007); „Bonev v. Bulgaria" (2006); „Tseber v. the Czech Republic" (2012); „Lučić v. Croatia" (2014)
[1573] „Schatschaschwili v. Germany" (2015)
[1574] „Gossa v. Poland" (2007); „Haas v. Germany" (2005); „Calabrò v. Italy and Germany" (2002); „Ubach Mortes v. Andorra" (2000); „Gani v. Spain" (2013)
[1575] „Lobarev and Others v. Russia" (2020)
[1576] „Schatschaschwili v. Germany" (2015)

There are a number of reasons why a witness may not attend trial, such as absence owing to death or fear,[1577] absence on health grounds,[1578] or the witness's unreachability,[1579] including his or her detention abroad.[1580] However, the fact that the witness is absent from the country where the proceedings are being conducted is not in itself sufficient reason to justify his or her absence from the trial.[1581] Nor does the fact that the witness lives in another part of the same country suffice of itself to justify his or her absence from the trial.[1582]

Lastly, different considerations apply with regard to the questioning of attesting witnesses for a search, when their testimony has been adduced by the prosecution.[1583] Attesting witnesses act as neutral observers of an investigative measure and, unlike material witnesses, they are not expected to have any knowledge of the case. Thus, they do not testify about the circumstances of the case or the defendants' guilt or innocence. Accordingly, their attendance at the hearing will only be necessary exceptionally, such as if the domestic courts rely on their statements in a substantial manner or that their testimony in court could otherwise influence the outcome of the criminal proceedings against the applicant.[1584] In other words, the absence of attesting witnesses from criminal trials does not infringe the guarantees of Article 6 §§ 1 and 3 (d) of the Convention insofar as their testimony is limited to the manner of conducting investigative measures and is, in essence, redundant evidence.[1585]

Nevertheless, when the domestic trial court specifically refers to the statements of the attesting witnesses in convicting the applicant and lists them as elements of evidence separate from the relevant police reports which those witnesses certified, then it is appropriate to examine the matter of non-attendance of those witnesses at the trial and reliance on their pre-trial statements in light of the Al-Khawaja and Tahery and Schatschaschwili principles.[1586]

On the other hand, when the defence intends to rely on the testimony of attesting witnesses, such witnesses are to be considered as „witnesses on behalf" of the defence within the meaning of Article 6 § 3 (d) of the Convention.[1587]

*d) The importance of the witness statement for the conviction:*

An issue concerning admission into evidence of statements of witnesses who did not attend the trial arises only if the witness statement is the "sole" or "decisive" evidence, or it it "carried significant weight" in the applicant's conviction.[1588]

The „sole" evidence is to be understood as the only evidence against the accused. The term „decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as

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[1577] „Mika v. Sweden" (2009); „Ferrantelli and Santangelo v. Italy" (1996); „Al-Khawaja and Tahery v. the United Kingdom" (2011)

[1578] „Bobeş v. Romania" (2013); „Vronchenko v. Estonia" (2013)

[1579] „Lučić v. Croatia" (2014)

[1580] „Štefančič v. Slovenia" (2012)

[1581] „Gabrielyan v. Armenia" (2012)

[1582] „Faysal Pamuk v. Turkey" (2022), where the trial court used the possibility of requesting the examination of witnesses by the courts of their places of residence if they were residing somewhere other than where the trial was taking place.

[1583] „Murtazaliyeva v. Russia" (2018)

[1584] „Shumeyev and Othersv. Russia" (2015)

[1585] „Murtazaliyeva v. Russia" (2018)

[1586] „Garbuz v. Ukraine" (2019)

[1587] „Murtazaliyeva v. Russia" (2018)

[1588] „Seton v. the United Kingdom" (2016); „Sitnevskiy and Chaykovskiy v. Ukraine" (2016), where the witness statement was not of any such importance.

decisive. The evidence that carries "significant weight" is such that its admission may have handicapped the defence.[1589]

In this context, as it is not for the Court to act as a court of fourth instance, its starting point for determining the importance of a witness statement for an applicant's conviction is the judgment of the domestic courts. The Court must review the domestic courts' evaluation in light of its standards for the assessment of importance of a witness statement as evidence and decide whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary. It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear.

*e) Counterbalancing factors:*

The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence.

In „Schatschaschwili v. Germany" (2015) the Court identified certain elements that may be relevant in this context:

- Whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available.[1590] Any directions given to the jury by the trial judge regarding the absent witnesses' evidence is another important consideration.[1591]
- Existence of a video recording of the absent witness's questioning at the investigation stage.
- Availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; further factual evidence, forensic evidence and expert reports; similarity in the description of events by other witnesses, in particular if such witnesses are cross-examined at trial.
- The possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of theproceedings.[1592] However, pre-trial confrontations conducted before an investigator who did not meet the requirements of independence and impartiality, who had the largely discretionary power to block questions and in which the applicants were unrepresented, are not a substitute for the examination of witnesses in open court.[1593]
- Possibility for the applicant or defence counsel to question the witness during the investigation stage. These pre-trial hearings are an important procedural safeguard which can compensate for the handicap faced by the defence on account of absence of a witness from the trial.[1594] Moreover, the Court has accepted that in exceptional circumstances there may be reasons for hearing evidence from a witness in the absence of the person against whom the statement is to be made on the condition that his lawyer was present

[1589] „Schatschaschwili v. Germany" (2015)
[1590] „Przydział v. Poland" (2016)
[1591] „Simon Price v. the United Kingdom" (2016)
[1592] „Paić v. Croatia" (2016)
[1593] „Chernika v. Ukraine" (2020)
[1594] „Palchik v. Ukraine" (2017)

during the questioning.[1595] However, there may nevertheless be circumstances where the defence counsel's involvement alone may not suffice to uphold the rights of the defence and the absence of a direct confrontation between a witness and the accused might entail a real handicap for the latter. Whether an applicant's direct confrontation with the witness against him or her was needed, is a matter to be determined on the facts of each case on the basis of the Court's criteria for the assessment of the overall fairness of the proceedings under Article 6 § 3 (d).[1596]

- The defendant must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness. However, this cannot, of itself, be regarded a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured.[1597] Moreover, domestic courts must provide sufficient reasoning when dismissing the arguments put forward by the defence.[1598]

In this connection, the Court has not been ready to accept a purely formal examination of the deficiencies in the questioning of witnesses by the domestic higher courts when their reasoning could be seen as seeking to validate the flawed procedure rather than providing the applicant with any counterbalancing factors to compensate for the handicaps under which the defence laboured in the face of its inability to examine a witness.[1599] Also, in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witness' statement relates.[1600]

In view of the autonomous meaning given to the term „witness", the above principles concerning absent witnesses are accordingly relevant in cases of absent expert witnesses.[1601] However, in this context, the Court has explained that the role of an expert witness can be distinguished from that of an eyewitness, who must give to the court his personal recollection of a particular event. In analysing whether the appearance in personof an expert at the trial was necessary, the Court is therefore primarily guided by the principles enshrined in the concept of a "fair trial" under Article 6 § 1 of the Convention, and in particular by the guarantees of "adversarial proceedings" and "equality of arms".[1602] Nevertheless, some of the Court's approaches to the examination in person of "witnesses" under Article 6 § 3 (d) may be applied, mutatis mutandis, with due regard to the difference in their status and role.[1603]

*f) Other restrictions on the right to examine witnesses:*

The above principles related to absent witnesses are accordingly applicable to other instances in which a defendant was not in a position to challenge the probity and credibility of witness evidence, including its truthfulness and reliability, by having the witnesses orally examined in his or her presence, either at the time the witness was making the statement or at some later stage of the proceedings, or where the witnesses do appear before the trial court but procedural irregularities prevent the applicant from examining them.[1604]

This may concern the admission into evidence of statements made by witnesses whose full identity is concealed from

[1595] „Šmajgl v. Slovenia" (2016)
[1596] „Fikret Karahan v. Turkey" (2021)
[1597] „Palchik v. Ukraine" (2017)
[1598] „Prăjină v. Romania" (2014
[1599] „Al Alo v. Slovakia" (2022)
[1600] „Yakuba v. Ukraine" (2019)
[1601] „Constantinides v. Greece" (2016)
[1602] „Kartoyev and Others v. Russia" (2021)
[1603] „Danilov v. Russia" (2020)
[1604] „Chernika v. Ukraine" (2020)

- the accused (anonymous testimony);[1605]
- witnesses, including the co-accused, who refuse to testify at trial or to answer questions from the defence[1606] and
- other witnesses who are questioned under special examination arrangements involving, for instance, impossibility for the defence to attend the witnesses' questioning[1607] or impossibility for the defence to have access to sources on which a witness based his or her knowledge or belief.[1608]

It should also be noted that the principles related to the admission into evidence of statements of absent witnesses accordingly apply to instances where the outcome of the proceedings complained of does not comprise guilt or innocence, but rather the factual circumstances relevant for the ultimate severity of sentence. Thus, where witness testimony could influence the outcome of an applicant's case in relation to determining the severity of the sentence, the Court will proceed to examine whether the impossibility to question that witness at any stage of the proceedings handicapped the applicant's defence to the point of rendering the trial against him or her as a whole unfair.[1609]

However, when a witness makes a statement at the pre-trial stage of the proceedings and then retracts it or claims to have no longer any recollection of facts when cross-examined at the trial, the principles related to absent witnesses will not necessarily apply. In other words, a change of attitude on the part of a witness does not of itself give rise to a need for compensatory measures. Indeed, the Court has refused to hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict. In such a situation, the Court will seek to determine whether the proceedings as a whole, including the way in which evidence was taken, were fair.[1610] Moreover, in such instances, other procedural guarantees may be of importance such as, for instance, the principle of equality of arms between the prosecution and the defence in examining a witness who has retracted his or her statement that was of a decisive importance for the applicant's conviction.[1611]

*g) Anonymous witnesses:*

While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him.[1612]

In particular, the Court has held that precise limitations on the defence's ability to challenge a witness in proceedings differ in the two cases (anonymous and absent witnesses). Absent witnesses present the problem that their accounts cannot be subjected to searching examination by defence counsel. However, their identities are known to the defence, which is therefore able to identify or investigate any motives for falsification. On the other hand, anonymous witnesses about whom no details are known as to their identity or background, present a different problem: the defence faces the difficulty of being unable to put to the witness, and ultimately to the jury,

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[1605] „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Scholer v. Germany" (2014); „Balta and Demir v. Turkey" (2015); „Asani v. the former Yugoslav Republic of Macedonia" (2018); , „Süleyman v. Turkey" (2020)

[1606] „Craxi v. Italy" (2002); „Vidgen v. the Netherlands" (2012); „Sofri and Others v. Italy" (2003); „Sievert v. Germany" (2012); „Cabral v. the Netherlands (2018); „Breijer v. the Netherlands" (2018)

[1607] „Papadakis v. the former Yugoslav Republic of Macedonia" (2013)

[1608] „Donohoe v. Ireland" (2013)

[1609] „Dodoja v. Croatia" (2021)

[1610] „Vidgen v. the Netherlands" (2019); „Makeyan and Others v. Armenia" (2019)

[1611] „Bonder v. Ukraine" (2019)

[1612] „Al-Khawaja and Tahery v. the United Kingdom (2011); „Asani v. the former Yugoslav Republic of Macedonia" (2018)

any reasons which the witness may have for lying. However, in practice, some disclosure takes place which provides material for cross-examination. The extent of the disclosure has an impact on the extent of the handicap faced by the defence. Thus, given the underlying concern in both types of cases, the Court has consistently taken a similar approach in the context of anonymous witnesses to that which it has followed in cases involving absent witnesses.

The use of statements made by anonymous witnesses to convict is not under all circumstances incompatible with the Convention.[1613]

While Article 6 does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as with interests coming generally within the ambit of Article 8 of the Convention. Contracting States should organise their criminal proceedings so that those interests are not unjustifiably impaired. The principles of a fair trial therefore require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.[1614]

Domestic authorities must have adduced relevant and sufficient reasons to keep secret the identity of certain witnesses.[1615]

The Court's case-law shows that it is more common for witnesses to have a general fear of testifying, rather than that fear being directly attributable to threats made by the defendant or his agents. For instance, in many cases, the fear has been attributable to the notoriety of the defendant or his associates. There is, therefore, no requirement that a witness' fear be attributable directly to threats made by the defendant in order for that witness to be excused from presenting evidence at trial. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine, first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence.[1616]

The Court has also held that the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the State's police force. Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. On the other hand, the Court has recognised that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities for his own or his family's protection and to not impair his usefulness for future operations.[1617]

If the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. In such cases, the handicap faced by the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[1618]

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[1613] „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997); „Krasniki v. the Czech Republic" (2006)

[1614] „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997)

[1615] „Doorson v. the Netherlands" (1996); „Visser v. the Netherlands" (2002); „Sapunarescu v. Germany" (2006); „Dzelili v. Germany" (2009)

[1616] „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Balta and Demir v. Turkey" (2015)

[1617] „Van Mechelen and Others v. the Netherlands" (1997); „Bátěk and Others v. the Czech Republic" (2017); „Van Wesenbeeck v. Belgium" (2017)

[1618] „Doorson v. the Netherlands" (1996); „Van Mechelen and Others v. the Netherlands" (1997) „Haas v. Germany" (2005); „Asani v. the former Yugoslav Republic of Macedonia" (2018)

*h) Witnesses in sexual abuse cases:*

Criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In assessing whether the accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account.

Therefore, in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with the adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicap under which the defence operates.[1619]

Having regard to the special features of criminal proceedings concerning sexual offences, Article 6 § 3 (d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel through cross-examination or by other means.[1620]

Relatedly, the Court has held that since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims risks further traumatisation of the victim, personal cross-examination by defendants should be subject to the most careful assessment by the national courts, the more so the more intimate the questions are.[1621]

However, this does not mean that measures related to the protection of victims, particularly the non-attendance of a witness to give evidence at the trial, are applicable automatically to all criminal proceedings concerning sexual offences. There must be relevant reasons adduced by domestic authorities for applying such measures and, as regards the possibility of excusing a witness from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.[1622]

The accused must be able to observe the demeanour of the witnesses under questioning and to challenge their statements and credibility.[1623]

The viewing of a video recording of a witness account cannot alone be regarded as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account was given by the authorities.[1624]

*i) Witnesses who refuse to testify in court:*

In some instances, a witness' refusal to give a statement or answer questions in court may be justified in view of the special nature of the witness' position in the proceedings. This will be the case, for instance, if a co-accused uses one's right to protection against self-incrimination.[1625]

The same is true for a former co-suspect refusing to give a statement or answer questions at the hearing as a witness,[1626] or a former co-suspect who is facing the charges of perjury for trying

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[1619] „Aigner v. Austria" (2012); „D. v. Finland" (2009); „F and M v. Finland" (2007); „Accardi and Others v. Italy" (2005); „S.N. v. Sweden" (2002); „Vronchenko v. Estonia" (2013)

[1620] „S.N. v. Sweden" (2002); „W.S. v. Poland" (2007)

[1621] „Y. v. Slovenia" (2015); „R.B. v. Estonia" (2021), concerning the participation in the proceedings of a four-year old alleged victim of sexual abuse by a parent).

[1622] „Al-Khawaja and Tahery v. the United Kingdom" (2011); „Lučić v. Croatia" (2014)

[1623] „Bocos-Cuesta v. the Netherlands" (2005); „P.S.v. Germany" (2001); „Accardi and Others v. Italy" (2005); „S.N. v. Sweden" (2002)

[1624] „D. v. Finland" (2009); „A.L. v. Finland" (2009)

[1625] „Vidgen v. the Netherlands" (2012)

[1626] „Sievert v. Germany" (2012)

to change his initial statement inculpating the applicant.[1627] Moreover, this may concern a witness who relied on testimonial privilege in order to not testify at the trial due to her relationship with one of the co-accused[1628] or a witness who refused to give a statement due to a fear of reprisals.[1629]

In each of these cases, the Court must assess whether the proceedings as a whole were fair and whether there was a possibility of putting the incriminating statement of a witness to the test in order to satisfy itself that the defence's handicap was offset by effective counterbalancing measures.[1630]

*j) Right to call witnesses for the defence:*

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter.[1631]

Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to examine a witness.[1632]

However, when a trial court grants a request to call a defence witness, it is obliged to take effective measures to ensure the witnesses' presence at the hearing[1633] by way of, at the very least, issuing a summons or by ordering the police to compel a witness to appear in court.[1634]

There may be exceptional circumstances which could prompt the Court to conclude that the failure to examine a person as a witness was incompatible with Article 6.[1635]

It is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence.[1636] If the statement of witnesses the applicant wished to call could not influence the outcome of his or her trial, no issue arises under Articles 6 §§ 1 and 3 (d) if a request to hear such witnesses is refused by the domestic courts.[1637]

When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his or her acquittal, the domestic authorities must provide relevant reasons for dismissing such a request.[1638]

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[1627] „Cabral v. the Netherlands" (2018)
[1628] „Sofri and Others v. Italy" (2003)
[1629] „Breijer v. the Netherlands" (2018)
[1630] „Sievert v. Germany" (2012); „Cabral v. the Netherlands" (2018); „Breijer v. the Netherlands" (2018)
[1631] „Perna v. Italy" (2003); „Murtazaliyeva v. Russia" (2018); „Solakov v. the former Yugoslav Republic of Macedonia" (2001)
[1632] „S.N. v. Sweden" (2002); „Accardi and Others v. Italy" (2005)
[1633] „Polufakin and Chernyshev v. Russia" (2008)
[1634] „Murtazaliyeva v. Russia" (2018)
[1635] „Murtazaliyeva v. Russia" (2018); „Dorokhov v. Russia" (2008); „Popov v. Russia" (2006); „Bricmont v. Belgium" (1989); „Pereira Cruz and Others v. Portugal" (2018), concerning the refusal by an appellate court to question a witness for the defence who had retracted his incriminating statement against the applicant.
[1636] „Perna v. Italy" (2003)
[1637] „Kapustyak v. Ukraine" (2016)
[1638] „Vidal v. Belgium" (1992); „Polyakov v. Russia" (2009); „Sergey Afanasyev v. Ukraine" (2012); „Topić v. Croatia" (2013)

Having regard to the above considerations in its case-law, in „Murtazaliyeva v. Russia" (2018) the Court has formulated the following three-pronged test for the assessment of whether the right to call a witness for the defence under Article 6 § 3 (d) has been complied with: (1) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (2) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and (3) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

In respect of the first element the Court held that it is necessary to examine whether the testimony of witnesses was capable of influencing the outcome of a trial or could reasonably be expected to strengthen the position of the defence. The „sufficiency" of reasoning of the motions of the defence to hear witnesses will depend on the assessment of the circumstances of a given case, including the applicable provisions of the domestic law, the stage and progress of the proceedings, the lines of reasoning and strategies pursued by the parties and their procedural conduct.

As to the second element of the test, the Court explained that generally the relevance of testimony and the sufficiency of the reasons advanced by the defence in the circumstances of the case will determine the scope and level of detail of the domestic courts' assessment of the need to ensure a witness' presence and examination. Accordingly, the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence's request to examine a witness.

With regard to the overall fairness assessment as the third element of the test, the Court stressed that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident. While the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion.

In „Kikabidze v. Georgia" (2021), the Court examined a situation where the defence application to admit a list of witnesses to be called on behalf of the defence into evidence was rejected on procedural grounds because the defence had produced the list after the expiry of the relevant time-limit. The de facto outcome of that decision was that in the course of the jury trial –introduced in the domestic legal order shortly before the trial in the applicant's case – not a single witness was heard on behalf of the defence. The Court found that state of affairs troubling, particularly given the nature of the subject matter of the criminal case (an aggravated murder committed in prison in the presence of some seventy prisoners), the absence of evidence other than witnesses, and the fact that the case was decided by a jury. The Court therefore considered that, from the point of view of the Convention requirements of fair trial, and the applicant's right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, the decision to exclude all witnesses proposed by the defence had to be motivated by weighty reasons going beyond the issue of the applicant's compliance with a procedural time-limit. On the facts of the case, the Court found that the presiding judge's rejection of the defence witness list in its entirety resulted from a rigid and restrictive application of domestic law to the applicant's detriment, which was particularly troubling given the absence of established judicial practice following implementation of the cardinal reform of the criminal procedure shortly before the applicant's trial.

# CHAPTER IX

# EXTRAORDINARY LEGAL REMEDIES

## 9.1. Retrial (CPC)

A retrial may be granted regarding a criminal proceeding concluded with a final and binding conclusive court decision on the indictment, provided that

- new evidence is brought up regarding a fact, either covered or not covered in the underlying case, suggesting the likelihood that (1) the defendant is to be acquitted, a considerably more lenient penalty is to be imposed, or (2) a measure is to be applied in place of a penalty, or the criminal proceeding is to be terminated, or (3) the defendant is to be found guilty, or a considerably more severe penalty is to be imposed, or a penalty is to be imposed in place of a measure, or a measure, that is considerably more severe than the measure applied in place of a penalty, is to be applied,
- more than one final and binding conclusive decision on the indictment is passed against the defendant for the same act,
- the defendant is referred to under an identity that is other than his own in the conclusive decision, and the situation could not be remedied by rectifying the decision,
- false or falsified evidence was used in the underlying case,
- a member of the court, the prosecution service, or the investigating authority violated his duties concerning the underlying case in a manner contrary to criminal law,
- the President of the Republic decided to pardon the defendant and terminate the criminal proceeding against him, etc.

A retrial shall not be prevented by the fact that the defendant served his sentence, while a retrial to the benefit of a defendant shall not be prevented even by the fact that the liability to punishment of the defendant was terminated. The provisions laid down in the Act on the Code of Civil Procedure shall apply to the granting of a retrial regarding only provisions passed in a final and binding conclusive decision of a court that concern a civil claim or parental custody rights.[1639]

### 9.1.1. Motions for retrial

A motion for retrial to the detriment of a defendant may be submitted by the prosecution service. A motion for retrial to the benefit of a defendant may be submitted by the prosecution service, the defendant, a defence counsel, the statutory representative of the defendant, the spouse or cohabitant of the defendant against ordering compulsory psychiatric treatment, a lineal relative, sibling, spouse, or cohabitant of the defendant after his death or, if more than fifty years have passed since the death of the defendant, his collateral relative.

If an authority or public officer becomes aware in his official capacity of a circumstance that may serve as a ground for a motion for retrial, he shall inform the prosecution office attached to the court that decides on the admissibility of a retrial accordingly.[1640]

A motion for retrial may be withdrawn before the commencement of a panel session of the court of second instance on the admissibility of a retrial. A defendant may withdraw also a motion for retrial that was filed to his benefit by another eligible person, unless (1) it was filed by the prosecution service, (2) it was filed against ordering compulsory psychiatric treatment.

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[1639] CPC 638. §
[1640] CPC 639. §

If a motion for retrial is withdrawn, the person filing the motion shall be obliged to bear all criminal costs incurred. If a motion for retrial is withdrawn by the prosecution service, the criminal costs shall be borne by the State.[1641]

### 9.1.2. Retrial investigation. Proceedings by the prosecution service. The admissibility of retrial

If a retrial investigation is ordered by the prosecution service, the provisions laid down in Part Ten of CPC shall apply to the investigation in line with the nature of retrial procedures. If a retrial investigation is ordered by a court, the provisions laid down in Part Ten shall apply to the investigation, in line with the nature of retrial procedures, subject to the following derogations:

- the court shall send the order on ordering an investigation, with other case documents, to the general investigating authority,
- in the course of the retrial investigation, the control powers shall be exercised by the court,
- the time limit for a retrial investigation shall be two months, which may be extended by the court two times, for up to two months each time,
- the general investigating authority shall return all case documents to the court after completing the retrial investigation.

Pre-trial detention, preliminary compulsory psychiatric treatment, or criminal supervision may not be ordered.[1642]

A motion for retrial, if filed by another eligible person, shall be filed in writing with, or recorded in minutes at, the prosecution office attached to the court that is authorised to decide on the admissibility of a retrial. If a motion for retrial is filed by an ineligible person, the prosecution office shall not send it to the court, and it shall notify the person filing the motion accordingly in writing. If a motion for retrial is filed by another eligible person, the prosecution service shall send the motion, together with its observations, to the court within one month. If a motion for retrial is submitted by the prosecution service, the means of evidence serving as grounds for a retrial shall be attached to or, if attaching them is not possible, identified in the motion for retrial. With a view to obtaining the court case documents of the underlying case, the prosecution service shall send a request, without delay, to the court that acted as court of first instance in the underlying case, provided that the case documents are needed for making a statement or submitting a motion for retrial. In such an event, the time limit shall be calculated from the day when the court case documents of the underlying case are received by the prosecution service. The prosecution service shall order a retrial investigation before sending a motion for retrial if doing so is necessary to clarify the conditions for a retrial or to acquire new evidence. In such an event, the time limit specified in paragraph (3) shall be calculated from the completion of the retrial investigation.[1643]

The matter of admissibility of a retrial shall be decided by a regional court, if a district court proceeded at first instance in the underlying cases, or a regional court of appeal, if a regional court proceeded at first instance in the underlying case. A court shall adjudicate a motion for retrial in a panel session. After receipt of a motion for retrial, the court shall obtain the case documents of the underlying case, unless such documents were attached by the prosecution service. If a motion for retrial was submitted to a court, the court shall send the motion, together with the court case documents of the underlying case, to the prosecution service for taking the measures specified in section 642.

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[1641] CPC 640. §
[1642] CPC 641. §
[1643] CPC 642. §

The prosecution service shall send back the case documents of the underlying case, together with its statement, to the court within one month. The court shall serve the statement of the prosecution service on the person who submitted the motion for retrial. A defendant and his defence counsel shall be served a motion for retrial filed by another person, together with the statement of the prosecution service. This person may make their observations regarding the motion for retrial, or the statement of the prosecution service within fifteen days of service. The court shall order a retrial investigation if locating any means of evidence is necessary for deciding on the admissibility of a retrial.[1644]

If a court finds a motion for retrial to be well-grounded, it shall order a retrial by passing a non-conclusive order, it shall (1) send the case to the court of first instance that proceeded in the underlying case, or (2) transfer the case to the court with subject-matter and territorial jurisdiction, for conducting a repeated proceeding. At the time of ordering a retrial, the court may suspend or interrupt the enforcement of a penalty imposed or a measure applied in the underlying case, or the implementation of the provisions of the final and binding conclusive decision, or order the necessary coercive measures. A court shall communicate its decision dismissing a motion for retrial to the person who submitted the motion for retrial and, if the motion was not filed by the prosecution service, to the prosecution service. A decision dismissing a motion for retrial filed by another person shall also be communicated to the defendant and his defence counsel. If a motion for retrial is filed again with unaltered content, it shall be dismissed by a court without stating any reason as to its merits. If a motion for retrial is dismissed, all criminal costs incurred shall be borne by the person filing the motion; if the motion was filed to the benefit of the defendant by another person, all criminal costs shall be borne by the defendant, provided that he could have withdrawn the motion under this Act. If a dismissed motion for retrial was filed by the prosecution service, all criminal costs shall be borne by the State.[1645]

No appeal shall lie against ordering a retrial. If a motion for retrial is dismissed, the person filing the motion may file an appeal, but he may not invoke a new ground for a retrial in his appeal. An appeal filed against a non-conclusive order with administrative finality may be dismissed by a court without stating any reason as to its merits. An appeal against an order of a regional court shall be adjudicated by a regional court of appeal, and an appeal against an order of a regional court of appeal shall be adjudicated by the Curia, in a panel session.[1646]

### 9.1.3. Conducting a retrial

In a retrial, a preparatory session may not be held. The court may suspend or interrupt the enforcement of a penalty imposed or a measure applied in the underlying case, or the implementation of the provisions of the final and binding conclusive decision, or order the necessary coercive measures. When summoning the defendant to the trial or when summoning or notifying his defence counsel, the court shall also serve on him the decision ordering a retrial if it had not been served earlier. At trial, in place of an indictment document, the court shall present a summary of the judgment challenged in the retrial, and the order on ordering a retrial.[1647]

If a court establishes that a retrial is well-grounded, it shall set aside the judgment or order on terminating the proceeding passed in the underlying case, or the part of the decision challenged on retrial, and it shall pass a decision in compliance with the legal requirements. A court shall

[1644] CPC 643. §
[1645] CPC 644. §
[1646] CPC 645. §
[1647] CPC 646. §

dismiss a retrial if it finds the retrial groundless. If a penalty imposed in the underlying case is included in an accumulative sentence, and the judgment imposing the accumulative sentence is to be set aside because the retrial is wellgrounded, the court shall also set aside the judgment imposing the accumulative sentence and conduct an accumulative sentence proceeding; otherwise, the case documents shall be sent to a court with subject-matterjurisdiction to conduct an accumulative sentence proceeding. If a motion for retrial was filed to the benefit of a defendant, provisions on the prohibition of reformatio in peius shall apply accordingly when passing a new decision. If a court establishes that a retrial is well-grounded, (1) it shall again adjudicate any civil claim, already adjudicated on its merits, upon a motion filed by the prosecution service, the defendant, his defence counsel or a civil party, (2) it shall pass a new decision on terminating parental custody rights upon a motion filed by the prosecution service, the defendant or his defence counsel. Legal remedy against a decision passed after a retrial is ordered shall be available pursuant to the general rules.[1648]

### 9.2. Review (CPC)

A review shall be granted regarding a final and binding conclusive court decision on the indictment (1) if the rules of substantive criminal law were violated, (2) if a procedural violation of law was committed, (3) on the basis of a decision passed by the Constitutional Court or a human rights organisation established by an international treaty, (4) if it deviates from a decision by the Curia published in the collection of court decisions Bírósági Határozatok Gyűjteménye.[1649]

A motion for review may be filed for violating the rules of substantive criminal law if a court

a) in violation of the rules of substantive criminal law

aa) found a defendant guilty,

ab) ordered compulsory psychiatric treatment for a defendant,

ac) acquitted a defendant, or

ad) terminated a proceeding;

b) due to the unlawful qualification of the criminal offence or in violation of any other rule of the Criminal Code

ba) imposed an unlawful penalty,

bb) applied an unlawful measure;

c) suspended the enforcement of a sentence despite a ground for exclusion specified in section 86 (1) of the Criminal Code.

A motion for review may be filed for committing a procedural violation of law if a court passed a decision

- without jurisdiction,
- in the absence of a private motion, crime report, or an act by the Prosecutor General,
- on the basis of an indictment brought to court by an ineligible person,
- by committing a procedural violation of law,
- in violation of the prohibition of reformatio in peius,
- in violation of immunity based on the rule of speciality or on immunity arising from public office as afforded by an Act or on international law.

A motion for review may be filed on the basis of a decision of the Constitutional Court if the Constitutional Court ordered the review of a criminal proceeding concluded with a final and binding conclusive decision.

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[1648] CPC 647. §

[1649] CPC 648. §

A motion for review may be filed on the basis of a decision passed by a human rights organisation established by an international treaty if the human rights organisation established by an international treaty established that a proceeding, or a final and binding conclusive court decision on the indictment, is in violation of a provision of an international treaty promulgated in an Act, provided that Hungary submitted to the jurisdiction of the international human rights organisation.

A review shall also be granted on the basis of a decision passed by a human rights organisation established by an international treaty if the human rights organisation established by an international treaty establishes the violation of an international treaty provision that constitutes a procedural violation of law and, under this Act, may be challenged only on appeal, but not on a review.

In case of a deviation from a decision by the Curia published in the collection of court decisions Bírósági Határozatok Gyűjteménye, a motion for review may be filed only if the deviation resulted in a violation of the rules of substantive criminal law or in a procedural violation of law.[1650]

9.2.1. Limits to reviews. Motion for review

No review may be granted

- against a provision, or part, of a final and binding conclusive decision passed by a court of third instance on the ground of violation of a rule of substantive criminal law,
- against a decision passed on the basis of a procedure for the uniformity of jurisprudence by the Curia, in a review procedure, or as a result of a legal remedy submitted on the ground of legality,
- if a violation of an Act can be remedied by conducting a simplified review procedure.

Facts established in a final and binding conclusive decision may not be challenged in a motion for review. A review regarding a provision of a final and binding conclusive court decision concerning solely a civil claim or parental custody rights shall be governed by the provisions laid down in the Act on the Code of Civil Procedure. A review may not be granted on the basis of a decision passed by an international human rights organisation if that decision established the violation of the requirement of adjudicating a case within a reasonable period only.[1651]

A motion for review may be submitted, to the detriment of a defendant, by the prosecution service. A motion for review may be submitted to the benefit of a defendant by (1) the prosecution service, (2) the defendant, (3) a defence counsel, (4) the statutory representative of the defendant, (5) the spouse or cohabitant of the defendant against ordering compulsory psychiatric treatment, (6) a lineal relative, sibling, spouse, or cohabitant of the defendant after his death or, if more than fifty years have passed since the death of the defendant, his collateral relative. If an authority or public officer becomes aware, in his official capacity, that a violation that may serve as a ground for a review procedure was committed to the detriment of a defendant, he shall inform the Prosecutor General accordingly.[1652]

A motion for review

- shall specify the decision challenged by the motion for review, as well as the reason and purpose of filing the motion;
- shall include contact details that are suitable for service to the person filing the motion;
- may be submitted to the detriment of a defendant within six months after a final and binding conclusive decision is communicated;

[1650] CPC 649. §
[1651] CPC 650. §
[1652] CPC 651. §

- may be filed to the benefit of a defendant without any time limit.

Filing a motion shall not be excluded by the fact that the defendant served his sentence or his liability to punishment was terminated. A motion for review may be filed with unaltered content only once.[1653]

### 9.2.2. Review procedures

The rules of third-instance court procedures shall apply to the administration of a review procedure subject to the derogations laid down in this Chapter. A motion for review may be submitted to the court that proceeded as court of first instance in the underlying case or the court the proceedings of which is challenged in the motion for review. The court shall forward the motion for review, together with the case documents of the underlying case, to the Curia within one month. A motion for review by the Prosecutor General shall be submitted, together with the case documents of the underlying case, to the Curia directly.[1654]

A motion for review may be withdrawn until the Curia holds a panel session to make a decision. A defendant may withdraw also a motion for review that was filed to his benefit by another eligible person, unless (1) it was filed by the prosecution service, (2) it was filed against ordering compulsory psychiatric treatment. A defence counsel may not withdraw, without the consent of the defendant, a motion for review filed by him. If a motion for review is withdrawn, the Curia shall terminate the review procedure.[1655]

With the exception specified in this Act, a motion for review shall be adjudicated in a panel session, or in a public session, by a panel of three professional judges of the Curia. If the subject matter of a review is a decision of the Curia, the motion shall be adjudicated by a panel of five professional judges, unless the motion is excluded in an Act, filed by an ineligible person, or late. The participation of a defence counsel in a review procedure shall be mandatory. The Curia shall appoint a defence counsel if the defendant does not have one, and he shall be invited to draft a motion for review, if necessary. A disciplinary fine may be imposed on an appointed defence counsel if he fails to file a motion within one month, or files an incomplete motion.[1656]

The chair of the proceeding panel shall invite the person who submitted the motion to supplement his motion within one month if it is unclear why he considers the final and binding conclusive decision injurious. A motion for review shall be dismissed by the Curia if

- a review is excluded in an Act,
- it was filed by an ineligible person,
- it is late,
- the motion for review was not submitted, or was submitted with deficiencies repeatedly,
- the person filing the motion became unavailable.

In the course of the proceeding, the Curia shall examine ex officio. The Curia may dismiss a motion without stating any reason as to its merits if it is filed by the same eligible person, or with unaltered content, repeatedly.[1657]

If a motion for review may not be dismissed and the prosecution wasrepresented by the prosecution service in the underlying case, the Curia shall forward the motion, together with the case documents of the underlying case, to the Office of the Prosecutor General for obtaining a statement. The prosecution service shall return the case documents of the underlying case, together with its statement, to the Curia within one month. The Curia shall send the statement

[1653] CPC 652. §
[1654] CPC 653. §
[1655] CPC 654. §
[1656] CPC 655. §
[1657] CPC 656. §

of the prosecution service to the person who submitted the motion for review. A defendant and his defence counsel shall be sent a motion for review filed by another person, together with the related statement by the prosecution service.[1658]

The Curia shall inform the Constitutional Court about instituting a review proceeding if a constitutional complaint is submitted against a final and binding conclusive decision or a law serving as ground for a final and binding conclusive decision. The Curia shall suspend the proceeding until the procedure for the uniformity of jurisprudence is concluded if the proceeding panel initiates a procedure for the uniformity of jurisprudence in the course of adjudicating the motion for review.[1659]

In a review proceeding, pieces of evidence may not be compared again or assessed differently, and evidence may not be taken; the facts established in the final and binding conclusive decision shall be observed when adjudicating a motion for review. A motion for review shall be adjudicated on the basis of laws in effect at the time when the challenged decision was passed. A motion for review shall not have a suspensory effect, but the Curia may suspend or interrupt the enforcement of a penalty imposed, or a measure applied, in the final and binding conclusive decision, or the implementation of the provisions of the final and binding conclusive decision, until the motion is adjudicated.[1660]

The Curia shall adjudicate a motion for review in a panel session. The Curia shall decide on a motion for review in a public court session if (1) a motion to that effect is filed by the defendant or the defence counsel within eight days after the service of a motion for review filed to the detriment of the defendant, or (2) the chair of the panel considers it necessary for any other reason.[1661]

In a public session, the attendance of a defence counsel and, if the prosecution was represented by the prosecution service, the Prosecutor General or his representative shall be mandatory. A notification shall be issued at a time that allows for it to be served at least eight days before the public session. A public session may be held, even if service of a notification failed because the whereabouts of the addressee are unknown. After opening the public session, the Curia shall present a summary of the motion for review and the challenged decision, and all parts of the case documents that are necessary for adjudicating the motion for review. After presenting the case, the person who filed the motion for review, the prosecutor, the defence counsel, and the other eligible persons may address the court within the limits of the motion for review. After the addresses an opportunity to respond shall be granted. The defendant shall be entitled to address the court last.[1662]

### 9.2.3. Decisions passed in review procedures

The Curia shall uphold in effect, by passing a non-conclusive order, a decision challenged in a motion for review if it does not grant the motion for review. The Curia shall amend a decision challenged in a motion for review, and it shall pass a decision in compliance with the legal requirements if the court that proceeded in the underlying case (1) found the defendant guilty, or ordered compulsory psychiatric treatment for the defendant, in violation of the rules of substantive criminal law, (2) imposed an unlawful penalty or applied an unlawful measure due to the unlawful qualification of the criminal offence, or in violation of any other rule of the Criminal Code, (3) passed its decision in violation of the prohibition of reformatio in peius. The

[1658] CPC 657. §
[1659] CPC 658. §
[1660] CPC 659. §
[1661] CPC 660. §
[1662] CPC 661. §

Curia may also amend a challenged decision to the benefit of a defendant, even if a motion for review is filed to the detriment of the defendant.[1663]

The Curia shall set aside a decision challenged in a motion for review, and instruct a court with subject-matter and territorial jurisdiction to conduct a new proceeding, if

- a defendant was acquitted, or a proceeding was terminated, because of a violation of the rules of substantive criminal law,
- it is not possible to pass a decision on the basis of case documents, or
- the review was instituted on the basis of a decision passed by a human rights organisation established by an international treaty, and repeating the proceeding is necessary for passing a decision that is in compliance with the relevant international treaty promulgated in an Act, even if the international human rights organisation established a violation that would otherwise not be a ground for setting aside the challenged decision under this Act.

The Curia shall set aside a decision challenged in a motion for review and terminate a proceeding, instruct a court with subject-matter and territorial jurisdiction to conduct a new proceeding, or send the case documents to the prosecution service, if the court that proceeded in the underlying case passed its final and binding conclusive decision by committing a procedural violation of law. If the Curia instructs a court to conduct a new proceeding, it shall provide mandatory instructions on conducting the new proceeding in the setting aside order. The Curia shall instruct a court of second or third instance to conduct a new proceeding if (1) the ground for a review arose in the second or third-instance court proceeding, (2) a decision, which is in compliance with the legal requirements, may be passed by repeating the second or third-instance court proceeding. If the Curia sets aside a decision challenged in a motion for review and the defendant concerned is detained, it shall decide on the matter of detention.[1664]

Criminal costs incurred in a review proceeding, including the fee of any defence counsel officially appointed to draft a motion for review, shall be borne by the person who submitted the motion, provided that the motion for review is dismissed and the review proceeding was not initiated by the prosecution service. In any other situation, the criminal costs shall be borne by the State. After a motion for review is administered, the Curia shall serve its decision. The Curia shall send back the case documents, together with its decision and the minutes, to the court that passed the decision challenged in the motion for review or is instructed to conduct a new proceeding.[1665]

### 9.3. Proceeding concerning constitutional complaints (CPC)

A court that proceeded at first instance in a case may suspend or interrupt the enforcement of a penalty imposed or a measure applied in the final and binding conclusive decision, or the implementation of the provisions of the final and binding conclusive decision,until the proceeding of the Constitutional Court is concluded.

A court that proceeded at first instance in a case shall notify the Constitutional Court about suspending or interrupting the enforcement of a penalty imposed or a measure appliedin the final and binding conclusive decision, or the implementation of the provisions of the final and binding conclusive decision.

Upon a call to that effect from the Constitutional Court, a court that proceeded at first instance in a case shall suspend or interrupt the enforcement of a penalty imposed or a measure applied in the final and binding conclusive decision, or the implementation of the provisions of the final and binding conclusive decision, and it shall notify the Constitutional Court accordingly.

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[1663] CPC 662. §
[1664] CPC 663. §
[1665] CPC 664. §

### 9.4. Legal remedy submitted on the ground of legalíty (CPC)

The Prosecutor General may submit legal remedy on the ground of legality against an unlawful final and binding conclusive decision, or a non-conclusive order with administrative finality passed by a court. Legal remedy may not be submitted if (1) the decision was passed by the Curia, (2) the violation may be remedied by conducting a retrial, a review, or a simplified review procedure. Legal remedy may be submitted without any time limit.[1666]

If a legal remedy submitted on the ground of legality may not be dismissed, it shall be adjudicated by the Curia in a panel session. The Curia shall decide on a legal remedy submitted on the ground of legality in a public session if (1) the Prosecutor General moves for doing so, or (2) the chair of the panel considers it necessary to do so for any other reason. The Prosecutor General, the defendant and his defence counsel shall be notified of the public session. If the defendant did not have a defence counsel in the underlying case, the Curia shall appoint a defence counsel for the defendant. The defendant and his defence counsel may make observations regarding a motion for legal remedy submitted on the ground of legality. A public session may not be held in the absence of the Prosecutor General or his representative. In a public session, the Prosecutor General or his representative, the defendant, and his defence counsel may address the court and, in line with the nature of the proceeding, file motions. If a panel of the Curia adjudicates a legal remedy submitted on the ground of legality in a panel session, then the defendant and the defence counsel may make observations within eight days from the service of the notification about the public session.[1667]

If the Curia finds a legal remedy submitted on the ground of legality to be well-grounded, it shall establish in a judgment that the challenged decision is unlawful; otherwise, it shall dismiss the legal remedy by passing an order. If a violation is established, the Curia may acquit a defendant, refrain from applying compulsory psychiatric treatment, terminate a proceeding, impose a more lenient penalty, or apply a more lenient measure, or may set aside a challenged decision and instruct the courtthat proceeded in the case to conduct a new proceeding with a view to passing such a decision, if necessary. The decision passed by the Curia may only establish the fact that a violation was committed. All criminal costs incurred in a legal remedy proceeding shall be borne by the State.[1668]

### 9.5. Procedure for the uniformity of jurisprudence (CPC)

If the outcome of a procedure for the uniformity of jurisprudence may have an impact on another extraordinary legal remedy proceeding pending before the Curia, the Curia shall suspend the extraordinary legal remedy proceeding until a uniformity decision is passed.

If, following a guidance on a question of principle, a provision, which establishes the criminal liability of a defendant, of a final and binding conclusive decision affected by a uniformity decision is to be considered unlawful, the uniformity chamber shall set aside the unlawful provision and acquit the defendant or terminate the proceeding. If the defendant concerned is detained, his detention shall also be terminated.

The statement of reasons for a uniformity decision shall specify the grounds for acquitting the defendant and terminating the proceeding.

A uniformity decision shall also be communicated to the defendant who is acquitted or

[1666] CPC 667. §
[1667] CPC 668. §
[1668] CPC 669. §

the proceeding against whom is terminated and his defence counsel.

A uniformity complaint may be filed pursuant to the provisions of the Act on the organisation and administration of the courts.

In a uniformity complaint procedure, the enforcement of a penalty imposed, or measure applied, by a final and binding conclusive decision, or the implementation of the provisions of a final and binding conclusive decision, shall not be suspended or interrupted.

A decision by the Curia challenged by a uniformity complaint shall not be set aside if the uniformity complaint chamber establishes that the decision challenged in a review procedure unduly deviated from a decision by the Curia published in the collection of court decisions Bírósági Határozatok Gyűjteménye, but the challenged decision may not be amended, or set aside, in the review procedure due to the absence of any violation.[1669]

### 9.6. Simplified review (CPC)

A simplified review procedure may be conducted if a court failed to pass a provision in an underlying case despite a mandatory provision of an Act, or it failed to pass a provision that is in compliance with the legal requirements, on any of the following matters:

- determining the security level of imprisonment,
- setting aside an order to enforce a sentence of imprisonment suspended on probation,
- passing a provision on parole,
- terminating a parole,
- crediting preliminary detention and criminal supervision, crediting confinement, community service or fine imposed and enforced in an infraction proceeding and a penalty or measure already enforced,
- disqualification from a profession and determining a profession a defendant is disqualified from,
- ex-post crediting of disqualification from driving a vehicle,
- determining the location subject to a ban on entering certain areas,
- determining the sports associations and sports facilities concerned when imposing a ban on visiting sports events,
- applying confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible, determining a thing to be seized, lifting sequestration,
- terminating release on probation,
- ordering supervision by a probation officer,
- criminal costs,
- determining that a convict is a recidivist,
- terminating a temporary release from a juvenile correctional institution, or
- costs that arose in causal relationship with the enforcement of the civil claim without qualifying as criminal costs.[1670]

In a simplified review procedure, the proceeding court shall be the court that passed the final and binding conclusive decision or the decision that reached administrative finality, provided that less than one month has passed since the conclusive decision became final and binding or the decision terminating the proceeding reached administrative finality; otherwise, the court that proceeded as court of first instance in the underlying case shall be the proceeding court. If the court proceeded as a panel, a simplified review procedure may also be conducted by the chair of the panel.

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[1669] CPC 670. §
[1670] CPC 671. §

A simplified review procedure shall be instituted ex officio or upon a motion by the prosecution service, the defendant, his defence counsel, a party with a pecuniary interest or an other interested party. The court may terminate the proceeding if the motion is withdrawn by the person filing it.

A motion for a simplified review procedure may be submitted to the detriment of a defendant, a party with a pecuniary interest, or an other interested party within six months after the decision is communicated, and a simplified review procedure may be instituted ex officio to the detriment of a defendant, a party with a pecuniary interest, or an other interestedparty within six months after the decision is communicated.

A simplified review procedure shall be concluded within six months after it is instituted; after this period, no decision that is more adverse to a defendant, a party with a pecuniary interest, or an other interested party may be passed.

A simplified review procedure may be initiated, or conducted, provided that (1) a decision is to be passed regarding confiscation or rendering electronic data permanently inaccessible, because possessing the given thing threatens public safety or is in breach of the law, or making accessible or publishing the data published on an electronic telecommunications network constitutes a criminal offence, or (2) a provision on confiscation or forfeiture of assets is to be passed in the context of seizure or sequestration.[1671]

The court shall decide on the basis of case documents; if interviewing a prosecutor, a defendant, or a defence counsel is necessary, it shall hold a public session; if other evidence is taken, it shall hold a trial. A simplified review procedure may also be conducted by a junior judge, but he may not hold a public session or a trial. In a simplified review procedure, proceedings may not be suspended. If the person filing the motion fails to appear in a public session or trial, his motion shall be deemed withdrawn. If the court holds a trial, a preparatory session may not be held. Interviewing a defendant may not be dispensed with if the court (1) decides on an ex-post modification of a provision on parole from life imprisonment, (2) imposes special rules of behaviour in connection with ordering supervision by a probation officer, (3) decides on the termination of release on probation. After opening a public session or a trial, the proceeding single judge or the chair of the panel shall present, as necessary, a summary of the decision passed in the underlying case, and of the circumstances that serve as grounds for instituting a simplified review procedure ex officio. If a simplified review procedure is instituted on the basis of a motion, the person filing the motion shall present a summary of his motion for a simplified review procedure and the supporting evidence during the public session or trial.[1672]

On the basis of a simplified review procedure, the court shall set aside any unlawful provision of a decision passed in an underlying case, as necessary, and pass a decision in compliance with the legal requirements. A court shall dismiss a motion if it is groundless. A court shall terminate a proceeding if the proceeding was instituted ex officio and the court establishes that the conditions of instituting a proceeding are not met. The court shall dismiss, without stating any reasons as to its merits, a motion that is late, excluded by law or filed by an ineligible person. If a motion filed by an ineligible person is dismissed, the court shall institute a proceeding ex officio, provided that the statutory conditions of a proceeding are met.

A court shall decide on the subject matter of a simplified review procedure by passing an order. An appeal against a court decision may be filed by a person who is entitled to file a motion for instituting a proceeding, or by a person a right or obligation of whom is affected by the decision, concerning matters affecting him. In a simplified review procedure, the court of second instance shall proceed in a panel session to decide on an appeal, proceed in a public session to hear the prosecutor, the defendant or his defence counsel, or proceed in a trial to take

[1671] CPC 672. §
[1672] CPC 673. §

other evidence. A court of second instance shall set aside a first instance decision passed in a simplified review procedure, and dismiss the respective motion, if conducting the proceeding is excluded by an Act. The court shall also proceed the same way if a motion is filed by an ineligible person and a simplified review procedure may not be conducted ex officio. A third-instance court proceeding may not be conducted in a simplified review procedure.[1673]

All criminal costs shall be borne by the State if it is established during a proceeding that a decision does not include any provision regarding the subject matter of a simplified review procedure, or includes any such provision that is not in compliance with the legal requirements. If a motion for a simplified review procedure is dismissed, the criminal costs shall be borne by the person filing the motion; if the motion was filed by the prosecution service, the criminal costs shall be borne by the State.[1674]

## 9.7. Right to an effective remedy (ECrHR)

The Court's judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[1675]

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[1676]

### 9.7.1. General principles

„Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

*a) Meaning of Article 13 of the Convention:*

1. Under Article 1 of the Convention, which provides: „The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention", the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights.[1677]

As can be seen from the travaux préparatoires in respect of the European Convention on Human Rights, the object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. Article 13 thus in principle concerns complaints of substantive violations of Convention provisions. This Article, in giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.[1678]

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[1673] CPC 674. §
[1674] CPC 675. §
[1675] Ireland v. the United Kingdom (1978)
[1676] Konstantin Markin v. Russia (2012)
[1677] Cocchiarella v. Italy (2006)
[1678] Kudła v. Poland (2000)

If Article 13 does not have full application, individuals will systematically be forced to refer to the Court complaints that would otherwise have to be addressed in the first place within the national legal system and, generally speaking, the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.[1679] Accordingly, the incomplete scrutiny of the existence and functioning of domestic remedies would weaken and render illusory the guarantees of Article 13, while the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[1680]

Consequently an applicant who has failed to use the appropriate and relevant domestic remedies cannot rely on Article 13 separately or in conjunction with another Article.[1681]

Article 13 secures the granting of an effective remedy before a national authority to everyone whose Convention rights and freedoms have been violated. The word „grant" does not appear in the English text of Article 13, which reads „everyone ... shall have an effective remedy". Article 13 thus requires a domestic remedy before a „competent national authority" affording the possibility of dealing with the substance of an „arguable complaint" under the Convention[1682] and of granting appropriate relief, Contracting States nevertheless being afforded a margin of appreciation in conforming with their obligations under this provision.[1683]

However, the protection afforded by Article 13 does not go so far as to require any particular form of remedy, in view of that margin of appreciation afforded to Contracting States.[1684]

Nor does Article 13 go so far as to require the incorporation of the Convention in domestic law.[1685] But the States parties have now all incorporated the Convention into their domestic legal order; the Court's case-law will thus be directly applicable.

Article 13 does not guarantee an applicant a right to secure the prosecution and conviction of a third party or a right to „private revenge".[1686]

The requirements of Article 13, and of the other Convention provisions, take the form of a guarantee and not of a mere statement of intent or a practical arrangement.[1687] That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention.

*b) An arguable claim:*

Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of every supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an "arguable" one in terms of the Convention.[1688]

Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order (Rotaru v. Romania [GC], 2000, § 67). Article 13 has no independent existence; it merely complements the other substantive clauses of the Convention and its Protocols.[1689]

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[1679] Kudła v. Poland (2000)
[1680] Scordino v. Italy (2006)
[1681] Slimani v. France (2004)
[1682] Boyle and Rice v. the United Kingdom (1988)
[1683] Vilvarajah and Others v. the United Kingdom (1991)
[1684] Budayeva and Others v. Russia (2008)
[1685] Smith and Grady v. the United Kingdom (1999)
[1686] Öneryıldız v. Turkey (2004)
[1687] Čonka v. Belgium (2002)
[1688] Boyle and Rice v. the United Kingdom (1988)
[1689] Zavoloka v. Latvia (2009)

It can only be applied in combination with, or in the light of, one or more Articles of the Convention or the Protocols thereto of which a violation has been alleged. To rely on Article 13 the applicant must also have an arguable claim under another Convention provision.

Where an applicant submits an arguable claim of a violation of a Convention right, the domestic legal order must afford an effective remedy.[1690]

The Court does not believe that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto.[1691]

Where the arguability of a complaint on the merits is not in dispute, the Court finds Article 13 applicable.[1692]

Where the Court has found a violation of the Article of the Convention or the Protocols in response to the complaint for which the right to a domestic remedy is invoked under Article 13, the Court finds the Article 13 complaint to be arguable.

In the case of Batı and Others v. Turkey (2004), concerning the length of the proceedings upon a complaint of ill-treatment in police custody against young detainees and a pregnant woman, leading to the acquittal of the perpetrators as the offence had become time-barred, the Court found that the respondent State's responsibility under Article 3 was engaged as a result of the acts of torture. The applicants' complaints were accordingly "arguable" for the purposes of Article 13.

In the case of Camenzind v. Switzerland (1997), concerning the effectiveness of the remedy available to complain about a house search, the "arguable" nature of the Article 8 complaint was not in doubt, since the Court found that the impugned search constituted an interference with the applicant's right to respect for his home in breach of that Article.

Where an applicant relies on Article 13 taken together with another Article, without previously having raised a complaint under the latter Article by itself, the Court may take the view that the complaint is nevertheless arguable, having regard, for example,

- to all the facts and arguments put forward by the applicant before the domestic courts and reiterated before the Court;[1693]
- to the findings of both the pre-trial investigation and the trial court about the length of the pre-trial stage;[1694]
- to the recognition by the domestic court of the poor conditions of detention endured by an applicant in a prison cell.[1695]

The Court may also consider prima facie that the complaint is arguable. This was the finding in cases concerning the effectiveness of remedies by which to complain of the length of proceedings, where the Court addressed the complaint under Article 13 first, then the Article 6 § 1 complaint. In Panju v. Belgium (2014), without prejudging the question whether or not the reasonable time requirement had been met, the Court found that the applicant's complaint concerning the length of the judicial investigation constituted prima facie an "arguable" complaint, as it had lasted for over eleven years. The applicant was thus entitled to an effective remedy in this connection.[1696]

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[1690] Costello-Roberts v. the United Kingdom (1993)
[1691] Boyle and Rice v. the United Kingdom (1988)
[1692] Vilvarajah and Others v. the United Kingdom (1991)
[1693] Stelian Roşca v. Romania (2013)
[1694] Hiernaux v. Belgium (2017)
[1695] Barbotin v. France (2020)
[1696] Sürmeli v. Germany (2006)

The Court has also found Article 13 applicable as the applicant had prima facie an arguable complaint to make before the national courts under Article 3 of the Convention. In the case of Yengo v. France (2015), the Court based that conclusion on an interpretation of the recommendations issued urgently by an independent national authority for the review of detention conditions. The Court found a violation of Article 13 in the light of Article 3 and did not examine the question of the Article 3 violation separately.

The fact that a complaint has been declared admissible may be an indication that it can be regarded as „arguable". In the case of Hatton and Others v. the United Kingdom (2003), the Court did not find a violation of Article 8 of the Convention, but took the view that it had toaccept the arguable nature of the complaint under that Article.

In addition, the inadmissibility of a complaint may be an indication of the inapplicability or non-violation of Article 13. In the case of Boyle and Rice v. the United Kingdom (1988), the Court found that on the ordinary meaning of the words, it was difficult to conceive how a „manifestly ill-founded" claim could nevertheless be "arguable" and vice versa. Rejection of a case as „manifestly ill-founded" means basically that there is not even an appearance of a justified complaint against the respondent State.

In the case of Powell and Rayner v. the United Kingdom (1990), the Court stated that, to address the question whether substantive claims were „arguable", the particular facts and the nature of the legal issues raised had to be examined, notably in the light of the Commission's admissibility decisions and the reasoning contained therein. However a claim was not necessarily rendered arguable because, before rejecting it as inadmissible, the Commission had devoted careful consideration to it and to its underlying facts. The Court was thus competent to take cognisance of all questions of fact and law arising in the context of the Article 13 complaints duly referred to it, including the "arguability" or not of each of the substantive claims. And while it was not decisive, the Commission's decision on the admissibility of the basic complaints provided, in its operative part and reasons, useful indications on their arguability for the purposes of Article 13.

In the case of Walter v. Italy (2006), the substantive complaints were declared inadmissible as manifestly ill-founded given that there was not even an appearance of a justified complaint against the respondent State. Thus Article 13 did not apply and this part of the application was incompatible ratione materiae with the Convention provisions.

In the case of Al-Shari and Others v. Italy (2005), the considerations as to the factual elements which had led the Court to dismiss the applicants' complaints under the substantive provision relied upon led it to conclude, under Article 13, that there was no arguable complaint. Consequently, Article 13 did not apply and this part of the application was inadmissible as manifestly ill-founded.

In the case of Kiril Zlatkov Nikolov v. France (2016) the Court found that a complaint which had been declared inadmissible for a lack of significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention, even if it might seem not to be manifestly ill-founded, was not „arguable" within the meaning of the Article 13 case-law. It followed that Article 13 did not apply and that part of the application was manifestly ill-founded.

The finding of a violation of another Convention provision is not a prerequisite for the application of Article 13.[1697] Notwithstanding its wording, Article 13 may come into play even without a violation of another provision – one of the so-called „substantive" Articles – of the Convention.[1698] A person cannot establish a violation before a „national authority" unless he is first able to lodge with such an "authority" a complaint to that effect. Consequently, it cannot be a prerequisite for the application of Article 13 that the Convention be in fact violated. Article 13 guarantees the availability within the national legal order of an effective remedy to enforce

[1697] Camenzind v. Switzerland (1997)

[1698] Klass and Others v. Germany (1978)

the Convention rights and freedoms – and therefore to complain of an inability to exercise them – in whatever form they may happen to be secured.[1699] Thus even if the Court has found no violation of a provision, the complaint may remain „arguable" for the purposes of Article 13.[1700] In the case of D.M. v. Greece (2017), even though the Court found no violation of Article 3 of the Convention under its substantive head, having regard to the conditions of the applicant's detention, it did not find that the applicant's complaint in this connection was prima facie unarguable. The Court reached this conclusion only after examining the merits of the case. It thus found that the applicant had raised an arguable complaint for the purposes of Article 13.

In the case of Nicolae Virgiliu Tănase v. Romania (2019), the complaint under Article 2 of the Convention was declared admissible. While the Court did not find a violation of that provision, it nevertheless considered that the complaint submitted by the applicant under Article 2 raised serious questions of fact and law requiring an examination on the merits. The Court thus found that the relevant complaint was „arguable" for the purposes of Article 13 of the Convention.

In the case of Zavoloka v. Latvia (2009), the mere fact that the Court had found no violation of Article 2 of the Convention taken separately was not in itself capable of depriving the complaint of its „arguable" nature for the purposes of Article 13. However, given all the relevant circumstances of the case, the Court took the view that no arguable allegation of a violation of Article 2 had been made out in respect of redress for damage sustained by the applicant on account of the death of her daughter in a car accident caused by a third party. The Court thus found no violation of Article 13 in connection with Article 2.

Considerations as to the facts which have led the Court to dismiss the applicant's complaints under substantive clauses may lead it to conclude, under Article 13, that the complaints were not arguable.[1701] Article 13 will thus not be applicable.

In the case of Halford v. the United Kingdom (1997), the Court had found no violation of Article 8 as regards telephone calls made by the applicant on her home telephone. And the evidence submitted by the applicant as to a reasonable likelihood of some measure of surveillance having been applied to her in breach of Article 8 had not been sufficient to found an "arguable" claim within the meaning of Article 13. It followed that there had been no violation of Article 13 in relation to the applicant's complaint concerning her home telephone.

In the case of Çaçan v. Turkey (2004), the Court found that there had been no violation of Articles 3 and 8 of the Convention or of Article 1 of Protocol No. 1 as there was no sufficient factual basis for the applicant's complaint that her home and possessions had been destroyed by the security forces. After a comprehensive examination of the facts, the Court found that the complaint was not arguable for the purposes of Article 13 given that the applicant had failed to lay the basis of a prima facie case of misconduct on the part of the security forces.

In the case of Ivan Atanasov v. Bulgaria (2010), the Court, taking account of the specificcircumstances and the evidence available, found that, as the violations of Article 8 and of Article 1 of Protocol No. 1 were not made out, Article 13 was not applicable in the absence of an arguable complaint.

In order to find that complaints are not "arguable" for the purposes of Article 13, the Court may refer either to the considerations which led it to find no violation of another provision,[1702] finding on the basis of the evidence adduced that it discloses no appearance of a violation,[1703] or to its inapplicability.[1704]

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[1699] Lithgow and Others v. the United Kingdom (1986)
[1700] Valsamis v. Greece (1996)
[1701] Al-Shari and Others v. Italy (2005)
[1702] Galanopoulos v. Greece (2013)
[1703] Söylemez v. Turkey (2006)
[1704] Athanassoglou and Others v. Switzerland (2000)

In the case of Russian Conservative Party of Entrepreneurs and Others v. Russia (2007), given that the third applicant had no arguable complaint of a violation of his right to vote and that the Court had found no violation of Article 3 of Protocol No. 1, Article 13 was not applicable in respect of that applicant.

In the case of Athanassoglou and Others v. Switzerland (2000), in the context of a complaint about the lack in domestic law of a judicial remedy to challenge a decision, the connection between that decision and the Convention rights recognised in domestic law and invoked by the applicants was too tenuous and remote to attract the application of Article 6 § 1 of the Convention.

The reasons for that finding likewise led to the conclusion, on grounds of remoteness, that no arguable claim of a violation of Article 2 or Article 8 of the Convention and, consequently, no entitlement to a remedy under Article 13, had been made out by the applicants. In sum, Article 13 was inapplicable. Similarly in Balmer-Schafroth and Others v. Switzerland (1997), the Court reached the same conclusion as to Article 13 after finding Article 6 inapplicable.

The Court may also declare admissible an application whose sole complaint concerns Article 13. Moreover, the Court has decided on the applicability of Article 13 and the existence of an arguable complaint under Article 1 of Protocol No. 1 by analogy with another case.[1705]

### 9.7.2. National authority

Article 13 requires that where an individual plausibly considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national "authority" in order both to have his claim decided and, if appropriate, to obtain redress.[1706]

According to the travaux préparatoires in respect of the European Convention on Human Rights, the national authority before which a remedy will be effective may be a judicial or nonjudicial body. The Court may find a remedy before a judicial authority to be essential. In the case of Ramirez Sanchez v. France (2006), having regard to the serious repercussions of prolonged solitary confinement for a prisoner, the Court found a violation of Article 13 of the Convention in the light of Article 3, as under the domestic law there was no effective remedy before a judicial body by which to challenge the procedural compliance or the merits, and thus the grounds, of decisions to prolong a convicted terrorist's solitary confinement over an eight-year period. By contrast, the Court may also take the view that there is no need to rule on whether effective redress necessarily required a judicial procedure, even if it is true that judicial remedies furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13.[1707]

In the case of Z and Others v. the United Kingdom (2001), the Court did not consider it appropriate to make any findings as to whether only court proceedings could have furnished effective redress in respect of local authorities' failings to care for children who were ill. However, the Court recognised that the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment or the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they had not been afforded an effective remedy in breach of Article 13 of the Convention.

The „authority" referred to in Article 13 does not need, in all cases, to be a judicial institution

[1705] Chizzotti v. Italy (2005)

[1706] Klass and Others v. Germany (1978)

[1707] Z and Others v. the United Kingdom (2001)

in the strict sense or a tribunal within the meaning of Articles 6 § 1 and 5 § 4 of the Convention.[1708]

The national authority may be

- a quasi-judicial body such as an ombudsman;[1709]
- an administrative authority such as a government minister[1710], or
- a political authority such as a parliamentary commission.[1711]

However, the authority's powers and the procedural safeguards that it affords are taken into account in order to determine whether the remedy is effective.[1712]

The Court will verify whether non-judicial „authorities" are independent[1713] and whether procedural safeguards are afforded to the applicant.[1714]

In the case of Khan v. the United Kingdom (2000), the referral of complaints to the Police Complaints Authority, for an investigation into the conduct of police officers, was left to the discretion of the Chief Constable. Moreover, the Secretary of State played an important role in appointing, remunerating and, in certain circumstances, dismissing members of the Police Complaints Authority. Thus the system of investigation of complaints did not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13.

A non-judicial body must normally have the power to hand down a legally binding decision. As regards remedies by which to complain about the monitoring of prisoners' correspondence, this was not the case, for example, of a Board of Visitors which could not enforce its conclusions or entertain applications from individuals who were not in prison; or of a Parliamentary Commissioner, who had no power to render a binding decision granting redress.[1715]

The same conclusion was reached as regards the Ombudsman and Chancellor of Justice in the context of a remedy available to the individual concerned in a system of secret security checks, in spite of their power to bring criminal or disciplinary proceedings.[1716]

In the case of Chahal v. the United Kingdom (1996), the Court found shortcomings in nonjudicial proceedings before an advisory panel reviewing the deportation order of a terrorism suspect, as the applicant was not entitled, inter alia, to legal representation, the panel had no power of decision and its advice to the Home Secretary was not binding and was not disclosed. In those circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.

A commission only having advisory powers cannot be regarded as an effective remedy. In the case of Zazanis v. Greece (2004), the powers of the commission in question, which could be called upon in the conditions laid down by presidential decree, were purely advisory. Thus any finding as to the non-enforcement of a judgment of the Supreme Administrative Court by the executive was not binding on the latter.

The reviewing authority cannot be a political organ which has issued the impugned instructions, otherwise it would be a judge in its own cause. That would be the case of the competent Minister, if dealing with a complaint as to the validity of an Order or Instruction under which a measure of control over correspondence had been carried out, as he could not be

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[1708] Golder v. the United Kingdom (1975)
[1709] Leander v. Sweden (1987)
[1710] Boyle and Rice v. the United Kingdom (1988)
[1711] Klass and Others v. Germany (1978)
[1712] Mugemangango v. Belgium (2020)
[1713] Leander v. Sweden (1987)
[1714] Chahal v. the United Kingdom (1996)
[1715] Silver and Others v. the United Kingdom (1983)
[1716] Segerstedt-Wiberg and Others v. Sweden (2006)

considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13.[1717] The position, however, would be otherwise if the complainant alleged that the impugned measure resulted from a misapplication of one of those directives.

### 9.7.3. An effective remedy

To be effective, the remedy must be capable of directly remedying the impugned situation.[1718] Contracting States are afforded some discretion (or a margin of appreciation) as to the manner in which they provide the requisite remedy and conform to their Convention obligations under Article 13.[1719] Neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention.[1720] But the nature of the right at stake has implications for the type of remedy the State is required to provide under Article 13.[1721]

The domestic authorities ruling on the case must examine the merits of the Convention complain.[1722] Thus the effectiveness of the remedy is assessed in relation to each complaint. The remedy must encompass the merits of the complaint as submitted by the applicant. If the authority or court concerned reformulates the complaint or fails to take into consideration an essential element of the alleged violation of the Convention, the remedy will be insufficient.[1723]

In the case of Hasan and Chaush v. Bulgaria (2000), the Supreme Court had refused to examine the merits of a complaint under Article 9 of the Convention, alleging State interference with the internal organisation of a religious community, finding that the Council of Ministers enjoyed an unlimited discretionary power in deciding whether or not to register the constitution and leadership of a religious denomination. It had merely ruled on the formal question whether the Decree laying down changes to the leadership and constitution of the Muslim community had been issued by the competent body. The appeal to the Supreme Court against the Decree was not, therefore, found to be an effective remedy.

In the case of Metropolitan Church of Bessarabia and Others v. Moldova (2001), the Supreme Court of Justice had not replied to the applicants' main complaints, namely their wish to join together and manifest their religion collectively within a Church distinct from the Metropolitan Church of Moldova and to have the right of access to a court to defend their rights and protect their assets, given that only denominations recognised by the State enjoyed legal protection. Consequently, not being recognised by the State, the Metropolitan Church of Bessarabia had no rights it could assert in the Supreme Court of Justice.

The effectiveness of the remedy is assessed in concreto.[1724] To challenge a judgment handed down against him the applicant had sought to lodge an appeal – prima facie out of time – which would have allowed him to complain that the proceedings in absentia were not compatible with Article 6 of the Convention.

The appeal was declared inadmissible by the Court of Appeal. However, on an appeal on points of law the Court of Cassation nevertheless examined his complaint and concluded that he had rightly been convicted in absentia. The applicant had thus had an effective remedy.

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[1717] Silver and Others v. the United Kingdom (1983)
[1718] Pine Valley Developments Ltd and Others v. Ireland (1989)
[1719] Kaya v. Turkey (1998)
[1720] Council of Civil Service Unions and Others v. the United Kingdom (1987)
[1721] Budayeva and Others v. Russia (2008)
[1722] Smith and Grady v. the United Kingdom (1999)
[1723] Glas Nadezhda EOOD and Elenkov v. Bulgaria (2007)
[1724] Colozza and Rubinat v. Italy (1982)

The requirements of Article 6 may be relevant for the assessment of the effectiveness of a remedy for the purposes of Article 13 of the Convention. As a general rule, the fundamental criterion of fairness, which encompasses the equality of arms, is a constitutive element of an effective remedy. A remedy cannot be considered effective unless the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the Convention are provided.[1725]

The term „effective" means that the remedy must be sufficient and accessible, fulfilling the obligation of promptness.[1726] The remedy must enable the submission of a complaint about the alleged violation of the Convention.

Excessively restrictive requirements may render the remedy ineffective. In the case of Camenzind v. Switzerland (1997), concerning the effectiveness of a remedy by which to complain of a house search under Article 8 of the Convention, only persons who were still affected, at least in part, by the impugned decision had locus standi to lodge a complaint before the Indictment Division of the Federal Court, which had accordingly declared inadmissible that part of the applicant's complaint concerning the search because the measure had ceased and he was no longer affected by it. Thus, even though the court had considered the complaint in so far as it concerned the interception and recording of a telephone conversation, the remedy could not be termed „effective" within the meaning of Article 13.

Remedies must be accessible for the person concerned. In the case of Petkov and Others v. Bulgaria (2009), candidates standing in parliamentary elections could challenge the result of the elections before the Constitutional Court, but only through the limited category of persons or bodies who were entitled to refer a matter to it. However, the Court has also found that a remedy was not ineffective merely because it was not directly accessible to the person concerned, given that the latter had the benefit of a statutory collective system of dispute settlement before an arbitral tribunal through the shareholders' representative, the Court having found this system not to be in breach of the requirements of Article 6 § 1 of the Convention, which were stricter than those of Article 13.[1727]

In cases involving minors, a legal representative must be capable of bringing proceedings on their behalf. In Margareta and Roger Andersson v. Sweden (1992), a mother had not been prevented from challenging, on behalf of her twelve-year-old child, the restrictions on contacts between her and her son.

A domestic remedy must present minimum guarantees of promptness.[1728] A remedy which will not bear fruit in sufficient time is inadequate and ineffective.[1729] In the case of Kadiķis v. Latvia (2006), the Court found a violation of Article 13 of the Convention in the light of Article 3 given that, in particular, the applicant had been imprisoned for fifteen days and the competent authority by law had a period of fifteen or thirty days to respond to an application or complaint, with the possibility for those time-limits to be extended in certain cases.

However, in the case of Kaić and Others v. Croatia (2008), the Court did not rule out the possibility that there might be cases where the delayed implementation, or even nonimplementation, of the Constitutional Court's decisions might be justified, rather than entailing a violation of Article 13 in the light of Article 6 § 1. However, in that case the Government had not attempted to justify the six-month delay, which was of particular importance given the fact that the predicate violation concerned the length of proceedings.

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[1725] Csüllög v. Hungary (2011)

[1726] Paulino Tomás v. Portugal (2003)

[1727] Lithgow and Others v. the United Kingdom (1986)

[1728] Kadiķis v. Latvia (2006)

[1729] Pine Valley Developments Ltd and Others v. Ireland (1991)

The existence of a mere power of suspension may suffice for the purposes of Article 13, taking account of the nature of the damage that might be caused and the specificities of the case at hand.[1730]

In the case of Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey (2006), the applicant company, which broadcast radio programmes, had been banned by the RTÜK, an independent administrative authority whose role was to govern the activities of radio and TV stations, after it had found a breach of the law. The Court took the view that the existence of a mere possibility of suspending the implementation of the measure could suffice for compliance with Article 13, even though the domestic courts had not granted the applicant company's request for a stay of execution in that case.

The same conclusion has been reached in cases concerning the expulsion and extradition of aliens who argue that they will be exposed, in their destination country, to a serious and proven risk of torture or other ill-treatment. In the case of Allanazarova v. Russia (2017), the Court found a violation of Article 13 of the Convention in the light of Article 3, as an appeal against the extradition under Russian law did not have an automatic suspensive effect or entail stringent scrutiny of the risk of ill-treatment in the State, Turkmenistan, which had requested the extradition of a woman.

Post-hoc remedies may suffice to be effective. In the case of M.S. v. Sweden (1997), it had been open to the applicant, whose complaint under Article 8 of the Convention concerned the disclosure, without her consent, of confidential personal and medical data by one public authority to another, to bring criminal and civil proceedings before the ordinary courts against the relevant staff of a clinic and to claim damages for breach of professional secrecy. Having regard to the limited nature of the disclosure and to the different safeguards, in particular the Social Security Office's obligation to secure and maintain the confidentiality of the information, the various post-hoc remedies satisfied the requirements of Article 13.

By contrast, the Court has found a violation of Article 13 of the Convention taken together with Article 11 where the judicial remedy that was available to the organisers in respect of decisions refusing to authorise their public events, only after the time when they were due to take place (and thus a post-hoc remedy), was not such as to provide satisfactory redress for the alleged violations of the Convention.[1731]

The Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant,[1732] these principles having been developed under Article 35 § 1 of the Convention. In the case of A.B. v. the Netherlands (2002), the Court took account, first, of the lack of adequate implementation by the authorities of judicial orders to repair the unacceptable shortcomings in prisons and, secondly, the failure to implement urgent recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In the case of Orhan v. Turkey (2002), the Court had regard to the situation which existed in south-east Turkey at the time of the events complained of by the applicant, which was characterised by violent confrontations between the security forces and members of the PKK. In the case of Aydın v. Turkey (1997), the Court found that the State should have taken particular precautions in the examination of a woman who alleged that she was raped in custody by a State official. The victim should have been examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence was not circumscribed by instructions given by the prosecuting authority as to the scope of the examination.

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[1730] Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey (2006)

[1731] Bączkowski and Others v. Poland (2007)

[1732] Akdivar and Others v. Turkey (1996)

However, a respondent State is not entitled to raise the political context as a defence to an insufficient remedy.[1733] The respondent Government had pleaded before the Commission that, pending the elaboration of an agreed political solution to the overall Cyprus problem, there could be no question of a right of displaced persons either to return to the homes and properties which they had left in Northern Cyprus or to lay claim to any of their immovable property vested in the "TRNC" authorities.

The remedy required by Article 13 must be „effective" in practice as well as in law.[1734] In the cases of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria (1994), the Government had not put forward any example showing the application of possible remedies in a similar case. In the case of Iovchev v. Bulgaria (2006), the courts dismissed the applicant's action and refused compensation on the sole ground that he had failed to adduce sufficient proof that he had suffered non-pecuniary damage arising out of the conditions of his detention. There was nothing to indicate that an action under the State Responsibility for Damage Act could not in principle provide a remedy in this connection.

In particular, the exercise of the remedy must not be unjustifiably hindered by acts or omissions of the respondent State.[1735] Thus, no question of hindering access to a tribunal arises where a litigant, represented by a lawyer, freely brings proceedings in a court, makes his submissions to it and lodges such appeals against its decisions as he considers appropriate.[1736] The obligation of States under Article 13 encompasses a duty to ensure that the competent authorities enforce remedies when granted (compare Article 2 § 3 (c) of the International Covenant on Civil and Political Rights). It would be inconceivable if Article 13 secured the right to a remedy, and provided for it to be effective, but did not guarantee the implementation of remedies used successfully. To hold the contrary would lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention.[1737]

The effectiveness must be established in relation to the relevant period, as a subsequent development of the case-law will not be sufficient.[1738]

In the case of Ramirez Sanchez v. France (2006), a new remedy stemming from a change in the case-law did not have retrospective effect and could not have any bearing on the applicant's position; it could not therefore be regarded as effective. The Court accordingly found a violation of Article 13, in the light of Article 3, on account of the lack of a remedy in domestic law that would have allowed the applicant to challenge the decisions to prolong his solitary confinement. The Court has found that it does not need to examine remedies which did not exist at the relevant time or were not applicable to the facts of the case. As the Court reiterated in Peck v. the United Kingdom (2003), its task is not to review the relevant law or practice in the abstract but rather to confine itself, without overlooking the general context, to examining the issues raised by the case before it and, in particular, to considering only those remedies which could have some relevance for the applicant.[1739]

A single final judicial decision, however comprehensive in its reasoning – given, moreover, at first instance – is not sufficient to satisfy the Court that there was an effective remedy available in theory and in practice.[1740]

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[1733] Cyprus v. Turkey (2001)
[1734] Menteş and Others v. Turkey (1997)
[1735] Aksoy v. Turkey (1996)
[1736] Matos e Silva, Lda., and Others v. Portugal (1996)
[1737] Kenedi v. Hungary (2006)
[1738] Khider v. France (2009)
[1739] Stewart-Brady v. the United Kingdom (1997)
[1740] Sürmeli v. Germany (2006)

The absence of further case-law indicates the present uncertainty of a remedy in practical terms.[1741] Thus in the case of Martins Castro and Alves Correia de Castro v. Portugal (2008), the Court found a violation of Article 13 in the light of Article 6 § 1, given that an action to establish non-contractual State liability could not be regarded as an „effective" remedy while the case-law emanating from the Supreme Administrative Court had not been consolidated in the Portuguese legal system, through a harmonisation of the case-law divergences which were to be found at the time of the judgment.

The Court may nevertheless examine the effectiveness of a remedy before the practice of the domestic courts can be determined.[1742]

A lack of established judicial practice may not be decisive. In the case of Charzyński v. Poland (2005), at the time when a law of 2004 entered into force, the long-term practice of the domestic courts could not yet be established. However, the wording of the 2004 Act clearly indicated that it was specifically designed to address the issue of an excessive length of proceedings before the domestic courts. The applicant was thus required by Article 35 § 1 of the Convention to complain to a domestic court, under that Act, about a breach of the right to a trial within a reasonable time, to ask for the proceedings to be expedited and to claim just satisfaction.

The „effectiveness" of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant.[1743]

The word „remedy", in the context of Article 13, does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint.[1744] Article 13 guarantees the availability of a remedy but not a successful outcome.[1745]

Feeble prospects of success in the light of the particular circumstances of the case do not detract from the „effectiveness" of a remedy for the purpose of Article 13.[1746]

The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to make use of it.[1747]

The mere fact that an applicant's claims were all dismissed is not in itself sufficient to determine whether or not the remedy was „effective".[1748] Thus in Amann v. Switzerland (2000), the Court found no violation of Article 13 in the light of Article 8, taking the view that the remedy was effective even though the applicant's claims had been dismissed. The Federal Court had jurisdiction to rule on those complaints and duly examined them.

The context in which an alleged violation – or category of violations – occurs, as the protection afforded by Article 13 is not absolute, may entail inherent limitations on the conceivable remedy.[1749] The Convention is to be read as a whole and therefore any interpretation of Article 13 must be in harmony with the logic of the text. In such circumstances Article 13 is not regarded as inapplicable, but its "effective remedy" requirement means a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in the context.[1750]

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[1741] Horvat v. Croatia (2001)
[1742] Slaviček v. Croatia (2002)
[1743] Swedish Engine Drivers' Union v. Sweden (1976)
[1744] C. v. the United Kingdom (1983)
[1745] R. v. the United Kingdom (1984)
[1746] R. v. the United Kingdom (1994)
[1747] Akdivar and Others v. Turkey (1996)
[1748] Amann v. Switzerland (2000)
[1749] Kudła v. Poland (2000)
[1750] Klass and Others v. Germany (1978)

The scope of judicial scrutiny by a domestic court must be sufficient to guarantee protection under Article 13. Insufficient powers of judicial review exercised by the courts may entail a violation of Article 13.[1751]

In the cases of Soering v. the United Kingdom (1989), and Vilvarajah and Others v. the United Kingdom (1991), the Court found judicial review to be an effective remedy for the applicants' complaints, concluding that there had been no violation of Article 13 of the Convention in the light of Article 3. The UK courts had been able to review the „reasonableness" of an extradition or expulsion decision in the light of the kind of factors relied on by the applicants before the Convention institutions in the context of Article 3.

In addition, the aggregate of remedies provided for under domestic law may meet the requirements of Article 13, even where no single remedy may itself entirely satisfy them.[1752]

In the case of Brincat and Others v. Malta (2014), the Court pointed out that it had sometimes found, under certain conditions, that an aggregate of remedies sufficed for the purposes of Article 13 in conjunction with Articles 2 and 3. This concept generally refers to a number of remedies which can be taken up one after the other or in parallel and which cater for different aspects of redress, such as a civil remedy providing for compensation and a criminal action for the purposes of satisfying the procedural aspect of Articles 2 and 3.

In Sürmeli v. Germany (2006), concerning the length of court proceedings, the Court did not rule on the effectiveness of four remedies in the aggregate, given that the Government had neither alleged nor shown that a combination of two or more of them would satisfy the requirements of Article 13.

Remedies may not be effective where there is some doubt as to which courts – civil, criminal, administrative or others – have jurisdiction to examine a complaint, and there is no effective or speedy mechanism for the purpose of resolving such uncertainty. In the case of Mosendz v. Ukraine (2013), the applicant had brought a civil claim against the Ministry of the Interior seeking compensation for damage in respect of the ill-treatment and death of her son during his compulsory military service. Pursuant to the instructions of a local court which refused to institute civil proceedings, she resubmitted her claim under the rules of administrative procedure. While the firstinstance court allowed her claim, the appellate court quashed that judgment on procedural grounds, holding that the case fell under the jurisdiction of the civil rather than the administrative courts, this decision being upheld by the highest court more than five years after the applicant had lodged her claim. As a result, the applicant's claim for damages remained without examination and she was denied an effective domestic remedy, in breach of Article 13, in respect of her complaints under Articles 2 and 3 of the Convention.

Where an applicant relies on the argument that an existing domestic remedy is ineffective, it is incumbent on the Government to adduce evidence of the implementation and practical effectiveness of the remedy that they have suggested, in the particular circumstances of the case, providing relevant examples of case-law from national courts or pointing to the decisions of administrative authorities in a similar case.[1753] The Court will consider whether a given remedy has acquired a sufficient degree of certainty in its implementation.[1754]

The Government must demonstrate the effectiveness of all the remedies on which they rely, failing which the Court may find a violation of Article 13[1755] or decline to rule on the matter.

### 9.7.4. Scope of Article 13 of the Convention

[1751] Smith and Grady v. the United Kingdom (1999)
[1752] Silver and Others v. the United Kingdom (1983)
[1753] Efstratiou v. Greece (1996)
[1754] Čonka v. Belgium (2002)
[1755] Wille v. Liechtenstein (1999)

The scope or extent of the field of action of the obligation under Article 13 will vary depending on the nature of the complaint under the Convention,[1756] or the nature of the right relied upon under the Convention.[1757]

To be effective, a remedy must be capable of directly providing redress for the impugned situation.[1758] The means of submitting complaints will be regarded as "effective" if they could have prevented the alleged violation occurring or continuing or could have afforded the applicant appropriate redress for any violation that had already occurred.[1759] Thus a successful outcome of an effective remedy could be, for example, depending on the case, the annulment, withdrawal or amendment of an act breaching the Convention, an investigation, reparation, or sanctions imposed on the person responsible for the act.

Where an arguable breach of one or more of the rights under the Convention is in issue, there should be available to the victim a mechanism for establishing any liability of State officials or bodies for that breach. Furthermore, in appropriate cases, compensation for the pecuniary and nonpecuniary damage flowing from the breach should in principle be available as part of the range of redress.[1760]

The Court adopts a stricter approach to the notion of „effective remedy" in the following situations:

- Where a right with as fundamental an importance as the right to life (Article 2 of the Convention) or the prohibition of torture and inhuman or degrading treatment (Article 3 of the Convention) is at stake, the notion of an effective remedy for the purposes of Article 13 entails, without prejudice to any other remedy available under the domestic system, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.[1761]
- The same is true where the right to a lawful arrest or detention (Article 5 of the Convention) is at stake and a relative has validly claimed that his or her son was taken into custody and has disappeared since his arrest.[1762]

But the Court has also drawn a distinction between the degrees of effectiveness of the remedies required in relation to the violations of substantive rights by the State or its agents (negative obligations) and violations due to a failure by the State to protect individuals against acts of third parties (positive obligations).[1763]

In Paul and Audrey Edwards v. the United Kingdom (2002), the Court pointed out that in cases where an alleged failure by the authorities to protect persons from the acts of others was concerned, Article 13 might not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, compensation for the non-pecuniary damage flowing from the breach should, in principle, be available.

A complaint by an applicant alleging that his return to another country would expose him to treatment prohibited by Articles 2, 3 and 8 of the Convention requires independent and rigorous

[1756] Chahal v. the United Kingdom (1996)
[1757] Hasan and Chaush v. Bulgaria (2000)
[1758] Pine Valley Developments Ltd and Others v. Ireland (1989)
[1759] Kudła v. Poland (2000)
[1760] T.P. and K.M. v. the United Kingdom (2001)
[1761] Kaya v. Turkey (1998)
[1762] Kurt v. Turkey (1998)
[1763] Z and Others v. the United Kingdom (2001)

scrutiny[1764] and particular promptness.[1765] Moreover, to be effective the remedy must be accompanied by the automatic suspensive effect of expulsion measures in cases where the applicant complains of a risk under Articles 2 or 3.[1766]

This requirement of automatic suspensive effect has also been confirmed in respect of complaints under Article 4 of Protocol No. 4.[1767]

The Court recognises two types of effective remedy, namely preventive and compensatory remedies, by which to complain about the effectiveness of remedies concerning allegations of poor conditions of detention under Article 3 of the Convention, the length of proceedings under Article 6 § 1 of the Convention and in cases of a particular nature with high stakes where the length of proceedings is clearly decisive for an applicant's family life under Article 8 of the Convention. Thus, for example, the means available to an applicant under domestic law for raising a complaint about the length of proceedings under Article 6 § 1 will be "effective" within the meaning of Article 13 if they can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays that have already occurred.[1768]

In cases where the authorities, through deliberate actions and omissions, prevent a parliamentary candidate from standing, the breach of Article 3 of Protocol No. 1 cannot be remedied exclusively through an award of compensation.[1769]

The effectiveness of a remedy may be restricted in respect of qualified rights such as the right to freedom of religion.[1770]

The scope of Article 13 may overlap with that of other Convention provisions which guarantee a specific remedy. In matters of deprivation of liberty, where a violation of Article 5 § 1 of the Convention is at issue, Article 5 §§ 4 and 5 of the Convention constitutes lex specialis in relation to the more general requirements of Article 13.[1771]

The less stringent requirements of Article 13 will thus be absorbed thereby. Accordingly, in order to decide whether an applicant was required to make use of a particular domestic remedy in respect of his or her complaint under Article 5 § 1 of the Convention, the Court must evaluate the effectiveness of that remedy from the standpoint of Article 5 §§ 4 and 5.[1772] If the Court finds a violation of the Convention in the light of that lex specialis, there is no legal interest in re-examining the same subject matter of complaint under the lex generalis of Article 13.[1773] Moreover, Article 6 § 1 of the Convention, which guarantees inter alia a right of access to a court, provides for more stringent safeguards than those of the effective remedy under Article 13. As a result the Article 6 § 1 safeguards, applying to civil rights and obligations and to criminal charges, entirely absorb those of Article 13.[1774]

There is, however, no overlap and hence no absorption where the alleged Convention violation that the individual seeks to bring before a „national authority" is a violation of the right to trial within a reasonable time, contrary to Article 6 § 1.[1775]

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[1764] Jabari v. Turkey (2000)
[1765] Batı and Others v. Turkey (2004)
[1766] Gebremedhin [Gaberamadhien] v. France (2007)
[1767] Čonka v. Belgium (2002)
[1768] Krasuski v. Poland (2005)
[1769] Petkov and Others v. Bulgaria (2009)
[1770] Hasan and Chaush v. Bulgaria (2000)
[1771] Tsirlis and Kouloumpas v. Greece (1997)
[1772] Ruslan Yakovenko v. Ukraine (2015)
[1773] De Wilde, Ooms and Versyp v. Belgium (1971)
[1774] Airey v. Ireland (1979)
[1775] Kudła v. Poland (2000)

Where the violation of a Convention right is accompanied by a lack of an effective remedy, the Court may decide that it does not need to examine the same situation under Article 13.[1776]

In the case of X. and Y. v. the Netherlands (1985), the lack of a sufficient remedy was among the factors which led the Court to find a violation of Article 8 of the Convention. It therefore did not need to examine the same question in the light of Article 13.

### 9.7.5. Acts covered by Article 13 of the Convention

The scope of Article 13 extends to all acts in respect of which there could be a remedy under domestic law.

*a) Acts of the administration or the executive:*
In principle, all acts of the administration (of government) or of the executive fall within the scope of Article 13.[1777] The Article itself states that it extends to acts entailing a violation of the Convention committed by persons acting in an official capacity.[1778]

*b) Acts of the legislature:*
As regards acts of the legislature, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention,[1779] or contrary to equivalent domestic legal norms.[1780] The Court may thus reject part of the complaint as incompatible ratione materiae with the Convention.[1781] Similarly, Article 13 does allow a general policy as such to be challenged.[1782] However, according to the Commission, this principle does not apply to immigration rules.[1783] After examining the remedies available, the Court found a violation of Article 13 in the absence of effective domestic remedies for complaints under Articles 3, 8 and 14 of the Convention.

It cannot be deduced from Article 13 that there must be a remedy against legislation as such which is considered not to be in conformity with the Convention. Such a remedy would in effect amount to some sort of judicial review of legislation because any other review – generally sufficient for Article 13 which requires only a „remedy before a national authority" – could hardly be effective concerning legislation.[1784]

In Christine Goodwin v. the United Kingdom (2002), the Court stated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention.

In the area of complaints about legislation the Court has found that it does not need to examine questions of interpretation relating to the obligations under Article 13[1785], or that Article 13 does not apply,[1786] or that there has been no violation of Article 13.[1787]

Article 13 does not guarantee an effective remedy in respect of constitutional provisions.[1788]

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[1776] Hokkanen v. Finland (1994)
[1777] Al-Nashif v. Bulgaria (2002)
[1778] Wille v. Liechtenstein (1999)
[1779] The Sunday Times v. the United Kingdom (1991)
[1780] James and Others v. the United Kingdom (1986)
[1781] Saccoccia v. Austria (2007)
[1782] Hatton and Others v. the United Kingdom (2003)
[1783] Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985)
[1784] Young, James and Webster v. the United Kingdom (1979)
[1785] Boyle and Rice v. the United Kingdom (1988)
[1786] Gustafsson v. Sweden (1996)
[1787] Maurice v. France (2005)
[1788] Johnston and Others v. Ireland (1995)

*c) Acts of the judiciary:*

Concerning the acts of the judiciary, Article 13:

- does not impose the existence of different levels of jurisdiction;[1789]
- does not guarantee a right of appeal, this only being recognised by Article 2 of Protocol No. 7 in a limited number of cases,[1790] nor a right to a second level of jurisdiction;[1791] and
- does not guarantee a right to complain to a Constitutional Court in addition to the rights already available before the ordinary courts.[1792]

The mere fact that the judgment of the highest judicial body is not subject to further judicial review does not in itself infringe Article 13 or does not constitute an arguable complaint under the Convention.[1793]

Where the impugned act emanates from the highest national court or authority, the application of Article 13 is impliedly restricted since it does not require any further appellate remedy.[1794]

In the case of Wendenburg and Others v. Germany (2003), the lack of a remedy in respect of a decision of the Constitutional Court, which had declared a provision incompatible with the Basic Law had not raised any question under Article 13, and that part of the application was declared inadmissible as manifestly illfounded.

Consequently, the Convention provisions cannot be interpreted as obliging States to create bodies to supervise the judiciary or national legal service.[1795] Article 13 is thus not applicable in cases where the alleged violation of the Convention is a judicial act.

As a general rule, Article 13 is not applicable where the alleged violation of the Convention has taken place in the context of judicial proceedings, except where the violation that the individual wishes to bring before the court is a violation of the right to trial within a reasonable time, contrary to Article 6 § 1.[1796] Thus Article 13 cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6 § 1.[1797]

The Court has also found a violation of Article 13 of the Convention in the light of Article 6 § 2 where there was no remedy available to an applicant before a criminal court in order to obtain redress for a breach of his right to be presumed innocent.[1798]

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[1789] Müller v. Austria (1974)
[1790] Pizzetti v. Italy (1991)
[1791] Z. and E. v. Austria (1986)
[1792] Altun v. Germany (1983)
[1793] Tregubenko v. Ukraine (2003)
[1794] Crociani and Others v. Italy (1980)
[1795] Pizzetti v. Italy (1991)
[1796] Kudła v. Poland (2000)
[1797] Yassar Hussain v. the United Kingdom (2006)
[1798] Konstas v. Greece (2011)

# CHAPTER X

# SPECIFIC PROCEDURES

## 10.1. Juvenile criminal procedure (CPC)

A juvenile criminal proceeding shall be conducted with a view to ensuring that the juvenile concerned is integrated into society and that he does not commit any other criminal offence by fostering his education and promoting his intellectual, moral, and emotional development.[1799]

A juvenile criminal proceeding may be conducted against a person if he has attained the age of twelve years but has not attained the age of eighteen years when committing the criminal offence. If a proceeding is conducted against a juvenile for more than one criminal offence, including criminal offences committed before and after he has attained the age of fourteen years, the provisions on juveniles who have attained the age of fourteen years shall apply to the juvenile criminal proceeding.

A juvenile criminal proceeding may not be conducted if a proceeding is conducted against a defendant or a person reasonably suspected of having committed a criminal offencefor more than one criminal offence, and at least one of those criminal offences was committed after he has attained the age of eighteen years. This provision shall also apply if a juvenile was released on probation for a criminal offence committed after he has attained the age of eighteen years, and that case had to be joined, to a proceeding conducted regarding a criminal offence committed as a juvenile. If there is more than one defendant, the case of an adult defendant shall be adjudicated together with the case of a juvenile defendant by the court, provided that it relates to the case of the juvenile defendant.

In juvenile criminal proceedings public prosecution shall be mandatory; the prosecution service shall proceed with regard to any criminal offence subject to private prosecution.[1800]

In the course of a proceeding, the court, prosecution service, and investigating authority shall monitor continuously whether any circumstance concerning a juvenile triggers a duty of indication, or of initiating an authority proceeding, as defined in the Act on the protection of children and guardianship administration.[1801]

In a juvenile criminal proceeding, a court of first instance shall proceed as a panel if (1) the criminal offence is punishable by law by imprisonment for up to eight years or more, or (2) the case was referred to a court panel by a single judge. In a juvenile criminal proceeding, a court panel proceeding at first instance shall be composed of one professional judge and two lay judges. Only a professional judge may serve as a single judge or the chair of a panel. In a court proceeding conducted against a juvenile, (1) before the indictment, the investigating judge at first instance or the chair of the panel at second instance (2) after the indictment, the proceeding single judge or the chair of the panel at first instance, or a member of the panel at second or third instance, with the exception of the Curia, shall be a judge designated by the National Office for the Judiciary.

In a juvenile criminal proceeding, a person may serve as lay judge only if he is (1) a pedagogue, (2) a psychologist, or (3) a person who works, or used to work, in a position, for which a university or college degree is required, that directly facilitates the provision of healing, treatment, employment, development, assistance, upbringing, care, or social support to a care recipient, or the settlement of the circumstances of a child, within the framework of a family, child or youth protection service or the guardianship administration. When administering

[1799] CPC 677. §
[1800] CPC 678. §
[1801] CPC 679. §

justice, professional judges and lay judges shall have the same rights and obligations. The provisions on the disqualification of judges shall also apply to lay judges.[1802]

In a juvenile criminal proceeding, a prosecutor designated by a superior prosecution office shall proceed.[1803] In a proceeding against a juvenile, the participation of a defence counsel shall be mandatory. The attendance of a defence counsel shall be mandatory at the following events involving a juvenile before the indictment:

- interrogation as a suspect,
- confrontation,
- presentation for identification,
- on-site interrogation,
- reconstruction of the criminal offence, and
- a court session in a proceeding relating to a coercive measure affecting personal freedom subject to judicial permission.

The defence counsel shall be notified ex post of any procedural act carried out with the participation of the juvenile concerned, provided that the defence counsel did not attend, nor was notified of, the procedural act.[1804]

In a juvenile criminal proceeding, evidence shall also be taken concerning circumstances that are relevant to learning about the special needs and environment of a juvenile. The means used for the individual assessment of a juvenile shall include, in particular,

- social environment assessments,
- opinion by a probation officer or summary opinion by a probation officer,
- expert opinions,
- witness testimony by a probation officer,
- witness testimony by the statutory representative of, or another person caring for, the juvenile concerned.

A statutory representative of, or another person caring for, a juvenile shall be obliged to cooperate in the course of an individual assessment of the juvenile concerned.

The court, prosecution service, or investigating authority may order an expert examination regarding the maturity and level of understanding of a juvenile who had attained the age of fourteen years at the time of committing a criminal offence.

Before passing a conclusive decision at the latest, arrangements shall be made to carry out the individual assessment of a juvenile repeatedly if any data arises during a proceeding suggesting any significant change in the circumstances underlying the individual assessment of the juvenile concerned or if over two years passed since a means of evidence was obtained for the purpose of carrying out the individual assessment of the juvenile concerned.[1805]

After a juvenile is interrogated as a suspect, a social environment assessment shall be obtained without delay that provides information as specified by law andon the examination of factors. A social environment assessment shall also include the risk assessment of the vulnerability of a juvenile in the context of crime prevention. A social environment assessment shall be produced by a probation officer. A probation officer

- shall be obliged and entitled to access any data that is necessary to produce a social environment assessment;
- shall interview the juvenile concerned, as well as the statutory representative of, or another person caring for, the juvenile;
- shall also obtain the opinion of a pedagogue and establish a child protection history;

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[1802] CPC 680. §
[1803] CPC 681. §
[1804] CPC 682. §
[1805] CPC 683. §

- may inspect case documents and request information from a defendant, aggrieved party, witness, aide, other interested party, guardianship authority, child welfare service, or any previous probation officer.

For the purpose of producing a social environment assessment, a probation officer may make use of the assistance of the police organ established to carry out general policing tasks.[1806]

If preventive probation of a juvenile was ordered in the context of the juvenile being taken under protection, the prosecution service before the indictment or the court after the indictment, shall order obtaining a summary opinion by a probation officer. In his summary opinion, a probation officer shall make recommendations regarding any individual rule of behaviour, or obligation, to be imposed on the defendant and, even in the absence of any instruction by the court or prosecution service, he shall cover whether the defendant is willing and capable of complying with any foreseen rule of behaviour, or obligation, and if the aggrieved party consents to any reparation foreseen. A probation officer who oversees or oversaw any preventive probation concerning a juvenile shall not be disqualified from the production of a summary opinion by a probation officer.[1807]

After the communication of reasonable suspicion, arrangements shall be made without delay for the appointment of an expert, pursuant to statutory provisions, to examine the capacity to be held liable for his acts, and the soundness of the mind necessary for recognising the consequences of the criminal offence, of a juvenile, who has attained the age of twelve years but has not attained the age of fourteen years at the time of committing his criminal offence. More than one expert shall produce a joint expert opinion.[1808]

An investigation shall be concluded within one year after a juvenile is interrogated as a suspect, provided that the proceeding was instituted against the juvenile concerned for a criminal offence punishable by imprisonment for not more than five years. If an investigation is in progress against a juvenile for a criminal offence punishable by imprisonment for more than five years, the time limit for the investigation may not be extended beyond two years after the juvenile concerned is interrogated as a suspect.[1809]

Pre-trial detention may not be imposed on a juvenile, unless doing so is necessary due to the particular material gravity of the criminal offence. A pre-trial detention shall terminate if its period reaches (1) one year, provided that the juvenile concerned has not attained the age of fourteen years at the time of committing the criminal offence, (2) two years, provided that the juvenile concerned has attained the age of fourteen years at the time of committing the criminal offence, with the exception of a pre-trial detention ordered, or maintained, after the announcement of a conclusive decision, or a situation where a proceeding is pending for the adjudication of anappeal against a setting aside order passed by the court of second or third instance, or aproceeding repeated on the ground of setting aside is pending. A court shall decide, as provided for by an Act, on the place of enforcing the pre-trial detention of a juvenile in light of his personality and the nature of the criminal offence held against him. A court shall decide on the temporary placement of a juvenile, as provided for by an Act, upon a motion from the prosecution service; no appeal shall lie against a decision on this matter. A juvenile who has not attained the age of fourteen years may not be placed temporarily. During the period of pre-trial detention, the court may change the place of enforcing the pre-trial detention upon a motion from the prosecution service, the defendant, or the defence counsel or, after the indictment, ex officio.[1810]

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[1806] CPC 684. §
[1807] CPC 685. §
[1808] CPC 686. §
[1809] CPC 687. §
[1810] CPC 688. §

An adult person caring for a juvenile concerned, if other than his statutory representative, shall be notified about a court session held in a proceeding relating to a coercive measure affecting personal freedom subject to judicial permission. A statutory representative, or an adult person caring for a juvenile concerned, may address the court during a court session. A decision on a coercive measure affecting personal freedom subject to judicial permission shall also be communicated to an adult person caring for a juvenile concerned.[1811]

Conditional suspension by the prosecutor, may be applied concerning a juvenile if (1) the investigation is being conducted for a criminal offence punishable by imprisonment for not more than eight years, and (2) the juvenile can be expected to develop in an appropriate direction as a result of conditional suspension by the prosecutor, having regard to the nature of the criminal offence, the manner of its commission, and the person of the suspect. If conditional suspension by the prosecutor may be applied concerning a juvenile, the prosecution service may suspend the proceeding for a period between one year and three years within the penalty range specified in the Special Part of the Criminal Code. The prosecution service shall order obtaining an opinion from a probation officer before applying conditional suspension by the prosecutor if it intends to impose any individual rule of behaviour or obligation to facilitate the achievement of the objective of supervision by aprobation officer. In his opinion, a probation officer shall make recommendations regarding any individual rule of behaviour, or obligation, to be imposed on the defendant, and, even in the absence of any instruction by the prosecution service, he shall cover whether the defendant is willing and capable of complying with any foreseen rule of behaviour or obligation, and if the aggrieved party consents to any reparation foreseen.[1812]

If the interests of the juvenile concerned make it necessary, the public shall be excluded from a preparatory session or a trial. If a part of a trial may have a detrimental impact on the development in the right direction of a juvenile, the court may order that part of the trial to be held in the absence of the juvenile concerned. A summary of a trial conducted this way shall be presented to the juvenile concerned before the evidentiary procedure is declared to be concluded at the latest.[1813]

In a juvenile criminal proceeding, the prosecution may not be represented by a trainee prosecutor or a junior prosecutor. As a defence counsel for a juvenile in court, an attorney-at-law may not be substituted by a junior attorney-at-law.[1814]

The attendance of a juvenile concerned at a preparatory session and at the trial shall be mandatory. If a conclusive decision may be passed during a preparatory session, the social environment assessment, opinion by a probation officer, and summary opinion by a probation officer shall be presented at the preparatory session. In his closing argument delivered at a trial, a prosecutor may not move for a specific period of special education in a juvenile correctional institution applied as a measure. If a court panel proceeds at first instance, the chair of the panel shall inform all lay judges before voting about the decisions that may be passed, the pieces of legislation that are necessary for decision-making, the types and ranges of penalties, and the measures. A court may order special education in a juvenile correctional institution only in a judgment of guilt. A decision on a coercive measure affecting personal freedom subject to judicial permission, and a conclusive decision, shall be communicated also to an adult person caring for a juvenile concerned.[1815]

If the court finds a juvenile accused guilty in committing an intentional criminal offence or establishes his liability for committing an infringement, then it may impose the obligation to

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[1811] CPC 689. §
[1812] CPC 690. §
[1813] CPC 691. §
[1814] CPC 692. §
[1815] CPC 693. §

bear criminal costs also on an adult person providing care for thejuvenile accused at the time of the commission of the criminal offence.[1816]

## 10.2. Military criminal procedure (CPC)

A military criminal proceeding shall be conducted concerning (1) a criminal offence committed by a member of the Hungarian Defence Forces on active service, (2) a military offence committed, or any other criminal offence committed at his place of service, or in relation to his service, by a professional member of the police, the Parliamentary Guard, the prison service, a professional civil defence organisation, or a civil national security service during his period of active service, (3) unless an international treaty promulgated in an Act provides otherwise, a criminal offence, falling within Hungarian criminal jurisdiction, committed by a member of an allied armed force in Hungary, or on a vessel, or aircraft, flying the flag of Hungary outside the borders of Hungary.

A military criminal proceeding shall be conducted with regard to all criminal offences committed by a defendant if a military criminal proceeding is to be conducted with regard to at least one of his criminal offences and the cases cannot be separated. In case there is more than one defendant, a military criminal proceeding shall beconducted if the criminal offence committed by any of the defendants is subject to military criminal procedure, and the cases cannot be separated as the facts of the cases are closely related. This provision shall also apply to handlers of stolen goods and accessories after the fact.

If there is more than one defendant, the case of a juvenile and the case of a soldier shall be adjudicated together by the proceeding court in a military criminal proceeding, provided that the cases are related. In this event, the provisions on juvenile criminal proceedings shall apply as appropriate with regard to the juvenile defendant.[1817]

In a case subject to military criminal procedure, the military panel of the regional court designated by the Act on the name, seat, and area of jurisdiction of courts shall proceed as the court of first instance. Unless otherwise provided in this Act, the military panel of the Budapest-Capital Regional Court of Appeal shall proceed as court of second instance in a case subject to military criminal procedure. Other panels of the Budapest-Capital Regional Court of Appeal may also proceed concerning the admissibility of a retrial or, if a retrial is ordered, in the course of revising a judgment passed in a retrial, at second instance. A military judge may also proceed in cases not subject to military criminal procedure.[1818]

A military panel of a regional court, as court of first instance, shall proceed

- in a panel of one professional judge and two lay judges if the criminal offence is punishable by law by imprisonment for up to eight years or if the case was referred to a panel by a single judge,
- as a single judge in other situations.

A court of first instance may also proceed as a panel of one professional judge and two lay judges if it establishes that the criminal offence specified in the indictment document may qualify as a criminal offence of greater gravity. In a military criminal proceeding, only a military judge may act as a professional judge at first and second instance; only a military lay judge may act as a lay judge at first instance. If a lay judge is included in a panel, the panel shall be chaired by a military judge. If a juvenile defendant is involved in a military criminal proceeding, and the court proceeds as a panel at first instance, one member of the panel shall be a military lay judge. In a military criminal proceeding, a lay judge may not hold a rank that is lower than that

[1816] CPC 693/A. §
[1817] CPC 696. §
[1818] CPC 697. §

of the accused. With regard to passing a decision, professional judges and military lay judges shall have the same rights and obligations. The provisions on the disqualification of judges shall also apply to military lay judges.[1819]

The area of jurisdiction of a military panel of a regional court designated formilitary criminal proceedings shall be determined by the Act on the name, seat, and area of jurisdiction of courts. A criminal offence committed outside the borders of Hungary shall fall within the territorial jurisdiction of the military panel of the Budapest-Capital Regional Court.[1820]

In a military criminal proceeding, the tasks of the prosecution service shall be carried out by a prosecution office designated by the Prosecutor General. In a military criminal proceeding, a military prosecutor or a prosecutor designated by the Prosecutor General for military criminal proceedings shall proceed. The investigation shall be carried out by the prosecution service if

- a soldier commits a military felony / a military misdemeanour, provided that he committed any other criminal offence in relation to the military misdemeanour, or there is more than one defendant and the cases cannot be separated / a non-military offence,
- the chief or deputy chief of the National Defence Staff, the director-general or a deputy director-general of the Military National Security Service, the national chief police commissioner or a deputy national chief police commissioner, the director-general or a deputy director-general of the Counter-Terrorism Centre, the director-general or a deputy directorgeneral of the National Protective Service, the commander or deputy commander of the Parliamentary Guard, the national chief or a deputy chief of the prison service, the directorgeneral or a deputy director-general of the National Directorate-General for Disaster Management, a director-general or a deputy director-general of a civilian national security service, a soldier serving at another organ, with the exception of soldiers deployed or transferred by and between other organs, or a dualstatus student of an institute of higher education of law enforcement holding a scholarship commits a military misdemeanour,
- a criminal offence, falling within Hungarian criminal jurisdiction, is committed by a member of an allied armed force in Hungary, or on a vessel or aircraft flying the flag of Hungary outside the borders of Hungary,
- a ground for disqualification exists with regard a commander,
- the service relationship of the soldier concerned is terminated in the meantime.

The prosecution service may also proceed in cases not subject to military criminal procedure. If a criminal offence subject to military criminal procedure is detected by an investigating authority other than a military investigating authority, or an investigating authority other than a military investigating authority becomes aware of such a criminal offence, it shall inform the prosecution service without delay about performing any procedural act. In a military criminal proceeding, public prosecution shall be mandatory; the prosecution service shall proceed with regard to any criminal offence subject to private prosecution. In a military criminal proceeding, the prosecution may not be represented by a junior prosecutor or a trainee prosecutor.[1821]

If an investigation is not conducted by the prosecution service, a commander exercising employer's rights over the military personnel shall proceed as the investigating authority. The commander shall not conduct a preparatory proceeding. A commander may exercise his powers as an investigating authority acting through also an investigating organ or an investigating officer authorised for the performance of this task. If an organ under the command of a commander does not have an investigating organ or investigating officer, or if the investigating organ or investigating officer is prevented from discharging its or his task or is disqualified from a proceeding, the commander shall carry out the investigation in person or request his superior commander to designate an investigating organ or investigating officer. A person may

[1819] CPC 698. §
[1820] CPC 699. §
[1821] CPC 700. §

not act as an investigating officer if the defendant or the person reasonably suspected of having committed a criminal offence is his military superior.[1822]

An investigation shall be carried out by the commander who was the service superior of the defendant or the person reasonably suspected of having committed a criminal offence at the time of instituting the criminal proceeding. If the place of service of a defendant or the person reasonably suspected of having committed a criminal offence changes after the act serving as ground for the proceeding was committed, the investigation shall be carried out by the commander who was the service superior of the defendant or the person reasonably suspected of having committed a criminal offence at the time the criminal offence was committed. If a commander establishes during his investigation that the criminal offence or, if more than one criminal offence was committed, a criminal offence committed by the defendant or the person reasonably suspected of having committed a criminal offence does not fall within his investigating competence, he shall transfer the case to the prosecution service, or a military investigating authority with subject-matter competence over the case, within three days.[1823]

If there is a conflict of territorial competences, the commander conducting the investigation shall be designated by the prosecution office supervising the investigation. If the commander of the place where the criminal offence was committed is conducting an investigation against an unknown perpetrator, and the identity of the perpetrator is revealed during the investigation, the investigating commander shall transfer the case to the commander of the defendant or the person reasonably suspected of having committed a criminal offence for further action, and he shall inform the prosecution service at the same time.[1824]

In a particularly justified case, a witness in military service may request to be deployed or transferred to another place of service. The request shall be decided by the prosecution service before the indictment or a court after the indictment. If a request is dismissed, the witness may seek legal remedy. A deployment or transfer shall be implemented by the personnel affairs organ within seventy-two hours after service of a corresponding decision.[1825]

If custody of a soldier is ordered by an investigating authority other than a military investigating authority for a criminal offence subject to military criminal procedure, the defendant or the person reasonably suspected of having committed a criminal offence shall be handed over to the prosecution office with territorial competence over the case within twenty-four hours. A custody ordered during an investigation conducted by a commander shall be enforced in a police detention facility. The pre-trial detention of a soldier may also be ordered if a proceeding is conducted against him for a military offence or any other criminal offence punishable by imprisonment and committed at his place of service or in relation to his service, and the defendant may not be left at liberty for a service or disciplinary reason. If criminal supervision of a member of the Hungarian Defence Forces on active service is ordered, so that he is prohibited by a court from leaving a designated area, compliance with this restriction shall be monitored by the commander or, if he is prevented from doing so, by another military superior.[1826]

A defendant or the person reasonably suspected of having committed a criminal offence shall be excused from service during the period of his active service if he participates in a procedural act where his attendance is permitted, or required, by this Act.[1827]

An investigation shall be directed and supervised by a commander. In the course of an investigation, an investigating officer shall follow the instructions given by the commander. If

[1822] CPC 701. §
[1823] CPC 702. §
[1824] CPC 703. §
[1825] CPC 704. §
[1826] CPC 705. §
[1827] CPC 706. §

a commander arranged for another proceeding to be conducted, he shall inform the prosecution service accordingly. In the course of an investigation by a commander, only the commander or the proceeding investigating officer may release information to the press.[1828]

A commander shall have exclusive subject-matter competence to decide on the following matters:

- disqualifying an investigating officer,
- ordering an investigation,
- ordering a crime report to be supplemented,
- transferring a crime report,
- dismissing a crime report,
- suspending a proceeding,
- terminating a proceeding,
- appointing a defence counsel, withdrawing the appointment of a defence counsel, discharging an appointed defence counsel,
- determining the fee and costs of an appointed defence counsel,
- appointing, disqualifying, discharging an expert,
- determining the fee of an expert,
- assessing an exemption invoked by a witness or expert,
- assessing an application for excuse,
- taking a defendant or the person reasonably suspected of having committed a criminal offence into custody, and terminating custody,
- ordering a search or body search,
- ordering or terminating a seizure,
- ordering the preservation of electronic data,
- applying or lifting sequestration not subject to a court decision,
- ordering forced attendance,
- initiating a measure falling within the subject-matter competence of the prosecution service,
- granting a complaint, or forwarding a complaint for assessment, within eight days after the filing of the complaint.[1829]

A commander shall notify the prosecution service without delay if he considers it necessary to apply a coercive measure that falls outside his subject-matter competence, or to terminate pre-trial detention, preliminary compulsory psychiatric treatment, or criminal supervision. Any complaint submitted against a decision passed in the course of an investigation, or against casting suspicion, shall be forwarded by the commander to the prosecution service, provided that it is not granted by the commander. A complaint made orally during an investigation shall be recorded in writing.[1830]

A prosecution office shall dismiss a crime report or terminate a proceeding, and send all case documents to an entity with disciplinary powers, if the objective of punishment for a military misdemeanour can also be achieved by disciplinary punishment. The decision on dismissing a crime report shall be served also on the person subject to crime report. If a military investigating authority considers it possible to assess a criminal offence in a disciplinary proceeding, it shall forward all case documents to the prosecution service for passing a decision pursuant to paragraph (1). Within three days after receipt of the case documents, the proceeding prosecution office shall pass a decision, and take a measure, or send back the case documents to the commander with a view to continuing his investigation. An investigation shall be ordered, or a proceeding shall be continued, if a complaint is filed by a person subject to crime report against

[1828] CPC 707. §
[1829] CPC 708. §
[1830] CPC 709. §

a decision on dismissing a crime report, or by a suspect or his defence counsel against a decision on terminating a proceeding, and there is no other reason for dismissing the crime report or terminating the proceeding. A person subject to crime report or a suspect shall be advised about this provision in the decision concerned. If a criminal offence is referred to a disciplinary proceeding by the prosecution service, the person with disciplinary powers may impose a disciplinary punishment pursuant to, and in a proceeding conducted in line with, the Act regulating the given service relationship. A decision on imposing disciplinary punishment shall also be served on the prosecution service.[1831]

A person subject to disciplinary punishment, or his defence counsel, may move for a court review of a decision or order, which may not be challenged in a complaint, or is passed on the basis of a complaint, imposing a disciplinary punishment for a criminal offence referred to a disciplinary proceeding. A motion for court review may be submitted within three days after the given decision or order is communicated. A disciplinary punishment may not be enforced until the motion is adjudicated. A motion shall be filed with the person with disciplinary powers who imposed a disciplinary punishment, and that person shall send the motion, together with all case documents, to the military panel of a regional court with territorial jurisdiction over the case within one day. A motion may be withdrawn before the commencement of the trial. A court shall (1) proceed as a single judge, (2) adjudicate a motion in a trial, (3) notify the person with disciplinary powers who imposed the disciplinary punishment concerned, and the prosecution service, about the date and time of a trial. A person with disciplinary powers and a prosecutor may address the court in a trial. If they wish to make a statement in writing, their statement shall be filed to the proceeding court before the commencement of the trial. A court shall adjudicate a motion by passing an order.

A court shall

- uphold the challenged decision or order if a motion is groundless,
- reduce a disciplinary punishment or impose a less detrimental disciplinary punishment,
- annul the decision or order imposing a disciplinary punishment, provided that an acquittal or termination of the proceeding would be in order if the case was adjudicated in a criminal proceeding.[1832]

In a military criminal proceeding, a mediation procedure may not be conducted regarding any criminal offence against property committed against an organ specified in Criminal Code.[1833]

In a military criminal proceeding before the indictment, the tasks of a court shall be carried out by a military judge of a regional court as an investigating judge. An appeal filed against a decision passed by a military judge as investigating judge shall be adjudicated by a second instance panel of a regional court.[1834] A proceeding may be terminated by the prosecution service, before the indictment, or the proceeding court, after the indictment, if a reason for terminating liability to punishment, exists.[1835]

If a proceeding court panel includes any lay judge, the chair of the panel shall inform all lay judges before voting about the decisions that may be passed, the pieces of legislation that are necessary for decision-making, the types and ranges of penalties, and the measures. In a military panel, a judge of lower rank shall vote before a judge of higher rank. If two judges hold the same rank, the judge promoted to that rank later shall vote first. If both judges were promoted at the same time, the younger judge shall vote first. The chair of the panel shall cast the last vote.[1836]

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[1831] CPC 710. §
[1832] CPC 711. §
[1833] CPC 712. §
[1834] CPC 713. §
[1835] CPC 714. §
[1836] CPC 715. §

If a court believes, in light of the outcome of a trial, that an act stated in an indictment document constitutes an infraction committed at the place of, or in relation to, service and, as a consequence, it acquits the accused, it shall send all case documents to the person with disciplinary powers with a view to conducting a disciplinary proceeding, with the exception of infractions that may also be punished by confinement for an infraction. If the service relationship of a soldier is terminated before the case documents are sent to an entity with disciplinary powers, his infraction shall be adjudicated by the proceeding court.[1837]

The court of second instance shall also set aside the first instance judgment with a non-conclusive order, and instruct the court of first instance to conduct a new proceeding, if the court proceeded pursuant to this Chapter in a case that is not subject to military criminal procedure.[1838]

### 10.3. Proceedings concerning persons having immunity (CPC)

*a) Immunity arising from public office:*

If a person is afforded immunity by law due to his public office, he may not be interrogated as a suspect, subject to a coercive measure, or indicted without lifting his immunity. If a person with immunity arising from his public office is caught in the act, a coercive measure specified in this Act may be applied against him. If data discovered during a criminal proceeding indicates that the suspect interrogation of, the application of a coercive measure against, or the indictment of a person with immunity arising from his public office would be in order, a motion for a decision shall be filed with the entity authorised to lift his immunity. The motion for lifting immunity shall be filed, before the indictment, by the Prosecutor General or, after the indictment or in a private prosecution or substitute private prosecution proceeding, by the court. If the person concerned is caught in the act, the motion shall be filed without delay.

The criminal proceeding shall be suspended at the time of filing the motion. If the motion is dismissed by the entity authorised to lift immunity, the proceeding shall be terminated without delay by a decision of the prosecution service or a non-conclusive order of the court.

The court of second instance shall set aside a decision by the court of first instance that was adopted in violation of immunity arising from public office and terminate the proceeding if the entity authorised to lift immunity arising from public office dismissed the motion forlifting immunity arising from public office.

Unless otherwise provided by an Act, the termination of the proceeding on such grounds shall not prevent the criminal proceeding from being conducted after the immunity arising from public office is terminated.

The Curia may uphold a decision challenged by a motion for review in a non-conclusive order if the entity authorised to lift immunity lifted immunity arising from public office. The Curia shall set aside a decision challenged by a motion for review and terminate the proceeding in a non-conclusive order if the court adopted its decision in the underlying case in violation of immunity arising from public office and the entity authorised to lift immunity arising from public office dismissed the motion for lifting immunity arising from public office.[1839]

*b) Immunity based on international law:*

The former provisions shall apply to cases of persons with immunity based on international law subject to the derogations laid down in this section. Establishing the criminal liability of a person with immunity based on international law shall be governed by an international treaty

[1837] CPC 716. §
[1838] CPC 717. §
[1839] CPC 719. §

or, in the absence of an international treaty, by international practice. As for international practice, a position shall be obtained from the Minister responsible for justice in agreement with the Minister responsible for foreign policy. No procedural act may be carried out regarding a person with immunity based on international law until his immunity is lifted. A motion to lift immunity based on international law shall be forwarded to the Minister responsible for foreign policy by the proceeding court, acting through the Minister responsible for justice, or by the Prosecutor General directly.[1840]

If a person with immunity acts as a private prosecuting party or a substitute private prosecuting party, the proceeding court shall suspend its proceeding until a decision is made on his immunity based on international law, and it shall send a submission, acting through the Minister responsible for justice, to the Minister responsible for foreign policy. If immunity is established by a court on the basis of the position of the Minister responsible for foreign policy, it shall terminate its proceeding. If the participation of a person with immunity based on international law becomes necessary in a criminal proceeding in other situation, the Prosecutor General, before the indictment, or the proceeding court acting through the Minister responsible for justice, after the indictment or in private prosecution or substitute private prosecution proceeding, shall send a submission to the Minister responsible for foreign policy without suspending its proceeding.

A submission shall be aimed at obtaining a position regarding the existence of immunity based on international law, and taking the measures necessary to waive immunity from criminal jurisdiction. If immunity could not be established based on the position of the Minister responsible for foreign policy, or a statement of waiver of immunity by the sending State is available, the person concerned may participate in the criminal proceeding.[1841]

*c) Immunity based on the rule of speciality:*

A person who arrived to Hungary due to surrender, extradition or other assistance in criminal matters cannot be interrogated as a suspect, cannot be subjected to a coercive measure and cannot be indicted for a criminal offence committed before his entry into Hungary, unless an Act or an international treaty promulgated in an Act enables conducting a criminal proceeding against the perpetrator.

If doing so is enabled by an Act or an international treaty promulgated by an Act, the obstacle to conducting a criminal proceeding can be eliminated by a waiver of the person reasonably suspected of having committed a criminal offence or the defendant or the consent of the State with the relevant power. To acquire such statement

- the court, before the indictment only upon a motion by the prosecution service, shall ask for a statement from the person reasonably suspected of having committed a criminal offence or the defendant whether he waives his right to the application of the rule of speciality as provided for by an Act or in international treaty promulgated in an Act, or
- the court or the prosecution service shall request the State authorised to give consent to the conduct of the criminal proceeding.[1842]

### 10.4. Immediate summary procedure (CPC)

In an immediate summary procedure, the provisions of CPC shall apply subject to the derogations laid down in this Chapter.[1843] A prosecution office may bring a defendant before a

[1840] CPC 720. §
[1841] CPC 721. §
[1842] CPC 721/A. §
[1843] CPC 722. §

court in an immediate summary procedure within two months after a criminal offence is committed, provided that (1) the criminal offence is punishable by imprisonment for up to ten years under an Act, (2) the evaluation of the case is simple, (3) the evidence is available, and (4) the defendant was caught in the act when he committed the criminal offence or the defendant confessed to the commission of the criminal offence.[1844]

If the defendant is caught in the act and the conditions specified in former section are met, custody may also be ordered for the purpose of an immediate summary procedure. A coercive measure affecting personal freedom subject to judicial permission, when ordered before an immediate summary proceeding, shall last until the trial that is held on the day the defendant is being brought before the court in the immediate summary proceeding is concluded. The court, if it returns the case documents to the proceeding prosecution office, shall decide, pursuant to the general rules and upon a motion, on extending, ordering, or terminating a coercive measure affecting personal freedom subject to judicial permission. If a court postpones a trial, it shall decide pursuant to the general rules on maintaining, ordering, or terminating a coercive measure affecting personal freedom subject to judicial permission.[1845]

The proceeding prosecution office shall inform the suspect that it intends to conduct an immediate summary procedure. If the defendant does not wish to authorise a defence counsel, the prosecution service shall appoint a defence counsel without delay. In order to comply with the provisions, the prosecution service may also make use of the investigating authority. The prosecution service shall prepare a memorandum containing personal data suitable for the identification of the suspect, a description, and the qualification pursuant to the Criminal Code, of the act serving as ground for the immediate summary proceeding, and a list of all means of evidence. The prosecution service shall ensure the inspection of the case documents for the defendant and his defence counsel and, at the same time, shall serve the memorandum on them after the trial date is set, at a time and in a way adequate for preparing the defence, but one hour before the commencement of the trial at the latest.[1846]

If a prosecution office intends to conduct an immediate summary procedure regarding a suspect, it shall inform the court accordingly by sending to it the memorandum together with the case documents of the investigation. The court shall examine, within three working days of receipt of the case documents of the investigation, whether the conditions for immediate summary procedure as set out under this section are met. If the court finds that there is no obstacle to conducting an immediate summary procedure, it shall set the date for trial immediately. Otherwise, the court shall send the case documents back to the prosecution service. No appeal shall lie against decision to send back the case documents to the prosecution service.

The proceeding prosecution office shall bring the suspect before a court in an immediate summary proceeding, summon the defence counsel, and ensure that the means of evidence are available at the trial. A prosecution office shall ensure that a detained suspect may consult his defence counsel before trial. A prosecution office shall also make arrangements to ensure that the persons the attendance of whom is required are attending, and the persons the attendance of whom is permitted under this Act are allowed to attend, the trial. A prosecution office may also make use of the investigating authority.[1847]

In an immediate summary procedure, the participation of a defence counsel in the court proceeding shall be mandatory. The prosecution office shall provide the proceeding court also with all other means of physical evidence before the commencement of a trial, provided that it did not do so previously. The prosecutor shall present the indictment orally. After the

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[1844] CPC 723. §
[1845] CPC 725. §
[1846] CPC 726. §
[1847] CPC 727. §

presentation of indictment, the court shall return the case documents to the prosecution service if

- more than two months passed between the commission of the criminal offence and the immediate summary proceeding,
- the criminal offence is punishable by imprisonment for over ten years under an Act, or
- the means of evidence are not available.[1848]

A court may postpone a trial once for up to fifteen days. If further means of evidence need to be discovered in addition to the evidence taken during a trial and, as a consequence, the trial could not be continued within fifteen days, or without another postponement, the court shall send back the case documents to the proceeding prosecution office. A prosecution office may modify an indictment if the conditions of conducting an immediate summary procedure are also met with regard to the criminal offence stated in the modified indictment. Otherwise, the court shall send back the case documents to the prosecution service. No appeal shall lie against sending back the case documents to the prosecution service.[1849]

An appeal against a first instance judgment or a conclusive order shall be adjudicated by the court of second instance within three months after receipt of the case.[1850]

## 10.5. Plea agreement procedure (CPC)

The participation of a defence counsel in a court proceeding conducted on the basis of a plea agreement shall be mandatory.[1851]

On a preparatory session, the prosecutor shall present the essence of the indictment and any motion filed. After the presentation of the indictment and the motions, the court shall inform the accused about the consequences of approving a plea agreement. Subsequently, the court shall call upon the accused to state whether he admits his guilt pursuant to the plea agreement and waives his right to trial. The court shall allow the accused to consult his defence counsel before making any statement.

If the accused admits his guilt pursuant to the plea agreement and waives his right to trial, the court shall examine, on the basis of this fact, the case documents, the interrogation of the accused and, if necessary. the responses to questions asked from the defence counsel, whether the conditions of approving the plea agreement are met. The prosecutor and the defence counsel may address the court before a decision is passed on the matter of approving the plea agreement.[1852]

A court shall approve a plea agreement if

- the plea agreement was concluded in line with sections in CPC,
- the content of the plea agreement are in line with sections in CPC,
- the accused understands the nature of the plea agreement and the consequences of its approval,
- there is no reasonable doubt regarding the capacity of the accused to be responsible for his acts, and the voluntary nature of his confession,
- the accused person’s confession of guilt is clear and supported by the case documents.[1853]

A court shall refuse to approve a plea agreement if

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[1848] CPC 728. §
[1849] CPC 729. §
[1850] CPC 730. §
[1851] CPC 731. §
[1852] CPC 732. §
[1853] CPC 733. §

- the indictment, or the motions filed under section CPC, differ from the content of the plea agreement as recorded in the minutes,
- the accused does not admit his guilt in line with the plea agreement or does not waive his right to a trial during the preparatory session,
- the conditions for approving the plea agreement are not met,
- the defendant failed to perform his obligations undertaken pursuant to section in CPC,
- it seems that a qualification different from that specified in the indictment can be established.

No appeal shall lie against a court's order on refusing to approve a plea agreement. If a court refuses to approve a plea agreement, the proceeding shall be continued pursuant to sections in CPC. In such a situation, neither the prosecution service nor the defendant shall be bound by the plea agreement.[1854]

If the conditions for approving a plea agreement are met and there is no ground for refusing the approval, the court shall approve the plea agreement during the preparatory session. No appeal shall lie against a court's order on approving a plea agreement.[1855]

The court shall adopt a provision in compliance with the law on a question subject to simplified review procedure that is not regulated in the plea agreement or is regulated in a manner that is not in compliance with the law. A court may not dismiss any civil claim. If not all accused persons entered into a plea agreement with the prosecution service, or not all plea agreements concluded by and between the prosecution service and the accused persons were approved by the court, the court shall pass a single decision on the indictment on the basis of a trial and, regarding any plea agreement approved.

If all other conditions for separation are met in a case conducted against multiple accused persons, the court, with a view to announcing a judgment, may separate cases pending before it as regards the accused affected by the approved plea agreement.[1856]

If it is necessary to hold a trial after a plea agreement is approved, the court shall present the essence of the plea agreement after opening the trial. A court may set aside its order on approving a plea agreement after obtaining a statement by the prosecutor service and the accused if, in light of the outcome of the taking of evidence, it finds that the refusal of the plea agreement would have been in order on the ground of changes to the facts of the case or the qualification. If a court set aside its order on approving the plea agreement,

- neither the prosecution service nor the defendant shall be bound by the plea agreement,
- the court, upon a motion filed by the prosecution service, the accused, or the defence counsel, shall decide on repeating the taking of any evidence already taken in the absence of the accused, and
- the prosecution service, the accused, and the defence counsel may file any motion within fifteen days.[1857]

No appeal shall lie against the following:

- the establishment of guilt,
- the facts of the case, or qualification, established in line with the indictment,
- the nature, amount, or period of any penalty or measure imposed,
- any other provision laid down in a judgment.

In an appeal, new facts may be stated, and new evidence may be presented. In a second instance proceeding, evidence may be taken. A court of second instance may not change the provisions of the challenged judgment with regard to the establishment of guilt, unless it can be established without holding a trial that acquitting the defendant, or terminating the proceeding,

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[1854] CPC 734. §
[1855] CPC 735. §
[1856] CPC 736. §
[1857] CPC 737. §

would be in order. A court of second instance shall set aside the judgment of the court of first instance, and instruct the court of first instance to conduct a new proceeding, if the court of first instance approved the plea agreement even though a ground.[1858]

### 10.6. Procedure for passing a punishment order (CPC)

In a procedure for passing a punishment order, the provisions of the CPC shall apply subject to the derogations laid down in this Chapter. A punishment order shall constitute a conclusive decision. Unless otherwise provided in this Act, the provisions on judgments shall apply to punishment orders.[1859]

In the case of a criminal offence punishable by up to three years of imprisonment, a court, acting upon a motion from the prosecution service or ex officio, shall pass a punishment order without holding a trial and on the basis of case documents if (1) passing a decision in the case is simple, (2) the accused is at liberty, or in detention in another case, and (3) the objective of punishment could be achieved without a trial.

In a punishment order, the proceeding court may

- impose an imprisonment the enforcement of which is suspended, community service, a financial penalty, disqualification from a profession, disqualification from driving a vehicle, a ban on entering certain areas, a ban on visiting sports events, or expulsion,
- also impose, on a soldier, demotion, discharge from service, reduction in rank, an extension of waiting period, or
- apply reparation work, release on probation, or reprimand.

A court shall pass a punishment order also regarding a criminal offence punishable by up to five years of imprisonment if these conditions are met, and the accused confessed to the commission of the criminal offence.[1860]

A punishment order shall be passed by a court within one month after receipt of the case. In addition to imposing a penalty, or applying a measure, the proceeding court may also

- apply supervision by a probation officer when imposing an imprisonment, the enforcement of which is suspended or reparation work, or applying release on probation,
- order confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible,
- grant a civil claim or order a civil claim to be enforced by other legal means,
- set aside a provision granting release on probation,
- decide on the joining or separation of cases, and suspending or terminating the proceeding.

The operative part of a punishment order shall contain the general elements specified in CPC, and advice regarding the provisions laid down in CPC. A statement of reasons for a punishment order shall describe the facts established, refer to the indictment and the fact that the conditions of passing a punishment order are met, and specify the laws applied. If a motion for passing a punishment order is submitted by the prosecution service, a punishment order may also be passed by a junior judge.[1861]

No appeal shall lie against a punishment order. Within eight days after receipt of the punishment order, the prosecution service, accused, defence counsel, civil party, party with a pecuniary interest, or other interested party may move for holding a trial. If a motion for passing a punishment order is submitted by the prosecution service, the prosecution service may not move for holding a trial on the ground that the court proceeded pursuant to this Chapter. A civil

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[1858] CPC 738. §
[1859] CPC 739. §
[1860] CPC 740. §
[1861] CPC 741. §

party may request holding a trial regarding a provision on adjudicating his civil claim; a party with a pecuniary interest or an other interested party may move for holding a trial only with regard to a provision of a decision that affects him directly.[1862]

Upon a motion for holding a trial filed by the prosecution service or an accused, defence counsel, civil party, or other interested party, the court shall hold a preparatory session and it shall continue its proceeding in line with the general rules. If the punishment order cannot be duly served, it shall be deemed as if the accused filed a motion for holding a trial.[1863]

A motion for holding a trial may be withdrawn by the person filing the motion until the commencement of a preparatory session. A motion for holding a trial, submitted to the benefit of an accused by another person, may not be withdrawn by the person filing the motion without the consent of the accused; this provision shall not apply to a motion filed by the prosecution service. The attendance of the person filing the motion who requested a trial to be held shall be mandatory at a preparatory session. If he fails to appear at the preparatory session and fails to provide a well-grounded excuse for his absence in advance and without delay, his motion shall be deemed withdrawn.[1864]

Before the commencement of a preparatory session, the proceeding court shall ask the person filing the motion if he maintains his motion for trial. The proceeding court shall call on the person filing the motion to supplement his motion if it is unclear why he considers the punishment order injurious. A motion filed by an accused or the defence counsel only for a payment moratorium, payment in instalments, or a rectification of a punishment order, shall not be considered a motion for holding a trial.[1865]

Before the commencement of a preparatory session, the proceeding court shall present the essence of the punishment order and the motion for holding a trial. If a motion for trial challenges a provision on a civil claim only, the proceeding court shall set aside the provision concerned and order the civil claim to be enforced by other legal means. In this situation, a punishment order shall be set aside by the proceeding court during the preparatory session. No appeal shall lie against this order. In the absence of a motion filed to the detriment of an accused, a court may impose a more severe penalty, or apply a more severe measure, if new evidence arises during a trial and, on the basis of that evidence, the proceeding court establishes a new fact in light of which the act is to be qualified as one of greater gravity, or a considerably more severepenalty is to be imposed, penalty is to be imposed in place of applying a measure, or a measure is to be applied that is considerably more severe than the measure applied in place of a penalty.[1866]

### 10.7. Proceeding against an absent defendant (CPC)

A defendant, or a person reasonably suspected of having committed a criminal offence, becoming unavailable shall not constitute an obstacle to a criminal proceeding. In a proceeding conducted against an absent defendant, the provisions of this Act shall apply subject to the derogations laid down in this Chapter. An absent defendant may be indicted, and subsequently subjected to a court proceeding, if (1) a defendant or a person reasonably suspected of having committed a criminal offence escapes or hides during a proceeding, or it is reasonable to assume that he became otherwise unavailable to avoid a criminal proceeding, (2) the measures taken to locate the defendant or the person reasonably suspected of having committed a criminal offence

[1862] CPC 742. §
[1863] CPC 743. §
[1864] CPC 744. §
[1865] CPC 745. §
[1866] CPC 746. §

were not successful within a reasonable time, and (3) it is justified by the material gravity or the criminal offence or the evaluation of the case. The condition specified in point (2) shall be deemed as met if

- any evidence is taken, activity for data acquisition is performed, or, where the relevant conditions are met, covert means are used for locating the defendant or the person reasonably suspected of having committed a criminal offence,
- a search warrant or, where the relevant conditions are met, an arrest warrant is issued by an investigating authority, prosecution office, or court, and
- the search warrant or arrest warrant remains unsuccessful for a period of fifteen days after it is issued.

If the conditions for conducting a proceeding against an absent defendant are not met, the proceeding court or prosecution office shall suspend its proceeding. The participation of a defence counsel shall be mandatory in a proceeding conducted against an absent defendant.[1867]

If the whereabouts of a person reasonably suspected of having committed a criminal offence, or a suspect, are unknown, and the conditions of conducting a proceeding against an absent defendant are met, the prosecution service shall declare the suspect, or the person reasonably suspected of having committed a criminal offence, to be an absent defendant. No complaint shall lie against such a decision. If the prosecution service declares the person reasonably suspected of having committed a criminal offence to be an absent defendant, but does not conclude the investigation, the rules on examination shall apply to the continuation of the investigation. If an absent defendant does not have a defence counsel, the proceeding prosecution office shall appoint a defence counsel for him at the time of adopting its decision. A prosecution office or investigating authority shall serve to an absent defendant only a decision on suspending or terminating the proceeding or a notification about the indictment.

If the conditions are met, any failure to communicate the suspicion shall not constitute an obstacle to indictment. If the prosecution service, in its indictment document, moves for conducting a proceeding in the absence of the defendant, the indictment document shall contain, in addition to the elements required under CPC.[1868]

A court shall proceed against an absent defendant upon a corresponding motion from the prosecution service. In a proceeding conducted against an absent defendant, a preparatory session may not be held.[1869]

If the prosecution service brings an indictment against an absent defendant, and the whereabouts of the defendant become known before the commencement of the trial, the court shall inform the prosecution service accordingly. If a defendant becomes unavailable after he is indicted, and the conditions for proceeding against an absent defendant are met, the proceeding court shall notify the prosecution service accordingly. A single judge, or the chair of a panel, shall suspend a proceeding, unless a motion to proceed in the absence of a defendant is filed by the prosecution service within fifteen days after receipt of a notification. The suspension of a proceeding shall not be an obstacle for the prosecution service to filing a motion subsequently. If a court appoints a defence counsel for an absent accused, the trial shall be continued by presenting the materials already covered earlier during the trial.[1870]

If the measures taken to locate an accused succeed before a conclusive decision is passed by a court of first instance, the proceeding court shall continue the trial by presenting the materials already covered earlier during the trial and reopen the taking of evidence, if necessary. If the

[1867] CPC 747. §
[1868] CPC 748. §
[1869] CPC 749. §
[1870] CPC 750. §

measures taken to locate an accused succeed after a conclusive decision is passed by a court of first instance, the accused may submit an appeal within the time limit open for appeals.[1871]

If the measures taken to locate an accused succeed during a second instance court proceeding, the court of second instance shall set a trial; during the trial, the court of second instance shall interrogate the accused, present the essence of the materials covered during a trial held in the absence of the accused, and, if necessary, take further evidence proposed in a motion by the accused or the defence counsel. If the measures taken to locate an accused succeed in a third instance court proceeding, the court of third instance shall set aside the second instance judgment and instruct the court of second instance to conduct a new proceeding. If the measures taken to locate an accused succeed in the course of adjudicating a legal remedy submitted against an order of the third instance on setting aside, the Curia shall set aside the third instance decision and instruct the court of third instance to conduct a new proceeding. If the place of residence of a defendant becomes known after a final and binding conclusive decision is passed, a motion for retrial may be submitted to the benefit of the defendant.[1872]

### 10.7.1. Proceeding in the absence of a defendant staying abroad

In a proceeding conducted in the absence of a defendant staying abroad, the provisions of the CPC shall apply subject to the derogations laid down in this Chapter. A proceeding may be conducted in the absence of a defendant or a person reasonably suspected of having committed a criminal offence staying abroad at a known location if

- a European or international arrest warrant may not be issued, or it was not issued because in the indictment document, the prosecution service did not move for imposing imprisonment to be served or applying special education in a juvenile correctional institution, and (1) the defendant or the person reasonably suspected of having committed a criminal offence failed to appear despite being duly summoned, or (2) the defendant or the person reasonably suspected of having committed a criminal offence is detained in another country,
- a European or international arrest warrant was issued, but neither the defendant or the a person reasonably suspected of having committed a criminal offence is surrendered orextradited within twelve months after his apprehension, nor the criminal proceeding is transferred,
- a European or international arrest warrant was issued, but the surrender or extradition of the defendant or the person reasonably suspected of having committed a criminal offence was refused, and the criminal proceeding was not transferred,
- a European or international arrest warrant was issued, and the surrender or extradition of the defendant or the person reasonably suspected of having committed a criminal offence was ordered to be postponed.

Even if these conditions are met, a proceeding may not be conducted in the absence of a defendant or person reasonably suspected of having committed a criminal offence staying abroad, unless (1) it is justified by the material gravity or the criminal offence or the evaluation of the case, and (2) the participation or attendance of the defendant or the person reasonably suspected of having committed a criminal offence in the proceeding or a procedural act cannot be ensured by issuing a request for international legal assistance in a criminal matter or using a telecommunication device, or the application of any of these methods is not justified by the material gravity of the criminal offence or the evaluation of the case.[1873]

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[1871] CPC 751. §
[1872] CPC 752. §
[1873] CPC 755. §

If it is established after the indictment that a defendant is staying abroad, and that these conditions are met, the proceeding court shall notify the prosecution service accordingly. A single judge or the chair of a panel shall suspend a proceeding, unless a motion to proceed in the absence of a defendant is filed by the prosecution service within fifteen days after receipt of a notification. The suspension of a proceeding shall not be an obstacle for the prosecution service to filing a motion subsequently. If it is established after the indictment that an absent defendant is staying abroad, and these conditions are met, the proceeding court shall continue its proceeding without notifying the prosecution service. If a defendant is detained in another country, after the indictment, the proceeding may be conducted against the defendant staying abroad only with consent from the defendantconcerned. If the defendant does not consent to conducting the proceeding, the court shall suspend the proceeding.[1874]

### 10.8. Proceeding subject to the depositing of security (CPC)

Subject to the derogations laid down in this Chapter, the provisions of the CPC shall apply to criminal proceedings subject to the depositing of security. Upon a motion from a defendant or his defence counsel residing in another country, the prosecution service, before the indictment, or a court, after the indictment, may permit a security to be deposited, provided that (1) the criminal offence is punishable by imprisonment for up to five years under an Act, (2) it is foreseeable that a financial penalty will be imposed on, or forfeiture of assets will be applied against, the defendant, (3) the absence of the defendant from the trial and any procedural act is not against the interests of the proceeding, and (4) the defendant mandated his defence counsel to act as an agent for service of process.

Depositing a security may not be permitted if the criminal offence caused death. A motion for permission for depositing a security may be submitted by a defendant or his defence counsel to the proceeding court or prosecution office. In his motion, a defendant shall agree to return to Hungary if necessary for the enforcement of any imprisonment or confinement that may be imposed on him. A court or prosecution office shall assess such a motion as a matter of priority. A court or prosecution office shall decide on a motion on the basis of case documents and shall interview the defendant or his defence counsel if necessary. A court shall also interview the proceeding prosecutor if necessary. The security amount shall be determined by a court or prosecution office, as necessary for the enforcement of any financial penalty that may be imposed on, or forfeiture of assets that may be applied against, the defendant, and any criminal cost that may arise. A legal remedy sought against a decision on such a motion shall have a suspensory effect.[1875]

If a court or prosecution office permits depositing a security, and the defendant deposits the security, the procedural acts may be carried out, and the trial may be conducted, in the absence of the defendant and the court may conclude the proceeding against a defendant who failed to appear. After a security is deposited, the proceeding court, prosecution office, and investigating authority shall notify the defendant, through his agent for service of process, about the trial and any procedural act. The participation of a defence counsel in the criminal proceeding shall be mandatory. If a defendant who deposited a security leaves the territory of Hungary, the provisions on proceeding against an absent defendant, or in the absence of a defendant staying abroad, shall not apply to the criminal proceeding. If a defendant who deposited a security leaves the territory of Hungary, the proceeding may not be suspended on the ground that the defendant is abroad.[1876]

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[1874] CPC 756. §
[1875] CPC 757. §
[1876] CPC 758. §

Conducting a proceeding subject to the depositing of security shall not prevent the proceeding court or prosecution office from sending a request for procedural assistance to another country, if necessary, pursuant to the Act on cooperation with the Member States of the European Union in criminal matters or the Act on international legal assistance in criminal matters. Procedural assistance may include, in particular, performing procedural acts, locating means of evidence, interrogating a defendant, or carrying out an inspection, search, body search, or seizure. If it is discovered before the indictment that a defendant can be reasonably suspected of having committed a criminal offence different from, or in addition to, the criminal offence with regard to which the prosecution service permitted depositing a security, and regarding the criminal offence thus discovered, depositing a security is not to be permitted under an Act, the prosecution service shall order the security already deposited to be released to the defendant. Subsequently, the criminal proceeding shall be conducted in line with the general rules. If, after the indictment, (1) the prosecution service modifies the indictment, or (2) the proceeding court establishes that the act serving as ground for the indictment may be qualified differently from that specified in the indictment, and depositing a security is not to be permitted, under an Act, regarding that criminal offence, the proceeding court shall order the security already deposited to be released to the defendant. The subsequent criminal proceeding shall be conducted in line with the general rules.[1877]

A security shall be acquired by the State when a conclusive decision becomes final and binding if

- the court finds the accused guilty,
- the court orders forfeiture of assets in a judgment of acquittal,
- the court or the prosecution service terminates the proceeding, and the court orders forfeiture of assets, or
- the court passes a punishment order imposing a penalty or applying a measure.

If a court imposes a financial penalty, applies forfeiture of assets, or obliges a defendant to bear the criminal costs, any security acquired by the State shall be used for the enforcement thereof.

Measures may be taken within the framework of legal assistance, in accordance with the Act on cooperation with the Member States of the European Union in criminal matters or the Act on international legal assistance in criminal matters, to enforce any penalty or measure other. If the amount of a financial penalty imposed, forfeiture of assets applied, or criminal costs determined, exceeds the amount of the deposited security, these provisions shall apply also to the enforcement of any remaining amount of the financial penalty, forfeiture of assets, or criminal costs. If a penalty or measure has been enforced, any security shall be returned to the convict after the conclusion of enforcement, unless the court imposed financial penalty or applied forfeiture of assets, or obliged the defendant to bear criminal costs, in addition to the given penalty or measure. If a civil claim is granted by a court, or the amount of the security applies, any remainder of the security after deducting the cost items specified there shall be used to satisfy the civil claim.[1878]

A security shall be released to a defendant if (1) the proceeding was terminated by the prosecution service or the time limit for an investigation expired, (2) the defendant was acquitted or the proceeding against him was terminated by the proceeding court,provided that the court did not order forfeiture of assets. If a proceeding was terminated because of the death of the defendant, any security shall be released to his heir. If the security amount exceeds the amount of any financial penalty imposed, forfeiture of assets applied, or criminal costs determined, the difference shall be released to the defendant, unless the remainder is to be used

[1877] CPC 759. §
[1878] CPC 760. §

to satisfy a civil claim. Any amount remaining from a security after all civil claims are satisfied shall be released to the defendant.[1879]

## 10.9. Private prosecution procedure (CPC)

*a) General rules:*
The provisions of CPC shall apply to private prosecution proceedings subject to the derogations laid down in this Chapter. A private prosecution proceeding may not be conducted if (1) the person subject to a crime report or the defendant is a juvenile, (2) the criminal offence is subject to military criminal proceeding, or (3) at the time of his commission of the criminal offence subject to private prosecution, the person subject to a crime report or the defendant committed also a criminal offence subject to public prosecution, and the cases cannot be separated. In addition to the rights of an aggrieved party, a private prosecuting party may also exercise the rights attached to representing the prosecution. A private prosecuting party may exercise the rights attached to representing the prosecution only with regard to the indictment he brought. In the absence of any counter-indictment, a private prosecuting party may be interviewed as a witness. Proving that the accused is guilty shall be the obligation of a private prosecuting party. In a private prosecution proceeding, a mediation procedure may not be conducted.[1880]

*b) Counter-indictment:*
If causing minor bodily harm, defamation, or insult was committed mutually, the accused may also bring an indictment against the private prosecuting party (hereinafter: „counter-indictment"). The accused may also request the proceeding court to adjudicate, within the framework of counter-indictment, any insult that constitutes an infraction and was committed mutually in relation to the above criminal offences. A counter-indictment may be brought before a conclusive decision is passed, even if the time limit for filing a private motion expired, provided that liability to punishment did not become time-barred. If a counter-indictment is brought, the private prosecuting party may exercise the rights, and shall perform the obligations, of an accused. With regard to a counter-indictment, the representative of the private prosecuting party shall have the status of defence counsel, and the defence counsel of the accused shall have the status of a representative, provided that this is covered by their authorisation. A counter-indictment may be brought, even if the prosecution service took over the representation of the prosecution. If a counter-indictment is brought, the prosecution service may take over the representation of the counter-indictment, provided that it did not take over, or withdrew from, representing prosecution.[1881]

*c) The prosecution service:*
The prosecution service may inspect the case documents, and the prosecutor may be attend the trial, even in a private prosecution proceeding. The prosecution service may take over the representation of the prosecution one time during a proceeding. This restriction shall not apply if the prosecution service intends to take over the representation of a counter-prosecution where it took over, and subsequently withdrew from, representing the prosecution. If the prosecution service took over the representation of a prosecution, it shall notify the aggrieved party accordingly. If the prosecution service took over the representation of a prosecution, the rules of private prosecution procedures shall apply, including the rules on holding a personal interview. If the prosecution service took over the representation of a prosecution, the private

[1879] CPC 761. §
[1880] CPC 762. §
[1881] CPC 763. §

prosecuting party may exercise the rights, and shall perform the obligations, of an aggrieved party, with the proviso that he may abandon the indictment at any time. If the prosecution service took over the representation of a prosecution, it may not abandon the indictment but may withdraw from representing the prosecution. If the prosecution service took over the representation of a prosecution, a failure of the prosecutor to appear at a personal interview or trial shall be deemed as withdrawal from representing the prosecution.[1882]

*d) Basis for instituting a proceeding. Tasks of a court after a crime report is filed:*
A proceeding shall be instituted on the basis of a crime report. In a crime report, the aggrieved party shall specify the person against whom, as well as the act for and the evidence on the basis of which, he moves for a criminal proceeding to be conducted. A crime report shall be made at a court.[1883]

A court

- shall send the crime report and all case documents to the prosecution service if it seems that a criminal offence could be established as regards which the prosecution is to be represented by the prosecution service,
- shall send the crime report and all case documents to the prosecution service if it finds it necessary that the prosecution service consider the possibility of taking over the representation of the prosecution,
- may call on the aggrieved party to clarify his crime report in writing if the identity of the person subject to a crime report or the criminal offence cannot established based on the crime report,
- may order an investigation on the basis of the crime report.

The proceeding court shall decide on transferring the case, or suspending or terminating the proceeding, if doing so is possible on the basis of the crime report and the case documents. The court may suspend the proceeding if it sent the case documents to the prosecution service.[1884]

*e) Investigation in a private prosecution proceeding:*
A court may order an investigation if the identity, personal data, or whereabouts of the person subject to a crime report are unknown, or a means of evidence needs to be discovered. For an investigation, a time limit not longer than two months shall be set by a court; this time limit may be extended twice for up to two months each time. The court shall send its order on ordering an investigation, with other case documents, to the investigating authority. An investigation shall be carried out, but may not be terminated or suspended, by the general investigating authority. After concluding an investigation, the general investigating authority shall send back all case documents to the court. If the identity of an unknown perpetrator could not be established on the basis of data discovered during an investigation, the general investigating authority shall notify the court accordingly. In that event, the court shall terminate the proceeding. If an aggrieved party withdraws his crime report during an investigation ordered by a court, the case documents produced up until the withdrawal shall be send back by the general investigating authority to the proceeding court. If the prosecution service takes over the representation of a prosecution before a summons for personal interview is issued, it may order an investigation.[1885]

*f) Tasks of a court before a court proceeding at first instance:*

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[1882] CPC 764. §
[1883] CPC 765. §
[1884] CPC 766. §
[1885] CPC 767. §

The rules on the rights and the obligations of a person reasonably suspected of having committed a criminal offence shall apply accordingly to a person subject to a crime report. The attendance of a defence counsel shall not be mandatory at a personal interview. If causing minor bodily harm, defamation, or insult was committed mutually and both persons concerned file a crime report, each person concerned shall participate in the personal interview in his capacity both as an aggrieved party and a person subject to a crime report. If the aggrieved party (1) fails to appear at the personal interview without providing a well-grounded excuse in advance and without delay, or becomes unavailable, (2) appears at a personal interview in a condition rendering him unable to perform his procedural obligations due to his own fault or leaves the place of the procedural act without permission, his crime report shall be considered withdrawn. The aggrieved party shall be advised of this provision in the summons.

An aggrieved party may not be expelled or removed from a personal interview even in the event of repeated or gravely disruptive conduct. If the aggrieved party does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the personal interview in his presence, he shall be deemed to have withdrawn the crime report. A person subject to a crime report shall be summoned indicating the name of the aggrieved party and the essence of the criminal offence.

If a person subject to a crime report is a foreign national, a consular representative of his State of citizenship shall be allowed to attend his personal interview.[1886]

At the beginning of a personal interview, the proceeding court shall establish the identity of the aggrieved party and the person subject to a crime report, present the essence of the crime report and, provided that the relevant conditions are met, advise the person subject to a crime report of the possibility of filing a counter-indictment. Then, the court shall attempt to reconcile the aggrieved party and the person subject to a crime report. If the attempt at reconciliation fails, the aggrieved party and the person subject to a crime report shall continue to participate in the proceeding as a private prosecuting party and an accused, respectively.

The proceeding court shall call on the private prosecuting party and, if a counterindictment was filed, the accused to specify their means of evidence and to state the facts each means of evidence is intended to prove. Upon the call by the court, both the accused and his defence counsel may specify the means of evidence that support his defence. For thesepurposes, the court may set a time limit of fifteen days. If there is more than one aggrieved party in a case, the party acting as the private prosecuting party shall be agreed on by the aggrieved parties. In the absence of an agreement, the party acting as the private prosecuting party shall be designated by the court.[1887]

If the aggrieved party makes a statement in his crime report or before the commencement of the personal interview that he does not wish reconciliation to be attempted and waives his attendance at the personal interview, then the person reporting the crime may be replaced by a legal representative at the personal interview. If the aggrieved party or the person subject to crime report made a statement that he does not wish reconciliation to be attempted, the court shall consider reconciliation to have failed without attempting it. If both the aggrieved party and the person subject to crime report made a statement that they do not wish reconciliation to be attempted, and there is no obstacle to holding the trial, the court may hold the trial immediately. It shall not be an obstacle to bringing a counter-indictment if the private prosecution party does not attend the personal interview in person. In such a situation, the court shall refrain from interviewing the private prosecuting party as an accused.[1888]

A court shall terminate a proceeding if (1) the aggrieved party withdraws his crime report, (2) an omission by the aggrieved party is to be deemed as withdrawal of the crime report, (3) the

[1886] CPC 768. §
[1887] CPC 768. §
[1888] CPC 769. §

attempt to reconcile the aggrieved party and the person subject to a crime report at the personal interview succeeds, or (4) the procedural fee is not paid within the time limit set by the Act on duties. In the course of a personal interview, the proceeding court may decide on any matter it is authorised to decide on before the personal interview.[1889]

*g) Court procedure at first instance:*

A legal representative may replace the private prosecuting party at trial if the private prosecuting party makes a statement that he does not wish to attend the trial in person. If the private prosecuting party was replaced by a legal representative, after such a statement is made, the legal representative shall proceed in place of the private prosecuting party in a private prosecution proceeding. The court may oblige a private prosecuting party who waived his attendance at trial to attend the trial if it is necessary for carrying out an evidentiary act or hearing an expert. If the private prosecuting party waived his attendance at trial and does not arrange for the appearance of a legal representative at trial, the indictment shall be deemed abandoned. The private prosecuting party shall be advised of this provision in the summons. If a private prosecuting party waived his attendance at trial appears at trial, or makes a statement that he wishes to attend the trial, from then on, the attendance of the private prosecuting party at trial shall be mandatory, and he may not waive his attendance again subsequently. When issuing a summons, or sending a notification, the proceeding court shall also inform the private prosecuting party and his legal representative about the evidence planned to be taken on a due date set.

If the private prosecuting party (1) fails to appear at trial without providing a well-grounded excuse in advance and without delay, or becomes unavailable, or (2) due to his own fault, appears at a trial in a condition rendering him unfit for interrogation, is unable to perform his procedural obligations, or leaves the place of the procedural act without permission,the indictment shall be considered abandoned. The private prosecuting party shall be advised of this provision in the summons. A private prosecuting party may not be expelled or removed from a trial even in the event of repeated or gravely disruptive conduct. If the private prosecuting party does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the trial in his presence, he shall be deemed to have abandoned the indictment.[1890]

After a personal interview is conducted, the pending private prosecution proceeding may not be joined with another private prosecution proceeding. If a new criminal proceeding is instituted on the basis of private prosecution against an accused who was released on probation in another public prosecution proceeding, the cases may be joined, provided that the prosecution service took over the representation of the prosecution. It that event, the court shall send all case documents to the prosecution service for the purpose of considering the possibility of taking over the representation of the prosecution.[1891]

If a private prosecuting party does not have a representative, his representative is not present, or an accused does not have a defence counsel, the court shall present the essence of the indictment and the counter-indictment at trial. At trial, the court shall interrogate the accused and the witnesses, and it shall hear the experts. If interrogating a private prosecuting party as a witness is necessary, the taking of evidence shall be commenced by interrogating the private prosecuting party. If the court establishes, after the closing arguments, addresses, and last words are delivered, that the qualification of the acts stated in the indictment may differ from the qualification presented in the indictment document, it may postpone the trial to facilitate

[1889] CPC 771. §
[1890] CPC 773. §
[1891] CPC 774. §

preparations for the defence, and it shall also obtain the opinion of the private prosecuting party on this matter.[1892]

The court shall send to the prosecution service the crime report and the case documents if, on the basis of a new fact or circumstance that arose during a personal interview or a trial,

- it seems that a criminal offence could be established as regards which the prosecution is to be represented by the prosecution service,
- it finds it necessary that the prosecution service consider the possibility of taking over the representation of the prosecution.

A private prosecuting party may abandon an indictment at any time. No reasons need to be provided for abandoning an indictment. A court shall terminate its proceeding if a private prosecuting party abandons the indictment or his omission is to be deemed as abandoning the indictment. If the prosecution service withdrew from representing a prosecution and the aggrieved party is present, the court shall continue the trial. Otherwise, the court shall postpone the trial and set, at the same time, a new trial date, and inform the aggrieved party that he represents the prosecution again.[1893]

With the exception of decisions passed in the context of administering a trial and keeping its order, all decisions shall be communicated to the private prosecuting party. The conclusive decision shall be served on the prosecution service if it took over the representation of the prosecution.[1894]

*h) Appeals*

A private prosecuting party shall be entitled to file an appeal against the judgment of the court of first instance. If a private prosecuting party represents the prosecution when an appeal is submitted, the statements for legal remedy may be made in the following order: statement by the private prosecuting party, the private party, other interested party, the accused, and the defence counsel. A private prosecuting party may file an appeal only to the detriment of the accused. A private prosecuting party shall provide a written statement of reasons for his appeal. If a private prosecuting party represents the prosecution when an appeal is submitted, the court of first instance shall forward the case documents to the court of second instance directly. The court shall serve a final and binding conclusive decision passed in a private prosecution proceeding also on the prosecution office that proceeded in the case previously. If the procedural fee for the appeal is not paid within the time limit set by the Act on duties, the appeal shall be considered withdrawn.[1895]

*i) Court procedure at second instance:*

A court of second instance shall summon the private prosecuting party to the trial; and the representative of the private prosecuting party, if any, shall be notified by the court. If the private prosecuting party waives his attendance at trial, the court shall summon the legal representative of the private prosecuting party to the trial.

If the private prosecuting party (1) fails to appear at trial without providing a well-grounded excuse in advance and without delay, or becomes unavailable, or (2) due to his own fault, appears at a trial in a condition rendering him unfit for interrogation, is unable to perform his procedural obligations, or leaves the place of the procedural act without permission, the appeal shall be considered withdrawn. The private prosecuting party shall be advised of this provision in the summons. A private prosecuting party may not be expelled or removed from a trial even in the event of repeated or gravely disruptive conduct. If the private prosecuting party does not

[1892] CPC 775. §
[1893] CPC 776. §
[1894] CPC 777. §
[1895] CPC 778. §

cease his disruptive conduct and, by his conduct, he makes it impossible to continue the trial in his presence, he shall be deemed to have withdrawn the appeal. If the private prosecuting party waived his attendance at trial, and he does not arrange for the appearance of a legal representative at trial, his appeal shall be considered withdrawn. The private prosecuting party shall be advised of this provision in the summons.

A court of second instance shall set aside a first instance judgment and terminate the proceeding in camera panel session, if a motion to that end is filed by the private prosecuting party before a conclusive decision is passed. A private prosecuting party shall be entitled to file an appeal against the conclusive decision of a court of second instance to the court of third instance. A private prosecuting party may file an appeal only to the detriment of the accused. If a private prosecuting party did not submit an appeal to the detriment of the accused against the conclusive decision of the court of first instance, he may not submit an appeal against the conclusive decision of the court of second instance, unless the accused is acquitted or the proceeding is terminated. A private prosecuting party shall provide a written statement of reasons for his appeal. The statement of reasons shall be filed with the court of second instance within the time limit open for appeals. If a private prosecuting party represent the prosecution when an appeal is submitted, the chair of the panel of the court of second instance shall forward the case documents to the court of third instance directly.[1896]

*j) Court procedure at third instance:*

If no appeal was submitted against a judgment to the detriment of the accused, the private prosecuting party may motion the court to set a public session. A court of third instance shall summon the private prosecuting party to the public session, and the representative of the private prosecuting party, if any, shall be notified by the court. If the private prosecuting party waived his appearance at a public session, the court shall summon the legal representative of the private prosecuting party to the public session. Adjudicating an appeal filed against an order passed by a court of second or third instance on setting aside.[1897]

A private prosecuting party shall be entitled to submit an appeal against an order passed by a court of second or third instance on setting aside, unless he submitted an appeal against the judgment for setting aside the judgment and instructing the court to conduct a new proceeding, and the judgment was set aside for a reason stated in the appeal.[1898]

*k) Criminal costs:*

If an accused was acquitted or the proceedings against an accused were terminated by the court, the private prosecuting party shall bear the criminal costs. If a private prosecuting party represented the prosecution and the accused was acquitted, or the proceedings against the accused were terminated by the court because the private prosecuting party abandoned the indictment, the private prosecuting party shall reimburse the fee and costs of the authorised defence counsel of the accused that were incurred in the proceeding with private prosecution, up to the amount specified by law, within one month after the conclusive decision becomes final and binding. The court of second instance shall oblige the private prosecuting party to bear the criminal costs, and the fee and costs that were incurred in the second instance proceeding, if only the private prosecuting party filed an appeal against the decision of the court of first instance, and the court of second instance upheld the decision. The court of third instance shall oblige the private prosecuting party to bear the criminal costs, and the fee and costs that were incurred in the third instance proceeding, if only the private prosecuting party filed an appeal against the decision of the court of second instance, and the court of third instance upheld the

[1896] CPC 779. §
[1897] CPC 780. §
[1898] CPC 781. §

decision. If a counter-indictment was filed, the proceeding court may also decide that the private prosecuting party and the counter-prosecuting party shall bear the criminal costs advanced by the respective party.[1899]

*l) Derogation from the provisions concerning extraordinary legal remedies:*
A private prosecuting party not file a motion for retrial, unless the defendant was acquitted or the proceeding was terminated for a reason other than the abandonment of the indictment. The motion for retrial shall be filed with, or recorded in minutes at, the court that is authorised to decide on the possibility of granting a retrial. The proceeding court shall send the motion for retrial to the prosecution service if it seems that a criminal offence could be established as regards which the prosecution is to be represented by the prosecution service. The prosecution service may order a retrial investigation regarding a criminal offence subject to public prosecution. If the procedural fee for retrial is not paid within the time limit set by the Act on duties, the motion shall be considered withdrawn.[1900]

A private prosecuting party may not file a motion for review. If a motion for review may not be dismissed, and a private prosecuting party represented the prosecution in the underlying case, the Curia shall send the motion to the private prosecuting party for the purpose of obtaining his statement. The private prosecuting party shall send his statement to the Curia within one month. The Curia shall send the statement of the private prosecuting party to the person who filed the motion for review, to the defendant and to the defence counsel. In a public court session, the appearance of the private prosecuting party shall be mandatory.[1901]

If a legal remedy is submitted on the ground of legality, the private prosecuting party shall be notified about the public court session. A private prosecuting party may make observations and, in a public session, address the court regarding the legal remedy submitted on the ground of legality. A uniformity decision shall also be communicated to a private prosecuting party. A private prosecuting party may not move for a simplified review procedure.[1902]

*m) Derogation from the provisions concerning specific proceedings and special proceedings:*
A private prosecuting party may not conduct an immediate summary procedure against an accused. A private prosecuting party may not enter into a plea agreement with an accused. A private prosecuting party may not file a motion for conducting a procedure for passing a punishment order. In a procedure for passing a punishment order (1) the time limit of one month open for passing an order shall be calculated from the date of the personal interview, (2) the private prosecuting party may move for trial within eight days after receipt of the punishment order. A private prosecuting party may not move for a court proceeding to be conducted against an absent defendant or in the absence of a defendant staying abroad. A private prosecuting party may not file a motion for conducting a special proceeding.[1903]

## 10.10. Substitute private prosecution procedure (CPC)

An aggrieved party may act as a substitute private prosecuting if (1) the crime report was dismissed by the prosecution service or the investigating authority, (2) the proceeding was terminated by the prosecution service or the investigating authority, (3) the prosecution service abandoned the indictment.

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[1899] CPC 782. §
[1900] CPC 783. §
[1901] CPC 784. §
[1902] CPC 785. §
[1903] CPC 786. §

A substitute private prosecuting party may not proceed if

- the person subject to a crime report, or the defendant, is a juvenile,
- the perpetrator is not liable to punishment or his act is not punishable due to infancy or a mental disorder,
- the criminal offence did not violate or endanger a right or legitimate interest of the aggrieved party directly,
- the aggrieved party is the State or an organ exercising public authority,
- an undercover investigator, a member of an organ authorised to use covert means, or a person cooperating in secret is reasonably suspected of having committed the criminal offence, and the prosecution service dismissed the crime report, or terminated the proceeding,
- the prosecution service dismissed the crime report or terminated the proceeding,
- the prosecution service terminated the proceeding because it entered into a plea agreement with the defendant, or
- the prosecution service abandoned the indictment.[1904]

Legal representation shall be mandatory for the aggrieved party in a substitute private prosecution proceeding. The participation of a defence counsel in a substitute private prosecution proceeding shall be mandatory. In a substitute private prosecution proceeding, the aggrieved party may file a civil claim in the motion for prosecution at the latest. In a substitute private prosecution proceeding, a mediation procedure may be in order if the prosecution service took over the representation of the prosecution. If there is more than one aggrieved party in a case, the party acting as the substitute private prosecuting party shall be agreed on by the aggrieved parties. In the absence of an agreement, the party acting as the substitute private prosecuting party shall be designated by the court. For the purposes of this Act, indictment document shall also mean a motion for prosecution that is accepted by the court.[1905]

The prosecution service may take over the representation of a prosecution from a substitute private prosecuting party once during a proceeding. If the prosecution service takes over the representation of a prosecution, it shall notify the aggrieved party accordingly. If the prosecution service takes over the representation of a prosecution, the substitute private prosecuting party may exercise the rights, and shall be bound by the obligations, of an aggrieved party, with the proviso that he may abandon the indictment at any time. If the prosecution service takes over the representation of a prosecution, it may not abandon the indictment but may withdraw from representing the prosecution. If the prosecution service takes over the representation of a prosecution, the failure of the prosecutor to appear at trial shall be deemed as withdrawal from representing the prosecution.[1906]

*a) Action by a substitute private prosecuting party if the crime report is dismissed or the proceeding is terminated:*

If a crime report is dismissed, the aggrieved party may act as a substitute private prosecuting party, provided that (1) the crime report filed by the aggrieved party is dismissed by the prosecution service or the investigating authority, (2) the aggrieved party filed a complaint against the decision on dismissing his crime report, and that complaint is dismissed by the prosecution service, and (3) no ground for exclusion. If the proceeding is terminated, the aggrieved party may act as a substitute private prosecuting party, provided that

- the proceeding was terminated by the prosecution service or the investigating authority, or for another reason terminating liability to punishment set out in an Act,

[1904] CPC 787. §
[1905] CPC 788. §
[1906] CPC 789. §

- the aggrieved party filed a complaint against the decision on terminating the proceeding, and that complaint is dismissed by the prosecution service, and
- no ground for exclusion specified in CPC.[1907]

If the aggrieved party may act as a substitute private prosecuting party, the aggrieved party may take action as a substitute private prosecuting party within two months after the decision on dismissing his complaint is communicated. After the dismissal of his complaint, the aggrieved party shall be allowed to inspect the case documents pertaining to the criminal offence committed against him. The aggrieved party may not inspect case documents that are kept separate from other case documents and handled confidentially.[1908]

The aggrieved party may file an application for legal aid within one month after the decision on dismissing his complaint is communicated. If the aggrieved party filed an application: (1) the two-month time limit open for taking action as a substitute private prosecuting party shall be calculated from the communication of the decision with administrative finality, or the final and binding decision, passed in the administrative case launched with regard to granting legal aid; (2) he shall notify the prosecution service accordingly within eight days after filing the application.[1909]

If the aggrieved party intends to take action as a substitute private prosecuting party, he shall file a motion for prosecution with the prosecution service that dismissed his complaint. The motion for prosecution shall include the following: (1) the items specified in CPC; (2) any civil claim by an aggrieved party; (3) a motion for persons to be summoned to, and persons to be notified about, the trial, and (4) a motion to read out the testimony of any witness the testimony of whom is necessary for the taking of evidence, but the personal appearance of whom at trial is not necessary, would involve disproportional difficulties, or is not possible. The motion for prosecution shall be signed by also the legal representative, or he shall affix to it his qualified electronic signature, or advanced electronic signature based on a qualified certificate. The prosecution service shall forward the motion for prosecution, together with the case documents, to the court with subject-matter and territorial jurisdiction over the case within fifteen days of receipt.[1910]

The court shall dismiss the motion for prosecution with a non-conclusive order if

- the aggrieved party filed the motion for prosecution after the expiry of the statutory time limit,
- the aggrieved party does not have a legal representative,
- under an Act, a substitute private prosecuting party may not take action,
- the motion for prosecution does not have the content required under CPC,
- the entity authorised to lift immunity refused to lift the immunity where the crime report was dismissed or the proceeding was terminated.

The aggrieved party may file the motion for prosecution again within fifteen days after receipt of the non-conclusive order on dismissing the motion for prosecution, provided that it was previously dismissed by the court and the ground for dismissal does not exist any longer. The court may not dismiss the motion for prosecution on the ground that it does not include all the personal data specified in CPC of the defendant, and such data may not be established from the case documents either, provided that the defendant may be identified beyond a reasonable doubt even in the absence of such data. If any data discovered during the examination of the motion for prosecution suggests that the defendant has immunity, the court shall first consider if any other ground for dismissing the motion for prosecution under CPC exists. If there is no ground for dismissing the motion for prosecution under CPC, the court shall request a decision from

[1907] CPC 790. §
[1908] CPC 791. §
[1909] CPC 792. §
[1910] CPC 793. §

the entity authorised to lift the immunity without suspending the proceeding. If the entity authorised to lift the immunity lifts the immunity, the court shall accept the motion for prosecution. Otherwise, the court shall dismiss the motion for prosecution.[1911]

If the court accepted the motion for prosecution,

- it shall notify the aggrieved party that he may proceed as a substitute private prosecuting party,
- it shall send the motion for prosecution to the defendant and the defence counsel without delay,
- it shall make arrangements to have the means of evidence available at trial,
- it may order the use of coercive measures.

If taking action as a substitute private prosecuting party is based on the termination of the proceeding, the defendant and the defence counsel, after the motion for prosecution is accepted, shall be eligible to inspect the case documents of the investigation and the means of evidence. If the defendant used a language other than the Hungarian language in the proceeding, the court shall make arrangements to have the parts of the motion for prosecution pertaining to the defendant translated into the language used during the proceeding.[1912]

*b) Action by a substitute private prosecuting party if the indictment is abandoned:*

If the prosecution service abandoned the indictment, the aggrieved party may take action as a substitute private prosecuting party, provided that the grounds for exclusion specified in CPC. The aggrieved party may take action as a substitute private prosecuting party within fifteen days after receipt of the statement specified in CPC. After the abandonment of the indictment, the aggrieved party shall be allowed to inspect the case documents pertaining to the criminal offence committed against him. The aggrieved party may not inspect case documents that are kept separate from other case documents and handled confidentially.[1913]

The aggrieved party may file an application for legal aid within one month after receipt of the statement containing the abandonment of the indictment. If the aggrieved party filed an application under CPC,

- the fifteen-day time limit open for taking action as a substitute private prosecuting party shall be calculated from the communication of the decision with administrative finality, or the final and binding decision, passed in the administrative case launched with regard to granting legal aid;
- he shall notify the court accordingly within eight days after filing the application.[1914]

If the aggrieved party intends to take action as a substitute private prosecuting party, he shall submit a written notice to the court proceeding in his case that he intends to represent the prosecution as a substitute private prosecuting party as regards the indictment abandoned by the prosecution service. The written notice shall be signed by also the legal representative, or he shall affix to it his qualified electronic signature, or advanced electronic signature based on a qualified certificate.[1915]

The court shall dismiss the written notice with a non-conclusive order if (1) the aggrieved party submitted the notice after the expiry of the statutory time limit, (2) the aggrieved party does not have a legal representative, (3) under an Act, a substitute private prosecuting party may not take action, (4) the notice does not have the content required under CPC. The aggrieved party may submit the written notice again within fifteen days after receipt of the non-conclusive order on dismissing the written notice, provided that it was previously dismissed by the court

[1911] CPC 794. §
[1912] CPC 795. §
[1913] CPC 796. §
[1914] CPC 797. §
[1915] CPC 798. §

under CPC and the ground for dismissal does not exist any longer. If the court accepts the notice, it shall notify the aggrieved party that he may proceed as a substitute private prosecuting party. If a substitute private prosecuting party acts in the proceeding, the trial shall be continued.[1916]

If the criminal proceeding is conducted because of more than one criminal offence, and the prosecution service abandons the indictment regarding any of the criminal offences, a substitute private prosecuting party may take action only if the case in which the prosecution service abandoned the indictment can be separated. If the criminal proceeding is conducted against more than one defendant because of the same criminal offence, and the prosecution service abandons the indictment against any of the defendants, the provisions laid down in CPC shall apply as appropriate. If the court accepts the written notice submitted by the aggrieved party, it shall separate the case in which the substitute private prosecuting party takes action. With regard to the separated case, the criminal proceeding shall be continued, on the basis of the indictment document filed by the prosecution service, by the court that proceeded until the separation.[1917]

*c) Preparation of the trial:*

The attendance of the substitute private prosecuting party and his legal representative at the preparatory session shall be mandatory. If the legal representative of the substitute private prosecuting party fails to appear at the preparatory session without providing a well-grounded excuse in advance and without delay, the court shall postpone the preparatory session at the expense of the legal representative and may impose a disciplinary fine on the legal representative. The court shall advise the legal representative of this provision in the summons. If the substitute private prosecuting party

- fails to appear at the preparatory session without providing a well-grounded excuse in advance and without delay, or the substitute private prosecuting party could not have been summoned because he failed to submit a notice of a change in his home address, or
- due to his own fault, appears at a trial in a condition rendering him unable to perform his procedural obligations, or leaves the place of the procedural act without permission,

the substitute private prosecuting party shall be deemed to have abandoned the indictment. The substitute private prosecuting party shall be advised of this provision in the summons. A substitute private prosecuting party may not be expelled or removed from a preparatory session even in the event of repeated or gravely disruptive conduct. If the substitute private prosecuting party does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the preparatory session in his presence, he shall be deemedto have abandoned the indictment. During the preparatory session, members of the court, the accused, and the defence counsel may ask questions from the substitute private prosecuting party.[1918]

*d) Court procedure at first instance:*

Unless otherwise provided in this Act, the substitute private prosecuting party may exercise the rights of an aggrieved party and the prosecution service, and he shall carry out the tasks of the prosecution service during the court procedure, including filing a motion for ordering any coercive measure affecting the personal freedom of the defendant or for issuing an arrest warrant. A substitute private prosecuting party may not file a motion for terminating the parental custody rights of an accused and may not extend the indictment.[1919]

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[1916] CPC 799. §
[1917] CPC 800. §
[1918] CPC 801. §
[1919] CPC 802. §

The attendance of the substitute private prosecuting party and his legal representative at trial shall be mandatory. When issuing a summons, the court shall also inform the substitute private prosecuting party and his legal representative about the evidence planned to be taken on a due date set. If the legal representative of the substitute private prosecuting party fails to appear at trial without providing a well-grounded excuse in advance and without delay, the court shall postpone the trial at the expenditure of the legal representative and may impose a disciplinary fine on the legal representative. The court shall advise the legal representative of this provision in the summons. If the substitute private prosecuting party

- fails to appear at a trial without providing a well-grounded excuse in advance and without delay, or the substitute private prosecuting party could not have been summoned because he failed to submit a notice of a change to his home address, or
- due to his own fault, appears at a trial in a condition rendering him unfit for interrogation, is unable to perform his procedural obligations, or leaves the place of the procedural act without permission,

the substitute private prosecuting party shall be deemed to have abandoned the indictment. The substitute private prosecuting party shall be advised of this provision in the summons. If legal representation of the substitute private prosecuting party is terminated during the proceeding, the court shall invite the substitute private prosecuting party, within eight days of becoming aware of such termination, to arrange for his legal representation within fifteen days. If the substitute private prosecuting party fails to arrange for his legal representation within the set time limit, the substitute private prosecuting party shall be deemed to have abandoned the indictment and the proceeding shall be terminated. The substitute private prosecuting party shall be advised of this provision. The substitute private prosecuting party may file an application for legal aid within eight days calculated from the invitation referred to in CPC.[1920]

The substitute private prosecuting party may not be expelled or removed from a trial even in the event of repeated or gravely disruptive conduct. If the substitute private prosecuting party does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the trial in his presence, he shall be deemed to have abandoned the indictment. The legal representative of the substitute private prosecuting party may not be expelled or removed from a trial even in the event of repeated or gravely disruptive conduct. If the legal representative does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the trial in his presence, the court shall interrupt the trial. In such an event, the substitute private prosecuting party may authorise another legal representative or request the legal aid service to appoint another legal aid lawyer. If this is not possible immediately, the court shall postpone the trial at the cost of the disrupting legal representative.[1921]

After the motion for prosecution, or the written notice specified in CPC, is accepted by the court, the pending substitute private prosecution proceeding may not be joined with another substitute private prosecution proceeding. It shall not form an obstacle to joining the cases if the accused was released on probation earlier in a case subject to private or public prosecution, and a substitute private prosecuting party represents the prosecution in the more recent criminal proceeding.[1922]

The substitute private prosecuting party may abandon the indictment at any time. No statement of reasons shall be required for abandoning an indictment. The court shall terminate the proceeding if the substitute private prosecuting party abandons the indictment or his omission is to be deemed as abandoning the indictment. If the prosecution service withdrew from representing the prosecution and the aggrieved party and the legal representative are present, the court shall continue the trial. Otherwise, the court shall postpone the trial and set a

[1920] CPC 803. §
[1921] CPC 804. §
[1922] CPC 805. §

new trial date, and it shall inform the aggrieved party that he represents the prosecution again.[1923]

If the court establishes, after the closing arguments, addresses, and last words are delivered, that the qualification of the acts stated in the indictment may differ from the qualification presented in the indictment document, it may postpone the trial to facilitate preparations for the defence, and it shall also obtain the opinion of the substitute private prosecuting party on this matter.[1924]

With the exception of decisions passed in the context of administering the trial and keeping its order, all decisions shall be communicated to the substitute private prosecuting party. The conclusive decision shall only be served on the prosecution service if it took over representing the prosecution.[1925]

*e) Appeals:*

The substitute private prosecuting party and, with the consent of the substitute private prosecuting party, his legal representative shall be entitled to file an appeal against the judgment of the court of first instance. If a substitute private prosecuting party represents the prosecution when the appeal is submitted, the statements for legal remedy may be made in the following order: statement by the substitute private prosecuting party, the civil party, other interested party, the accused, and the defence counsel. A substitute private prosecuting party may file an appeal only to the detriment of the accused. The court of first instance shall notify the accused and the defence counsel about any appeal filed by the substitute private prosecuting party pursuant to CPC. A substitute private prosecuting party shall provide a written statement of reasons for his appeal. If a substitute private prosecuting party represents the prosecution when the appeal is submitted, the court of first instance shall forward the case documents to the court of second instance directly. The court shall send a final and binding conclusive decision passed in a substitute private prosecution proceeding also to the prosecution service that proceeded in the case previously.[1926]

*f) Court procedure at second instance:*

The court of second instance shall summon the substitute private prosecuting party and his legal representative to the trial. If the substitute private prosecuting party

- fails to appear at a trial without providing a well-grounded excuse in advance and without delay, or the substitute private prosecuting party could not have been summoned because he failed to submit a notice of a change to his home address, or
- due to his own fault, appears at a trial in a condition rendering him unfit for interrogation, is unable to perform his procedural obligations, or leaves the place of the procedural act without permission,

the substitute private prosecuting party shall be deemed to have withdrawn his appeal. The substitute private prosecuting party shall be advised of this provision in the summons. The substitute private prosecuting party may not be expelled or removed from a trial even in the event of repeated or gravely disruptive conduct. If the substitute private prosecuting party does not cease his disruptive conduct and, by his conduct, he makes it impossible to continue the trial in his presence, he shall be deemed to have withdrawn his appeal. The substitute private prosecuting party and, with the consent of the substitute private prosecuting party, his legal representative shall be eligible file an appeal against the conclusive decision of the court of second instance to the court of third instance. A substitute private prosecuting party may file an

[1923] CPC 806. §
[1924] CPC 807. §
[1925] CPC 808. §
[1926] CPC 809. §

appeal only to the detriment of the accused. If the substitute private prosecuting party did not submit an appeal to the detriment of the accused against the conclusive decision of the court of first instance, he may not submit an appeal against the conclusive decision of the court of second instance, unless the accused is acquitted or the proceeding is terminated. The substitute private prosecuting party shall provide a written statement of reasons for his appeal. The statement of reasons shall be filed with the court of second instance within the time limit open for appeals. If a substitute private prosecuting party represents the prosecution when the appeal is submitted, the chair of the panel of the court of second instance shall forward the case documents to the court of third instance directly.[1927]

*g) Court procedure at third instance:*
If no appeal was submitted to the detriment of the accused against the judgment, the substitute private prosecuting party may motion the court to set a public session. The court of third instance shall summon the substitute private prosecuting party and his legal representative to the public session.[1928]

*h) Adjudicating an appeal filed against an order passed by a court of second or third instance on setting aside:*
The substitute private prosecuting party shall be eligible to submit an appeal against an order on setting aside by the court of second or third instance, unless he submittedan appeal against setting aside the judgment and instructing the court to conduct a new proceeding, and the judgment was set aside for a reason stated in the appeal.[1929]

*i) Criminal costs:*
If the accused was acquitted or the proceedings against the accused were terminated by the court, the substitute private prosecuting party shall bear the costs, from among the criminal costs specified in CPC, that were incurred after the substitute private prosecuting party took action. If a substitute private prosecuting party represented the prosecution and the accused was acquitted, in a situation other than that specified in section CPC, or the proceedings against the accused were terminated by the court because the substitute private prosecuting party abandoned the indictment, the substitute private prosecuting party shall reimburse the fee and costs of the authorised defence counsel of the accused that were incurred after the substitute private prosecuting party took action, up to the amount specified by law, within one month after the conclusive decision becomes final and binding. The substitute private prosecuting party may be obliged to bear only the criminal costs that are related to that act or those elements of the facts of the case, and to reimburse only that part of the fees and costs referred to in CPC, regarding which he filed a motion for prosecution or submitted a written notice and the court passed a judgment of acquittal, with the exception of the situation specified in CPC, or terminated the proceeding. The court of second instance shall oblige the substitute private prosecuting party to bear the criminal costs, and the fee and costs specified in CPC, that were incurred in the second instance proceeding if only the substitute private prosecuting party filed an appeal against the decision of the court of first instance, and the court of second instance upheld the. The court of third instance shall oblige the substitute private prosecuting party to bear the criminal costs, and the fee and costs specified in CPC, that were incurred in the third instance proceeding if only the substitute private prosecuting party filed an appeal against the decision of the court of second instance, and the court of third instance upheld the decision.[1930]

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[1927] CPC 810. §
[1928] CPC 811. §
[1929] CPC 812. §
[1930] CPC 813. §

*j) Derogation from the provisions concerning extraordinary legal remedies:*
A substitute private prosecuting party may file a motion for retrial only if the defendant was acquitted or the proceeding was terminated for a reason other than the abandonment of the indictment. The motion for retrial shall be filed with, or recorded in minutes at the court that is authorised to decide on the possibility of granting a retrial.[1931]

A substitute private prosecuting party may not file a motion for review. If a motion for review may not be dismissed and a substitute private prosecuting party represented the prosecution in the underlying case, the Curia shall send the motion to the substitute private prosecuting party for the purpose of obtaining his statement. The substitute private prosecuting party shall send his statement to the Curia within one month. The Curia shall send the statement of the substitute private prosecuting party to the person who filed the motion for review, to the defendant and to the defence counsel. The persons may make their observations regarding the statement of the substitute private prosecuting party within fifteen days of service. The attendance of the substitute private prosecuting party and the legal representative at the public court session shall be mandatory.[1932]

If legal remedy is submitted on the ground of legality, the substitute private prosecuting party and his legal representative shall be notified about the public court session. The substitute private prosecuting party may make observations, and address the court in a public session, regarding the legal remedy submitted on the ground of legality. The uniformity decision shall also be communicated to the substitute private prosecuting party. A substitute private prosecuting party may not move for a simplified review procedure.[1933]

*k) Derogation from the provisions concerning specific proceedings and special proceedings*
A substitute private prosecuting party may not conduct an immediate summary procedure against an accused. A substitute private prosecuting party may not file a motion for conducting a procedure for passing a punishment order. In a proceeding for passing a punishment order,

- the substitute private prosecuting party may move for trial within eight days after receipt of the punishment order,
- the court, on the basis of a motion for trial filed by the substitute private prosecuting party, shall continue the proceeding pursuant to Chapter C, subject to the derogations laid down in this Chapter.

A substitute private prosecuting party may not move for a court proceeding to be conducted against an absent defendant or in the absence of a defendant staying abroad. The substitute private prosecuting party may not file a motion for conducting a special proceeding.[1934]

## 10.11. Procedure for the removal of assets or things, or rendering data inaccessible (CPC)

In a proceeding for the removal of assets or things, or rendering inaccessible data relating to a criminal offence (hereinafter: „proceeding for the removal of assets"), the provisions of this Act shall apply subject to the derogations laid down in this Chapter.

A proceeding for the removal of assets may be conducted if

- no investigation was instituted,
- a criminal proceeding was terminated, or

[1931] CPC 814. §
[1932] CPC 815. §
[1933] CPC 816. §
[1934] CPC 817. §

- a criminal proceeding was suspended, because (1) the perpetrator is staying at an unknown location or in another country, (2) the perpetrator cannot participate in the proceeding due to his permanent and serious illness, or a mental disorder that occurred after the commission of the criminal offence, or (3) the identity of the perpetrator could not be determined during the investigation, and confiscation, forfeiture of assets, rendering electronic data permanently inaccessible, or taking a seized thing into State ownership is necessary.

A proceeding for the removal of assets may be conducted after a final and binding conclusive decision is passed by a court if (1) recovering assets originating from a criminal offence or (2) ordering retrospectively confiscation, forfeiture of assets, or the rendering of electronic data permanently inaccessible is necessary.[1935]

The prosecution service or investigating authority shall order assets, things, or data relating to a criminal offence to be located, or the ownership status of a seized thing to be clarified (hereinafter jointly „search for assets") if it is reasonable to assume that the purpose of a proceeding for the removal of assets can be achieved and

- no investigation was instituted, or
- it is not possible, on the basis of data of the proceeding, to pass a decision on the merits of the matter of (1) confiscation, forfeiture of assets, rendering electronic data inaccessible, or (2) taking a seized thing into State ownership.

In a situation specified in CPC, the prosecution service shall order a search for assets after a final and binding conclusive decision is passed by a court

- for the purpose of recovering assets originating from a criminal offence if a forfeiture of assets, expressed as a sum of money, was ordered in a final and binding conclusive decision, and (1) the enforcement of forfeiture of assets failed, according to the information provided by the national tax and customs authority, or (2) the assets of a defendant falling within the scope of forfeiture of assets could not be secured before a final and binding conclusive decision is passed,
- if confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible could be applied retrospectively, and it is reasonable to assume that the purpose of a proceeding for the removal of assets can be achieved.

In this situation, (1) the prosecution service shall notify the national tax and customs authority about ordering a search for assets; (2) the search for assets shall be conducted by the investigating authority or the prosecution service; (3) the search for assets shall be conducted by the asset recovery organ of the investigating authority. In the course of a search for assets, (1) data acquisition activities, (2) obtaining means of evidence, and performing evidentiary acts, (3) coercive measures other than coercive measures affecting personal freedom may be ordered pursuant to the provisions of this Act.

In the course of a search for assets, the use of covert means may also be ordered. To the use of covert means the provisions laid down in CPC shall apply. The use of covert means subject to permission of a judge may be permitted by the court. If covert means subject to permission of a judge were used earlier against a person concerned during the investigation, and the use of covert means subject to permission of a judge is permitted again in the course of locating assets or things relating to the criminal offence, the periods of using such covert means shall be added together. In the course of a search for assets, and with a view to securing the enforcement of a forfeiture of assets ordered in the final and binding conclusive decision and expressed as a sum of money, seizure or sequestration may also be ordered regarding assets or things that may fall within the scope of the forfeiture of assets ordered in the final and binding conclusive decision. If a party with a pecuniary interest is unknown, is at an unknown location, or does not

[1935] CPC 819. §

understand the Hungarian language, a guardian ad litem shall be appointed for him. The rules of investigation shall apply as appropriate to the relationship between an investigating authority, the asset recovery organ of an investigating authority, and the prosecution service, with the proviso that the rules of examination shall apply after seizure or sequestration is ordered for the purpose of securing assets, things, or data relating to a criminal offence.[1936]

A search for assets may last for up to two years after it is ordered. The proceeding prosecution office, investigating authority, or the asset recovery organ of the investigating authority shall terminate a proceeding if (1) achieving the purpose of a proceeding for the removal of assets is impossible and cannot be expected, or (2) the time limit for a search for assets, as specified in CPC, expired. The termination of the proceeding for the removal of assets shall not prevent a search for assets from being ordered again if a new fact or circumstance arises that serves as ground for a proceeding for the removal of assets. In a situation described in CPC, the proceeding prosecution office, or the asset recovery organ of the investigating authority, shall serve on the national tax and customs authority its decision on terminating the proceeding. No complaint shall lie against a decision on terminating the proceeding.[1937]

If, on the basis of data of a proceeding or a search for assets, confiscation, forfeiture of assets, rendering electronic data permanently inaccessible, taking a seized thing into State ownership, or determining if an asset falls within the scope of forfeiture of assets ordered in a final and binding conclusive decision is necessary, the proceeding prosecution office shall submit a motion to that effect to the court. The motion of the proceeding prosecution office shall contain

- personal data that are suitable for identifying the defendant, the person reasonably suspected of having committed the criminal offence or the party with a pecuniary interest, affected by a measure specified in the motion, or the defendant or the person reasonably suspected of having committed the criminal offence affected by a coercive measure where a seized thing is taken into State ownership,
- a specification of the asset, thing, or data affected by the measure or coercive measure,
- a motion for applying a measure or taking a seized thing into State ownership, including a reference to applicable laws,
- a description of the facts supporting the motion.[1938]

If the territorial jurisdiction of a court cannot be determined pursuant to CPC, the proceeding court shall be the court with territorial jurisdiction over the location where an authority detected the circumstance serving as ground for a proceeding for the removal of assets. The court shall decide on the basis of case documents, but it shall hold a trial, if necessary. In a court proceeding, the proceeding may not be suspended. If the proceeding court holds a trial, a preparatory session may not be held. After opening the trial, the chair of the panel shall present the essence of the decision passed in the underlying case, as necessary, and then the prosecutor shall present the essence of the motion.[1939]

In a situation described in CPC, the proceeding court shall order confiscation, forfeiture of assets, or rendering electronic data permanently inaccessible, or, taking a seized thing into State ownership, provided that the motion is well-grounded; otherwise, it shall dismiss the motion. In a situation described CPC, the proceeding court shall establish that the assets identified in the motion fall within the scope of forfeiture of assets ordered in the final and binding conclusive decision, provided that the motion is well-grounded. Otherwise, it shall dismiss the motion. If the court passed its decision on the basis of case documents, no appeal shall lie against its conclusive order, but the prosecution service, a defendant, a person reasonably suspected of having committed a criminal offence, a defence counsel and a party with a

[1936] CPC 820. §
[1937] CPC 821. §
[1938] CPC 822. §
[1939] CPC 823. §

pecuniary interest may move for trial within eight days after the order is served. The court shall notify all persons referred to on CPC about the trial.[1940]

The proceeding court shall oblige the convict to bear the criminal costs if it establishes that the assets identified in the motion fall within the scope of forfeiture of assets ordered in the final and binding conclusive decision. Otherwise, criminal costs arising in a proceeding for the removal of assets shall be borne by the State.[1941]

## 10.12. Procedure concerning criminal offences related to the border fence

To a criminal proceeding instituted for illegal crossing of the border fence, vandalisation of the border fence, or obstructing construction works related to the border fence (hereinafter jointly „criminal offences related to the border fence"), the provisions of the CPC shall apply subject to the derogations laid down in this Chapter. The scope of this Chapter shall also cover other criminal offences committed by the defendant if adjudicated in the same proceeding as the criminal offence related to the border fence.[1942]

A single judge may refer a case to a court panel if a proceeding is conducted on the basis of another criminal offence in addition to a criminal offence related to the border fence. In a case falling within the subject-matter jurisdiction of a district court, the district court located at the seat of a regional court shall proceed with territorial jurisdiction over the entire territory of the county, while within the territory of the Budapest-Capital Regional Court, the Central District Court of Pest, shall proceed with territorial jurisdiction over the entire territory of Budapest. If the criminal offences committed by a defendant fall within the territorial jurisdiction of different district courts, the court with territorial jurisdiction under CPC concerning any of the criminal offences shall proceed. A district court located at the seat of a regional court or, within the territory of the Budapest-Capital Regional Court, the Central District Court of Pest, shall also have territorial jurisdiction for a proceeding if it has territorial jurisdiction over the home address or actual place of residence of the defendant, and the indictment is brought to that court by the prosecution service.[1943]

The participation of a defence counsel in a criminal proceeding shall be mandatory.[1944]

In the course of ordering and enforcing a coercive measure affecting personal freedom, special attention shall be paid to avoiding the violation of the interests of any person who has not attained the age of eighteen years accompanying the defendant, and the unnecessary separation of a juvenile from his relatives. The prosecution service, before the indictment, or the proceeding court, after the indictment, may order custody to be enforced in a facility used for the placement of, caring for, and the detention of, a person falling within the scope of the Act on asylum or the Act on the entry and residence of third-country nationals, so that the person concerned is separated from other persons not subject to any criminal proceeding. If custody is enforced at a facility, the prosecution service, before the indictment, or the proceeding court, after the indictment, may order custody to be enforced without separating defendants or persons reasonably suspected of having committed a criminal offence who are relatives, provided that it does not violate the interests of the investigation or a juvenile defendant or person reasonably suspected of having committed a criminal offence. If a court orders criminal supervision concerning a defendant who is not a Hungarian citizen or does not have a home address in Hungary, the court shall designate (1) an accommodation centre or

[1940] CPC 824. §
[1941] CPC 826. §
[1942] CPC 827. §
[1943] CPC 828. §
[1944] CPC 829. §

reception centre as defined in the Act on asylum or the Act on the entry and residence of third-country nationals, provided that the relevant statutory conditions are met, (2) otherwise, a facility used for the placement of, caring for, and the detention of, a person falling within the scope of the Act on asylum or the Act on the entry and residence of thirdcountry nationals, provided that it is possible at that facility to separate the defendant from other persons not subject to any criminal proceeding and other persons in pre-trial detention as residence for the defendant. The proceeding court may deviate from the provisions laid down in CPC if the proceeding is conducted against the defendant on the basis of another criminal offence in addition to a criminal offence related to the border fence. The proceeding court may order the pre-trial detention to be enforced in a facility used for the placement of, caring for, and the detention of, a person falling within the scope of the Act on asylum or the Act on the entry and residence of third-country nationals, so that the person concerned is separated from other persons not subject to any criminal proceeding. If the pre-trial detention is enforced at a facility, the prosecution service, before the indictment, or the proceeding court, after the indictment, may order the pre-trial detention to be enforced without separating defendants who are relatives, provided that it does not violate the interests of the investigation or a juvenile defendant. On the basis of a court order, the pre-trial detention may also be enforced in a police detention facility as an exception.[1945]

A prosecution office or investigating authority shall notify the immigration or asylum authority with territorial jurisdiction over the seat of the proceeding prosecution office or investigating authority about interrogating, for the first time, a suspect who is not a Hungarian citizen or does not have a home address in Hungary.[1946]

A court may suspend a criminal proceeding if it establishes that an asylum proceeding is pending based on an asylum application filed by the defendant or the person reasonably suspected of having committed a criminal offence. A proceeding shall be terminated if a defendant or a person reasonably suspected of having committed a criminal offence, who is not a Hungarian citizen and does not have a home address in Hungary, is at an unknown location. The proceeding court shall decide on this matter by passing a non-conclusive order.[1947]

A defendant may waive his right to have the indictment document or judgment translated.[1948]

The provisions laid down in CPC shall not apply if a proceeding is conducted against a juvenile on the basis of a criminal offence related to the border fence only. In a juvenile criminal proceeding, a single judge proceeding at first instance may refer the case to a panel. A social environment assessment shall not be necessary regarding a juvenile who is not a Hungarian citizen and does not have a home address in Hungary, provided that the proceeding is conducted against the juvenile concerned on the basis of a criminal offence related to the border fence only. By way of derogation from CPC, if a social environment assessment is necessary, it shall not assess the risks the juvenile concerned is exposed to in the context of crime prevention. If a court orders criminal supervision concerning an unaccompanied juvenile defendant, it may designate a child protection institution as residence for the defendant.[1949]

A prosecution office may bring a defendant to court in an immediate summary procedure within fifteen days after a criminal offence is committed. The court shall send back the case documents to the prosecution service if (1) the criminal offence is, under an Act, punishable by imprisonment for more than ten years, or (2) the means of evidence are not available.[1950]

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[1945] CPC 830. §
[1946] CPC 831. §
[1947] CPC 832. §
[1948] CPC 833. §
[1949] CPC 834. §
[1950] CPC 835. §

A court may pass a punishment order also as regards a defendant who is subject to criminal supervision. A punishment order shall be passed by a court within five days after receipt of the case documents.[1951]

[1951] CPC 836. §

# CHAPTER XI

# SPECIAL PROCEDURES

## 11.1. Introduction

To a special proceeding, the provisions of this Act shall apply subject to the derogation laid down in this Part, with the proviso that

- unless otherwise provided in this Act, an appeal against a first instance court decision may be filed by the prosecution service, a convict, or a defence counsel,
- the court shall pass a provision meeting the legal requirements if the motion is wellgrounded,
- the court shall dismiss the motion if it is unsubstantiated,
- the court shall or may terminate the proceeding if it establishes in a proceeding conducted ex officio that the conditions for instituting the proceeding are not met or the person who filed the motion withdrew his motion and the proceeding cannot be conducted ex officio,
- the court of second instance shall decide on an appeal in a panel session; if interviewing a prosecutor, a defendant, or a defence counsel is necessary, it shall hold a public session; if other evidence is taken, it shall hold a trial,
- no third-instance proceedings can be brought.

The following shall constitute a special procedure:

- postponing the earliest date of release on parole from life imprisonment,
- procedure for imposing an accumulative sentence,
- procedure for ex-post setting of the period of expulsion,
- procedure in case of release on probation,
- procedure in case of reparation work,
- granting a payment moratorium, or payment in instalments, for the payment of criminal costs to the State.

A motion excluded in an Act shall be dismissed by a court without stating any reason as to its merits. A motion filed by an ineligible person shall be dismissed by a court without stating any reason as to its merits if the statutory conditions for proceeding ex officio are not met. If a motion can be dismissed without stating any reason as to its merits under the CPC, the proceeding court may also decide on the basis of case documents.[1952]

## 11.2. Postponing the earliest date of release on parole from life imprisonment (CPC)

If life imprisonment is imposed as penalty with final and binding effect in an underlying case, the court of first instance in the underlying case shall decide, ex officio or upon a motion from the prosecution service, by passing a non-conclusive order in a public court session or trial on postponing the earliest date of releasing the convict on parole from life imprisonment. If the court decides to postpone the earliest date of release on parole, the criminal costs shall be borne by the convict. If the court does not postpone the earliest date release on parole, the criminal costs shall be borne by the State.[1953]

## 11.3. Procedure for imposing an accumulative sentence (CPC)

[1952] CPC 837. §
[1953] CPC 838. §

In a proceeding for imposing an accumulative sentence, the proceeding court shall be the court that proceeded at first instance in the case that was concluded for last, provided that the proceedings were conducted by courts with identical subject-matter jurisdiction; otherwise, the court of first instance with higher subject-matter jurisdiction shall proceed. If a military criminal proceeding was conducted in any of the cases, the matter of passing an accumulative sentence shall be decided by the court that conducted the military criminal proceeding, unless military criminal procedure was applied on the basis of CPC. A proceeding for imposing an accumulative sentence shall be instituted ex officio or upon a motion from a prosecution office, convict, or defence counsel. The consent of the convict concerned shall be obtained to conduct a proceeding for imposing an accumulative sentence, unless a motion for such a proceeding was filed by the convict. A convict may withdraw his motion or consent before a first instance judgment is passed; in that event, the court shall terminate its proceeding. The proceeding court shall determine the period already served by the convict from the sentences of imprisonment serving as ground for an accumulative sentence; if justified, the court shall interrupt the enforcement of imprisonment imposed in the underlying judgments. An appeal filed against interrupting the enforcement of imprisonment shall not have a suspensory effect on the interruption.

A court shall decide on the basis of case documents or a public court session; an accumulative sentence shall be imposed by passing a judgment, and a motion for such a sentence shall be dismissed by passing an order. In its judgment, the proceeding court shall also include provisions on the security level of imprisonment and the earliest date of release on parole. The scope of an authorisation, or appointment, granted to a defence counsel in the latest proceeding conducted before the court with power to impose an accumulative sentence shall also extend to the proceeding for imposing the accumulative sentence. If an accumulative sentence is passed, the criminal costs shall be borne by the convict. If an accumulative sentence is not passed, the criminal costs shall be borne by the State.[1954]

A court, acting ex officio or upon a motion from a prosecution office, convict, or defence counsel, may set aside its decision passed in a proceeding for imposing an accumulative sentence, and conduct a proceeding for imposing an accumulative sentenceagain on the basis of section 839, if it establishes, after concluding the proceeding for imposing an accumulative sentence with final and binding effect, that it failed to adopt a provision concerning the passing, or period, of an accumulative sentence or the provision adopted is not in compliance with the law.[1955]

### 11.4. Procedure for ex-post setting of the period of expulsion (CPC)

If the secondary penalty of expulsion was imposed with final and binding effect for an indefinite period pursuant to Act IV of 1978 on the Criminal Code as in force until 28 February 1999, the court that proceeded as court of first instance in the underlying case shall determine in a conclusive order the period of expulsion ex officio or at a motion by the prosecution service, the convict or the defence counsel on the basis of the case documents or in a public session, in accordance with section 2/B of Act CCXXIII of 2012 on transitional provisions in connection with the entry into force of Act C of 2012 on the Criminal Code and amending certain Acts. The court shall decide on the dismissal of the motion to this effect in a non-conclusive order. The court shall set aside, by way of a judgment, a final and binding judgment provision on

[1954] CPC 839. §
[1955] CPC 840. §

imposing the secondary penalty of expulsion for an indefinite period if imposing expulsion is excluded pursuant to section 59 (2) to (4) of the Criminal Code.

The proceeding shall not be carried out if

- the expulsion imposed for an indefinite duration was enforced in accordance with the laws on immigration,
- ten years have passed since the judgment imposing expulsion for an indefinite duration becoming final and binding, with the proviso that the period of imprisonment served by the defendant shall not be credited to this period.

The criminal costs shall be borne by the State.[1956]

### 11.5. Procedure in case of release on probation (CPC)

A court that proceeded at first instance in an underlying case shall decide, upon a motion from the prosecution service, in a public session, or trial, on extending a probationary period, or setting aside a provision on release on probation and imposing a penalty, if a person released on probation violates seriously the rules of behaviour of supervision by a probation officer. If the proceeding court sets aside a provision granting release on probation and imposes a penalty, it shall pass a judgment; otherwise, it shall pass a non-conclusive order. After beginning a public court session or a trial, the proceeding single judge or the chair of the panel shall present the essence of the decisions passed in the underlying cases. The criminal costs shall be borne by the convict if the court extends his probationary period, or orders to set aside a provision granting release on probation and imposes a penalty.[1957]

### 11.6. Procedure in case of reparation work (CPC)

A court that proceeded at first instance in an underlying case shall decide, upon a motion from the prosecution service, in a public court session, or trial, on

- setting aside a provision ordering reparation work, and on imposing a penalty, if the convict failed to provide evidence that he performed his reparation work, or seriously violated the rules of behaviour of supervision by a probation officer;
- extending the time limit open for providing evidence of the performance of reparation work if the convict provides evidence that he was unable to perform the reparation work ordered for health reasons;
- establishing that the enforceability of reparation work ceased if any permanent change concerning the health of the convict prevents the enforcement of his reparation work.

A court shall pass a judgment, a nonconclusive order, or a conclusive order. The criminal costs shall be borne by the convict if the court decides to set aside a provision ordering reparation work, and imposes a penalty.[1958]

### 11.7. Granting a payment moratorium or payment in instalments for the payment of criminal costs (CPC)

The proceeding single judge or the chair of the panel may grant a payment moratorium, or allow payment in instalments, regarding the criminal costs payable to the State under the conditions,

[1956] CPC 840/A. §
[1957] CPC 841. §
[1958] CPC 842. §

and within the limits, specified in section 42 (1) of the Punishment Enforcement Act. An application for a payment moratorium or payment in instalments shall not have a suspensory effect. The court that proceeded at first instance in the underlying case shall decide on the application on the basis of case documents and without holding a trial. No appeal shall lie against this decision.[1959]

## 11.8. Other procedures relating to a criminal proceeding (CPC)

11.8.1. Recompense for unfounded restriction of freedom

*a) Legal basis for recompense:*
Subject to the conditions laid down in this Act, recompense shall be provided to a defendant if his freedom was restricted, or he was deprived of his freedom, without foundation in the course, or as a result, of a criminal proceeding. A recompense shall only serve as remedy for disadvantages suffered due to the fact and period of the restriction, or deprivation, of personal freedom.[1960]

Recompense shall be provided for any pre-trial detention, preliminary compulsory psychiatric treatment, criminal supervision during which, as prescribed by the court, the defendant was not allowed to leave a home, other premises, an institute or a fenced area of it without permission, or custody ordered before ordering any of the above, provided that the proceeding was terminated by a prosecution office or investigating authority because

a) the act does not constitute a criminal offence,

b) the criminal offence was not committed by the suspect,

c) the commission of a criminal offence could not be established on the basis of available data or means of evidence, or a ground excluding the liability to punishment of the perpetrator, or the punishability of his act, could be established,

d) it cannot be established on the basis of available data or means of evidence that the criminal offence was committed by the suspect,

e) the liability to punishment was terminated due to a statute of limitations, or

f) the act has already been adjudicated with final and binding effect.

Recompense shall be provided for any pre-trial detention, preliminary compulsory psychiatric treatment, criminal supervision, or custody ordered before ordering any of the above, provided that the court

a) acquitted the defendant with final and binding effect, unless his compulsory psychiatric treatment was ordered;

b) terminated the proceeding in a final and binding conclusive order because (1) the liability to punishment of the accused terminated due to a statute of limitations, (2) the prosecution abandoned the indictment, or (3) the act has already been adjudicated with final and binding effect;

c) terminated the proceeding in a non-conclusive order with administrative finality, because (1) a private motion, crime report, or an act by the Prosecutor General, was missing, (2) the indictment was brought by an ineligible person, or (3) the indictment document does not contain the statutory elements required under CPC, or contains only some of those, and as a consequence, the indictment is unsuitable for adjudication on the merits;

d) found the defendant guilty with final and binding effect, and (1) applied only release on probation, reparation work, or reprimand against the defendant, or (2) did not impose any punishment.

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[1959] CPC 843. §
[1960] CPC 844. §

Recompense shall be provided for any pre-trial detention, preliminary compulsory psychiatric treatment, criminal supervision, or custody ordered before ordering any of the above, provided that the court found the defendant guilty with final and binding effect, and the period of any of the above exceeds

a) the period of imprisonment,
b) the period of confinement,
c) the period of community service,
d) the number of daily units of financial penalty,
e) the period of special education in a juvenile correctional institution

imposed with final and binding effect.

Recompense shall be provided for any imprisonment, confinement, special education in a juvenile correctional institution, or compulsory psychiatric treatment enforced on the basis of a final and binding judgment, provided that a court, as a result of extraordinary legal remedy,

a) acquitted the defendant with final and binding effect, unless his compulsory psychiatric treatment was ordered,
b) imposed a less detrimental penalty on the defendant, with final and binding effect,
c) released the defendant on probation, ordered the defendant to perform reparation work, or applied reprimand against the defendant, with final and binding effect,
d) terminated the proceeding against the defendant with a final and binding conclusive order, or
e) did not apply compulsory psychiatric treatment regarding the defendant.[1961]

Recompense may not be provided even when the conditions specified in section 845 are met if the person seeking recompense

- hid, escaped, or attempted to escape from a court, prosecution office, or investigating authority, or did not, or attempted not to, cooperate with a measure aimed at his apprehension,
- committed a criminal offence, established in a final and binding conclusive decision, in order to prevent the establishment of the facts of the case,
- sought to mislead a court, prosecution office, or investigating authority after becoming aware of the launch of a criminal proceeding and, by doing so, was at fault for providing a reason for reasonable suspicion against himself and ordering, extending, or maintaining his custody, pre-trial detention, preliminary compulsory psychiatric treatment, or criminal supervision,
- was acquitted, subjected to a less detrimental penalty, released on probation, ordered to perform reparation work, subjected to reprimand, or the proceeding against him was terminated, at a retrial, but in the underlying case, he withheld facts or evidence that served as ground for the judgment passed at retrial.

Refusal to testify in and of itself shall not exclude the possibility of recompense.[1962]

*b) Recompense procedure:*

A claim for recompense may be enforced by way of a simplified recompense procedure or a recompense action, at the discretion of the person seeking recompense. A claim for recompense may not be enforced in an order for payment procedure. A claim for recompense shall be enforced against the State. The State shall be represented by the Minister responsible for justice.[1963]

A person seeking recompense may enforce his claim for recompense within one year after the decision serving as ground for recompense is communicated to him. Failing to meet this time

[1961] CPC 845. §
[1962] CPC 846. §
[1963] CPC 848. §

limit shall lead to forfeiture of rights. If a defendant seeking recompense dies in the course of a recompense proceeding, his heir may request the proceeding to be continued within six months after the death of the defendant. Failing to meet this time limit shall lead to forfeiture of rights.[1964]

In the course of a recompense proceeding, the Minister responsible for justice may request data, in line with the provisions on data requests, with a view to obtaining any data or document referred to in the application or statement of claim or needed to clarify a circumstance that arose in the recompense proceeding. In the course of a recompense proceeding, the Minister responsible for justice may request data, falling within a category specified in an Act, from the following registers: (1) the criminal records system, (2) the register of personal data, home address, and contact address of citizens, (3) the central immigration register. In a recompense proceeding, the tasks of the court that proceeded in a criminal proceeding may also be performed by a junior judge.[1965]

### 11.8.2. Simplified recompense procedure

In a simplified recompense proceeding, a person seeking recompense may apply for recompense for the unfounded restriction or deprivation of his freedom in an amount calculated pursuant to a government decree. A simplified recompense proceeding shall be aimed at reaching an agreement by and between the person seeking recompense and the Minister responsible for justice, to serve as basis for providing recompense.

If a proceeding was terminated by a prosecution office or investigating authority, an application for a simplified recompense proceeding shall be submitted to the court where the prosecution service submitted its motion for pre-trial detention, preliminary compulsory psychiatric treatment, or criminal supervision. Otherwise, the application shall be submitted to the court that proceeded as court of first instance in the criminal proceeding.

A court shall send an application for a simplified recompense proceeding to the Minister responsible for justice within one month of receipt and without any examination as to its merits, together with the case documents of the criminal proceeding. If the case documents cannot be sent in view of their volume or for any other reasons, the court shall send thedecision on terminating the proceeding, the conclusive decisions, the decisions on a coercive measure, the minutes of the interrogation of the person seeking recompense, and any other case documents that are relevant to assessing the claim for recompense.

The Minister responsible for justice shall examine, within two months after receipt of the application, whether a claim for recompense is justified and if there is any ground that would exclude any recompense. If the Minister responsible for justice finds the application well-grounded, he shall determine the recompense amount calculated pursuant to a government decree to be provided for the unfounded restriction or deprivation of freedom, and he shall notify the person seeking recompense in writing accordingly. The notification shall also include that the simplified recompense proceeding is to be concluded by entering into a written agreement if the recompense amount is accepted. If the Minister responsible for justice finds the application groundless, he shall notify the person seeking recompense in writing accordingly. An agreement shall be concluded in writing within five months after an application is filed. If an agreement is concluded with a person seeking recompense, no further claim for recompense may be enforced. A recompense amount shall be paid within fifteen days after the conclusion of a written agreement.[1966]

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[1964] CPC 849. §
[1965] CPC 850. §
[1966] CPC 851. §

If no agreement is concluded in a simplified recompense proceeding within five months after an application is filed, or if the Minister responsible for justice finds the application groundless, the person seeking recompense may file a recompense action pursuant to CPC within two months after the expiry of the time limit or the receipt of a notification about the ineligibility of his application. This time limit shall be a term of preclusion. If a recompense action is filed according to paragraph (1), the person seeking recompense shall file his statement of claim with the court with subject-matter and territorial jurisdiction over the recompense action under the Act on the Code of Civil Procedure. At a request of the court, all case documents shall be sent without delay by the Minister responsible for justice.[1967]

### 11.8.3. Recompense action

In a recompense action, (1) compensation may be demanded for damages caused and (2) grievance award may be demanded for non-material harm suffered as a result of the unfounded restriction or deprivation of freedom. In a recompense action, the provisions laid down in the Act on the Civil Code concerning recompense and grievance awards shall apply to the amount and payment of the recompense subject to the derogations laid down in this Act. A recompense amount shall become due and payable on the day when (1) the decision on terminating the proceeding is communicated, or (2) the conclusive decision becomes final and binding. In a recompense action, the fee and expenses of an authorised defence counsel who proceeded in the criminal proceeding may not be enforced.[1968]

To a recompense action, the provisions laid down in the Act on the Code of Civil Procedure shall apply subject to the derogations laid down in this Act. A recompense action shall be instituted by filing a statement of claim. A statement of claim shall specify

- natural identification data of the person seeking recompense,
- the name, registered address, phone number, and electronic mail address of his legal representative, if any, as well as the name of the legal representative designated to receive official documents, if multiple legal representatives are involved,
- the amount claimed as recompense,
- the right to be enforced by specifying the legal basis,
- the facts supporting the right to be enforced and the claim,
- available pieces of evidence, and motions for evidence, in support of each statement of fact.

If a proceeding was terminated by a prosecution office or investigating authority, a statement of claim shall be submitted to the court where the prosecution service submitted its motion for pre-trial detention, preliminary compulsory psychiatric treatment, or criminal supervision. Otherwise, the statement of claim shall be submitted to the court that proceeded as court of first instance in the criminal proceeding.

A court shall send a statement of claim in a recompense action, together with the case documents of the criminal proceeding, to the district court or regional court with territorial jurisdiction over the ministry responsible for justice and subject-matter jurisdiction over the action within one month of receipt and without any examination as to its merits. If the case documents cannot be sent in view of their volume or for any other reasons, the court shall send the decision on terminating the proceeding, the conclusive decisions, the decisions on a coercive measure, the minutes of the interrogation of the person seeking recompense, and any other case documents that are relevant to adjudicating the claim for recompense.

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[1967] CPC 852. §
[1968] CPC 853. §

Upon a motion from the party against whom the action is brought, the court may obtain a statement from the prosecution office, or investigating authority, that proceeded in the criminal proceeding, with a view to determining if a ground for exclusion specified in CPC exists or clarifying a matter that arose in the recompense action. The statement shall present a legal position on the ground for exclusion, or the circumstance that arose in the recompense action, and it shall be accompanied by supporting documents.[1969]

*Rules concerning the payment of recompense:*
If the State is to pay recompense, and any indication arises during the recompense proceeding that a civil claim was granted with final and binding effect against the person seeking recompense in relation to his commission of the criminal offence that served as ground for the criminal proceeding giving rise to recompense, the Minister responsible for justice shall retain the recompense sum, provided that the civil claim was not satisfied before recompense is paid. In that event, the civil claim granted shall be satisfied from the recompense sum. Any remainder of the recompense sum shall be paid after a statement by a court bailiff confirming seizure is received.

If the State is to pay recompense, and any indication arises during the recompense proceeding that forfeiture of assets was ordered, financial penalty was imposed on a juvenile, or the person seeking recompense was obliged to bear criminal costs, in relation to his commission of the criminal offence that served as ground for the criminal proceeding giving rise to recompense, the Minister responsible for justice shall send a request to the national tax and customs authority regarding enforcement before paying any recompense, provided that enforcement was not effected before recompense is paid. The request shall include the natural identification data of the person seeking recompense, and data relating to the payment of recompense.

The Minister responsible for justice may process data relating to a civil claim, forfeiture of assets, financial penalty imposed on a juvenile, or criminal costs, and he may request data from a court bailiff or the national tax and customs authority pursuant to the provisions on data requests; additionally, a court bailiff, with a viewto enforcing a civil claim, and the national tax and customs authority, with a view to enforcing a forfeiture of assets, a financial penalty imposed on a juvenile, or criminal costs, may accessand process personal data relating to a recompense proceeding.[1970]

## 11.9. Reimbursement (CPC)

Any amount paid as financial penalty, fine for an infraction, or criminal costs shall be reimbursed to the defendant, including prevailing interest calculated for the period between the date of payment and reimbursement, if

- as a result of extraordinary legal remedy, the final and binding conclusive decision is set aside by a court, or annulled by the Constitutional Court, and a repeated proceeding is to be conducted,
- as a result of extraordinary legal remedy, the final and binding conclusive decision is set aside and the case documents are sent to the prosecution service by a court,
- as a result of extraordinary legal remedy, the defendant was acquitted or the proceeding against him was terminated by the proceeding court, or
- a decision passed as a result of extraordinary legal remedy does not impose any obligation to pay a financial penalty, a fine for an infraction, or criminal costs.

[1969] CPC 854. §
[1970] CPC 855. §

If a decision passed as a result of extraordinary legal remedy imposes an obligation to pay a lower amount as financial penalty, fine for an infraction, or criminal costs, the difference between the amount already paid and the imposed lower amount shall be reimbursed to the defendant, including prevailing interest calculated for the period between the date of payment and reimbursement. These provisions shall also apply to forfeiture of assets, confiscation, and if a seized thing is taken into State ownership, with the proviso that where a court, as a result of extraordinary legal remedy, acquitted, or terminated a proceeding against, a defendant, reimbursement may not be granted, unless the court did not order any forfeiture of assets or confiscation, or did so only for a lower amount, in its judgment of acquittal or decision on terminating the proceeding. A thing confiscated, asset forfeited, or thing seized shall be returned in kind, if possible. If it is not possible, or forfeiture of assets was applied with regard to a specific amount of money, an amount calculated on the basis of the commercial value, or the amount of money, at the time of forfeiture or confiscation shall be reimbursed, including prevailing interest calculated up until the date of reimbursement. Reimbursement shall be ordered by a court ex officio, or upon a motion from the prosecution service, the defendant, the defence counsel, or an other interested party.

Where (1) a motion for extraordinary legal remedy is submitted after the death of a defendant, (2) a defendant dies in the course of a proceeding for extraordinary legal remedy, or (3) a defendant dies after a decision is passed as a result of extraordinary legal remedy, but before a motion for reimbursement is submitted, a motion for reimbursement may also be submitted by an heir of the defendant.[1971]

A reimbursement shall be ordered by

- the court that passed the final and binding conclusive decision in a repeated proceeding in the case of a retrial,
- the court that proceeded at first instance, if a constitutional complaint is filed,
- the Curia in a review proceeding, or if legal remedy is submitted on the ground of legality, or in a proceeding for the uniformity of jurisprudence,
- the court that passed a final and binding conclusive decision in the underlying case during a simplified review proceeding.

If the court, in its final and binding conclusive decision passed as a result of an extraordinary legal remedy, granted a civil claim submitted by an aggrieved party, the amount to be reimbursed shall be used to satisfy the civil claim concerned, provided that the civil claim has not yet been satisfied or has only been satisfied in part. Any amount remaining after all civil claims are satisfied shall be reimbursed to the defendant.[1972]

## 11.10. Pardon in a criminal proceeding (CPC)

A pardon proceeding for terminating a criminal proceeding shall be conducted pursuant to the provisions laid down in this Chapter. A pardon proceeding for terminating a criminal proceeding may be instituted upon request or ex officio. A petition for pardon may be filed by a defendant, defence counsel, statutory representative of a defendant, or a relative of a defendant. A petition for pardon shall be filed in writing with the court or prosecution office before which the criminal proceeding is pending. A pardon proceeding may be instituted ex officio by the court or prosecution office acting in the criminal proceeding by way of a pardon initiative. In the case of a pardon initiative, or if a plea for pardon is filed by a person other than the defendant, the proceeding court or prosecution office shall obtain a statement from the

[1971] CPC 856. §
[1972] CPC 857. §

defendant as to whether he consents to a pardon proceeding. If the defendant concerned refuses his consent, the pardon proceeding may not be conducted.[1973]

A pardon proceeding shall not have a suspensory effect on a criminal proceeding. In a pardon proceeding, a court or prosecution office shall obtain data and documents concerning a defendant, in line with the provisions laid down in this Act concerning data requests, that are necessary for conducting a pardon proceeding and assessing a plea for pardon or a pardon initiative. The proceeding court or prosecution office may obtain the following in particular: (1) a social environment assessment regarding the defendant, (2) an evaluation opinion from the penal institution holding the defendant, if he is detained, (3) a police report on public data concerning the lifestyle of the defendant. The social environment assessment shall be prepared by the probation officer. A plea for pardon or a pardon initiative, all or some of the case documents shall be sent by the (1) proceeding prosecution office, before the indictment, to the Prosecutor General, (2) proceeding court, after the indictment, to the Minister responsible for justice within eight days after they are obtained.[1974]

The Prosecutor General or Minister responsible for justice shall examine the plea for pardon or the pardon initiative, and the data and documents received, and he may request data, if necessary, pursuant to the provisions on data requests. In the course of a pardon proceeding, the Prosecutor General or the Minister responsible for justice may request data, falling within a category specified in an Act, from the following registers:

- the criminal records system,
- the infraction records system,
- the register of personal data, home address, and contact address of citizens,
- the road transport register,
- the central immigration register,
- the search warrant register.

A proposal for granting a pardon and terminating a criminal proceeding may be submitted to the President of the Republic by the Prosecutor General, before the indictment, or the Minister responsible for justice, after the indictment. The Prosecutor General or the Minister responsible for justice shall forward a plea for pardon, and the Minister responsible for justice shall forward a pardon initiative by a court, to the President of the Republic, even if he does not propose that pardon be granted.[1975]

The President of the Republic shall send his decision on granting a pardon to the Minister responsible for justice for counter-signature. The Minister responsible for justice shall notify the President of the Republic about exercising his right to counter-sign the decision.[1976]

If a proposal was submitted by the Prosecutor General, the Minister responsible for justice shall send to the Prosecutor General the counter-signed decision on granting a pardon and the documents of the pardon proceeding. The Prosecutor General shall send the counter-signed decision on granting a pardon and the documents of the pardon proceeding to the prosecution office that proceeds in the criminal proceeding concerned. If a proposal was submitted by the Minister responsible for justice, the Minister responsible for justice shall send to the court of the criminal proceeding the counter-signed decision on granting a pardon and the documents of the pardon proceeding. If the Minister responsible for justice decides not to counter-sign a decision on granting a pardon, this shall be recorded on the original copy of the decision. Without countersignature, the pardon proceeding shall be closed. A counter-signed decision on granting a pardon, or a notification about closing a pardon proceeding, shall be served on the defendant, the defence counsel and the person who submitted a petition for pardon by the court

[1973] CPC 858. §
[1974] CPC 859. §
[1975] CPC 860. §
[1976] CPC 861. §

or prosecution office that proceeds in the criminal proceeding concerned. The court or prosecution office shall also serve a decision on terminating the proceeding together with the counter-signed decision on granting a pardon and terminating the criminal proceeding. If the defendant is in detention, the court or prosecution office shall send a copy of the counter-signed decision on granting a pardon and terminating the criminal proceeding to the detaining organ. If the President of the Republic does not grant a pardon, or the pardon proceeding is concluded for the reason specified in paragraph (3), the eligible person may file another petition for pardon.[1977]

### 11.11. Reducing the amount of or waiving, criminal costs or disciplinary fine (CPC)

An application for reducing the amount of, or waiving, for a reason deserving special consideration, criminal costs or a disciplinary fine payable to the State may be filed by a person obliged to pay criminal costs to the State or subjected to a disciplinary fine (hereinafter jointly „payment obligor"), or a defence counsel, representative, or relative of a payment obligor. If liability for the payment of criminal costs to the State is joint and several, all payment obligors shall file an application. Even in that event, the personsshall be entitled to file the application.

An application for reducing the amount of, or waiving, criminal costs shall be filed with the court that proceeded in the case at first instance, or the prosecution office that passed a decision on terminating the proceeding; an application for reducing the amount of, or waiving, a disciplinary fine shall be filed with the court, prosecution office, or investigating authority that imposed the disciplinary fine.[1978]

Before forwarding an application, the proceeding court, prosecution office, or investigating authority shall obtain, in line with the provisions on data requests, data and documents concerning the payment obligor that are necessary for conducting a proceeding and assessing the application. The proceeding court, prosecution office, or investigating authority may request the following data in particular:

- a certificate containing the amount of the outstanding debt and data regarding any payment already made,
- data regarding the financial situation and income of the payment obligor,
- a partial social environment assessment regarding the personal and family circumstances, financial situation, and income of the payment obligor, or
- an evaluation opinion from the penal institution holding the payment obligor if he is detained.

The social environment assessment shall be prepared by the probation officer. An application, all or some of the case documents of the criminal proceeding, and the data and documents obtained shall be sent by the proceeding court, prosecution office, or investigating authority to the Minister responsible for justice within eight days after they are obtained. If an application is filed for reducing or waiving a disciplinary fine, the court may order, until a decision is passed by the Minister responsible for justice, the enforcement of the disciplinary fine to be suspended or, if the disciplinary fine is converted, the enforcement of the confinement replacing the disciplinary fine to be postponed or interrupted.[1979]

The Minister responsible for justice shall examine the application and the data and documents received, and he may request data, if necessary, pursuant to the provisions on data requests. In the course of assessing an application, the Minister responsible for justice may request data from the register of personal data, home address, and contact address of citizens. The Minister

[1977] CPC 862. §
[1978] CPC 863. §
[1979] CPC 864. §

responsible for justice shall send his decision on an application to the court, prosecution office, or investigating authority that forwarded the application. The court, prosecution office, or investigating authority that forwarded the application shall send the decision on the application to the payment obligor and the person who filed the application.[1980]

[1980] CPC 865. §

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