The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights

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THE CONCEPT OF

EQUALITY OF ARMS

IN CRIMINAL PROCEEDINGS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

THE CONCEPT OF EQUALITY OF ARMS IN CRIMINAL PROCEEDINGS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Inherent in and at the core of the right to fair trial in Article 6 of the European Convention on Human Rights is the concept of equality of arms, the construct to which this thesis is devoted within the context of criminal proceedings. As a contextual prelude to specific analysis of this concept, a background for Article 6 is first established which identifies influential historical developments in trial rights and provides an outline of the rationale for the Convention and of the content, and applicability, of the article. Thereafter, the thesis offers a theoretical insight on equality of arms, identifying and exploring its value, contemporary international legal basis and constituent elements as per the Strasbourg definition. The insight on the latter recognises an underpinning relationship between the concept of equality of arms and Article 6(3), and introduces the key argument in the thesis: the European Court of Human Rights equates inequality of arms not with procedural inequality in itself, which would be a dignitarian interpretation, but with procedural inequality that gives rise to actual or, in some circumstances, inevitable prejudice. This argument predominates the subsequent survey of case-law in which the Court's approach to procedural equality is demonstrated and assessed within the context of the right to challenge and call witness evidence (Article 6(3)(d)), the right to adequate time and facilities (Article 6(3)(b)) and the right to legal assistance (Article 6(3)(c)). Though the thesis is based on Article 6 decisions of the Court and, to a lesser extent, the former European Commission of Human Rights, references are made throughout to other national and international legal instruments and judgements whenever instructive.

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PRELIMINARY STATEMENTS

CURRENCY OF RESEARCH

This thesis is based upon the law as at 17 January 2011.

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CASES CITED

EUROPEAN COURT OF HUMAN RIGHTS

AB v Slovakia (App 41784/98) ECHR 4 March 2003
Abbasov v Azerbaijan (App 24271/05) ECHR 17 January 2008
Abramyan v Russia (App 10709/02) ECHR 9 October 2008
Adolf v Austria (App 8269/78) (1982) Series A no 49
Airey v Ireland (App 6289/73) (1979) Series A no 32
Albert and Le Compte v Belgium (Apps 7299/75; 7496/76) (1983) Series A no 58
Alvarez Sanchez v Spain (App 50720/99) ECHR 2001-XI
AM v Italy (App 37019/97) ECHR 1999-IX
Ananyev v Russia (App 20292/04) ECHR 30 July 2009
Andandonskiy v Russia (App 24015/02) ECHR 28 September 2006
Anderson v UK (App 44958/98) ECHR 5 October 1999
APBP v France (App 38436/97) ECHR 21 March 2002
APEH Üldözötteinek Szövetsége and others v Hungary (App 32367/96) ECHR 2000-X
Artico v Italy (App 6694/74) (1980) Series A no 37
Artner v Austria (App 13161/87) (1992) Series A no 242-A
Asch v Austria (App 12398/86) (1991) Series A no 203
Ashughyan v Armenia (App 33268/03) ECHR 17 July 2008
Atlan v UK (App 36533/97) ECHR 19 June 2001
Averill v UK (App 36408/97) ECHR 2000-VI

B v Finland (App 17122/02) ECHR 24 April 2007
Bakalov and others v Bulgaria (App 55796/00) ECHR 18 September 2007
Balčiūnas v Lithuania (App 17095/02) ECHR 20 July 2010
Balliu v Albania (App 74727/01) ECHR 16 June 2005
Barberà, Messegué and Jabardo v Spain (App 10590/83) (1988) Series A no 146
Batsanina v Russia (App 3932/02) ECHR 26 May 2009
Beet and others v UK (App 47676/99 et seq) ECHR 1 March 2005
Belziuk v Poland (App 23103/93) ECHR 1998-II
Bendenoun v France (App 12547/86) (1994) Series A no 284
Benham v UK (App 19380/92) ECHR 1996-III
Bíro v Slovakia (App 57678/00) ECHR 27 June 2006
Birutis and others v Lithuania (Apps 47698/99; 48115/99) ECHR 28 March 2002
Blokker v the Netherlands (App 45282/99) ECHR 7 November 2000
Bocos-Cuesta v the Netherlands (App 54789/00) ECHR 10 November 2005
Boddaert v Belgium (App 12919/87) (1992) Series A no 235-D
Boner v UK (App 18711/91) (1994) Series A no 300-B
Bonev v Bulgaria (App 60018/00) ECHR 8 June 2006
Bönisch v Austria (App 8658/79) (1985) Series A no 92
Borgers v Belgium (App 12005/86) (1991) Series A no 214-B
Borisova v Bulgaria (App 56891/00) ECHR 21 December 2006
Botmeh and Alami v UK (App 15187/03) ECHR 7 June 2007
Brandstetter v Austria (Apps 11170/84; 12876/87; 13468/87) (1991) Series A no 211
Brennan v UK (App 39846/98) ECHR 2001-X
Bricmont v Belgium (App 10857/84) (1989) Series A no 158
Bulut v Austria (App 17358/90) ECHR 1996-II

Campbell v UK (App 13590/88) (1992) Series A no 233
Campbell and Fell v UK (Apps 7819/77; 7878/77) (1984) Series A no 80

Perez v France (App 47287/99) ECHR 2004-I
Perić v Croatia (App 34499/06) ECHR 27 March 2008
Perks and others v UK (App 25277/94 et seq) ECHR 12 October 1999
Perna v Italy (App 48898/99) ECHR 6 May 2003
PG and JH v UK (App 44787/98) ECHR 2001-IX
Pham Hoang v France (App 13191/87) (1992) Series A no 243
Pierre-Bloch v France (App 24194/94) ECHR 1997-VI
Pishchalnikov v Russia (App 7025/04) ECHR 24 September 2009
Płonka v Poland (App 20310/02) ECHR 31 March 2009
Pobornikoff v Austria (App 28501/95) ECHR 3 October 2000
Poitrimol v France (App 14032/88) (1993) Series A no 277-A
Polufakin and Chernyshev v Russia (App 30997/02) ECHR 25 September 2008
Popov v Russia (App 26853/04) ECHR 13 July 2006
Pretty v UK (App 2346/02) ECHR 2002-III
Prežec v Croatia (App 48185/07) ECHR 15 October 2009
PS v Germany (App 33900/96) ECHR 20 December 2001
Pullar v UK (App 22399/93) ECHR 1996-III
Putz v Austria (App 18892/91) ECHR 1996-I

Quaranta v Switzerland (App 12744/87) (1991) Series A no 205

Ramanauskas v Lithuania (App 74420/01) ECHR 5 February 2008
Ravnsborg v Sweden (App 14220/88) (1994) Series A no 283-B
RD v Poland (Apps 29692/96; 34612/97) ECHR 18 December 2001
Reinhardt and Slimane-Kaïd v France (Apps 23043/93; 22921/93) ECHR 1998-II
Rowe and Davis v UK (App 28901/95) EHCR 2000-II
Rozhkov v Russia (App 64140/00) ECHR 5 February 2007
Rumyana Ivanova v Bulgaria (App 36207/03) ECHR 14 February 2008
Rutkowski v Poland (App 45995/99) ECHR 2000-XI
Ryakib Biryukov v Russia (App 14810/02) ECHR 17 January 2008
Rybacki v Poland (App 52479/99) ECHR 13 January 2009

S v Switzerland (Apps 12629/87; 13965/88) (1991) Series A no 220
Sabirov v Russia (App 13465/04) ECHR 11 February 2010
Sadak and others v Turkey (No 1) (App 29900/96 et seq) ECHR 2001-VIII
Şahin Çağdaş v Turkey (App 28137/02) ECHR 11 April 2006
Saïdi v France (App 14647/89) (1993) Series A no 261-C
Salabiaku v France (App 10519/83) (1988) Series A no 141-A
Salduz v Turkey (App 36391/02) ECHR 27 November 2008
Salov v Ukraine (App 65518/01) ECHR 6 September 2005
Sannino v Italy (App 30961/03) ECHR 2006-VI
Saunders v UK (App 19187/91) ECHR 1996-VI
Schönenberger and Durmaz v Switzerland (App 11368/85) (1988) Series A no 137
Sejdovic v Italy (App 56581/00) ECHR 2006-II
Selmouni v France (App 25803/94) ECHR 1999-V
Sergey Zolotukhin v Russia (App 14939/03) ECHR 10 February 2009
Shabelnik v Ukraine (App 16404/03) ECHR 19 February 2009
Sharomov v Russia (App 8927/02) ECHR 15 January 2009
Shilbergs v Russia (App 20075/03) ECHR 17 December 2009
Shulepov v Russia (App 15435/03) ECHR 26 June 2008
Sidorova (Adukevich) v Russia (App 4537/04) ECHR 14 February 2008
Sipavičius v Lithuania (App 49093/99) ECHR 21 February 2002
Skrobol v Poland (App 44165/98) ECHR 8 July 2003
SN v Sweden (App 34209/96) ECHR 2002-V
Solakov v the former Yugoslav Republic of Macedonia (App 47023/99) ECHR 2001-X
Stadukhin v Russia (App 6857/02) ECHR 18 October 2007

Stanford v UK (App 16757/90) (1994) Series A no 282-A
Stoimenov v the former Yugoslav Republic of Macedonia (App 17995/02) ECHR 5 April 2007
Stran Greek Refineries and Stratis Andreadis v Greece (App 13427/87) (1994) Series A no 301-B
Svinarenkov v Estonia (App 42551/98) ECHR 15 February 2000

T v UK (App 24724/94) ECHR 16 December 1999
Taal v Estonia (App 13249/02) ECHR 22 November 2005
The Sunday Times v UK (No 1) (App 6538/74) (1979) Series A no 30
Timergaliyev v Russia (App 40631/02) ECHR 14 October 2008
TK and SE v Finland (App 38581/97) ECHR 31 May 2005
Tripodi v Italy (App 13743/88) (1994) Series A no 281-B
Tudor-Comert v Moldova (App 27888/04) ECHR 4 November 2008
Twalib v Greece (App 24294/94) ECHR 1998-IV
Tyrer v UK (App 5856/72) (1978) Series A no 26

Unterpertinger v Austria (App 9120/80) (1986) Series A no 110

V v Finland (App 40412/98) ECHR 24 April 2007
Vacher v France (App 20368/92) ECHR 1996-VI
Van de Hurk v the Netherlands (App 16034/90) (1994) Series A no 288
Van Geyseghem v Belgium (App 26103/95) ECHR 1999-I
Van Mechelen and others v the Netherlands (App 21363/93 et seq) ECHR 1997-III
Van Orshoven v Belgium (App 20122/92) ECHR 1997-III
Vaudelle v France (App 35683/97) ECHR 2001-I
Vermeulen v Belgium (App 19075/91) ECHR 1996-I
Vidal v Belgium (App 12351/86) (1992) Series A no 235-B
Visser v the Netherlands (App 26668/95) ECHR 14 February 2002
Vladimir Romanov v Russia (App 41461/02) ECHR 24 July 2008
Vozhigov v Russia (App 5953/02) ECHR 26 April 2007

Weber v Switzerland (App 11034/84) (1990) Series A no 177
Wemhoff v Germany (App 2122/64) (1968) Series A no 7
Werner v Austria (App 21835/93) ECHR 1997-VII
Windisch v Austria (App 12489/86) (1990) Series A no 186
WS v Poland (App 21508/02) ECHR 19 June 2007

Zhoglo v Ukraine (App 17988/02) ECHR 24 April 2008
Zhuk v Ukraine (App 45783/05) ECHR 21 October 2010
Zoon v the Netherlands (App 29202/95) ECHR 2000-XII

EUROPEAN COMMISSION OF HUMAN RIGHTS

Artico v Italy (App 6694/74) (1979) 2 Digest 836
Austria v Italy (App 788/60) (1961) 4 Yearbook 116

Bazil v UK (App 14385/88) EComHR 10 March 1989
Bell v UK (App 12322/86) EComHR 13 October 1987
Belziuk v Poland (App 23103/93) EComHR Report 26 February 1997
Biondo v Italy (App 8821/79) (1983) 64 DR 5
Bonzi v Switzerland (App 7854/77) (1978) 12 DR 188
Brown v UK (App 11129/84) (1985) 42 DR 269

Callaghan and others v UK (App 14739/89) (1989) 60 DR 296
Campbell v UK (App 12323/86) (1988) 57 DR 148
Can v Austria (App 9300/81) EComHR Report 12 July 1984

V v UK (App 11465/85) EComHR 3 March 1986

Wiechert v Germany (App 1404/62) (1964) 7 Yearbook 104

X v Austria (App 2370/64) (1967) 22 CD 96
X v Austria (App 2676/65) (1967) 23 CD 31
X v Austria (App 4338/69) (1970) 36 CD 79
X v Austria (App 4428/70) (1972) 40 CD 1
X v Austria (App 7138/75) (1977) 9 DR 50
X v Austria (App 8251/78) (1979) 17 DR 168
X v Belgium (App 1134/61) (1961) 4 Yearbook 378
X v Denmark (App 8395/78) (1981) 27 DR 50
X v Germany (App 509/59) (1960) 3 Yearbook 174
X v Germany (App 599/59) (1961) 8 CD 12
X v Germany (App 646/59) (1960) 3 Yearbook 272
X v Germany (App 722/60) (1962) 5 Yearbook 104
X v Germany (App 1169/61) (1963) 6 Yearbook 520
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X v Germany (App 3139/67) (1968) 26 CD 77
X v Germany (App 6946/75) (1976) 6 DR 114
X v Germany (App 7300/75) (1976) 2 Digest 857
X v Germany (App 9365/81) (1982) 28 DR 229
X v Germany (App 10098/82) (1984) 8 EHRR 214
X v Norway (App 5923/72) (1975) 3 DR 43
X v Norway (App 8202/78) (1979) 2 Digest 857
X v Sweden (App 434/58) (1959) 2 Yearbook 354
X v Switzerland (App 9127/80) (1981) 26 DR 238
X v UK (App 3852/68) (1969) 32 CD 38
X v UK (App 4042/69) (1970) 13 Yearbook 690
X v UK (App 5871/72) (1974) 1 DR 54
X v UK (App 6298/73) (1975) 2 Digest 831
X v UK (App 6956/75) (1976) 8 DR 103
X v UK (App 7413/76) (1977) 9 DR 100
X v UK (App 8295/78) (1978) 15 DR 242
X v UK (App 8386/78) (1980) 21 DR 126
X and Y v Austria (App 7909/74) (1978) 15 DR 160
X and Y v Belgium (Apps 1420/62; 1477/62; 1478/62) (1963) 6 Yearbook 590
X and Z v Germany (App 3897/68) (1970) 35 CD 75
X and Y v Germany (Apps 5217/71; 5367/72) (1972) 42 CD 139
X and Y v Ireland (App 8299/78) (1980) 22 DR 51

Y v Germany (App 11777/85) EComHR 13 October 1986

HUMAN RIGHTS COMMITTEE

Äärelä and Näkkäläjärvi v Finland (Comm 779/1997) UN Doc CCPR/C/73/D/779/1997 (2001)
Abdool Saleem Yasseen and Noel Thomas v Republic of Guyana (Comm 676/1996) UN Doc CCPR/C/62/D/676/1996 (1998)
Antonio Viana Acosta v Uruguay (Comm 110/1981) UN Doc Supp No 40 (A/39/40) 169 (1984)

Campbell v Jamaica (Comm 248/1987) UN Doc CCPR/C/44/D/248/1987 (1992)
Carlton Reid v Jamaica (Comm 250/1987) UN Doc CCPR/C/39/D/250/1987 (1990)

Delia Saldias de Lopez v Uruguay (Comm 52/1979) UN Doc CCPR/C/OP/1 88 (1984)
Devon Simpson v Jamaica (Comm 695/1996) UN Doc CCPR/C/73/D/695/1996 (2001)

Fei v Colombia (Comm 514/1992) UN Doc CCPR/C/53/D/514/1992 (1995)
Frank Robinson v Jamaica (Comm 223/1987) UN Doc CCPR/C/35/D/223/1987 (1989)

Henry v Jamaica (Comm 230/1987) UN Doc CCPR/C/43/D/230/l987 (1991)
Hervin Edwards v Jamaica (Comm 529/1993) UN Doc CCPR/C/60/D/529/1993 (1997)
Hezekiah Price v Jamaica (Comm 572/1994) UN Doc CCPR/C/58/D/572/1994 (1996)

Jansen-Gielen v the Netherlands (Comm 846/1999) UN Doc CCPR/C/71/D/846/1999 (2001)
John Campbell v Jamaica (Comm 307/1988) UN Doc CCPR/C/47/D/307/1988 (1993)

Lindon v Australia (Comm 646/1995) UN Doc CCPR/C/64/D/646/1995 (1998)
Little v Jamaica (Comm 283/l988) UN Doc CCPR/C/43/D/283/l988 (1991)

Michael Sawyers, Michael and Desmond McLean v Jamaica (Comm 256/1987) UN Doc CCPR/C/41/D/256/1987 (1991)
Miguel Angel Estrella v Uruguay (Comm 74/1980) UN Doc Supp No 40 (A/38/40) 150 (1983)
Morael v France (Comm 207/1986) UN Doc Supp No 40 (A/44/40) 210 (1989)

Oral Hendricks v Guyana (Comm 838/1998) UN Doc CCPR/C/76/D/838/1998 (2002)

Paul Kelly v Jamaica (Comm 253/1987) UN Doc CCPR/C/41/D/253/1987 60 (1991)

Robinson LaVende v Trinidad and Tobago (Comm 554/1993) UN Doc CCPR/C/61/D/554/1993 (1997)

Smith v Jamaica (Comm 282/1988) UN Doc CCPR/C/47/D/282/1988 (1993)

Wolf v Panama (Comm 289/1988) UN Doc CCPR/C/44/D/289/1988 80 (1992)
Wright v Jamaica (Comm 459/1991) UN Doc CCPR/C/55/D/459/1991 (1995)

INTER-AMERICAN COURT OF HUMAN RIGHTS

Barrios Altos Case (Interpretation of Judgment on the Merits: Art 67 ACHR) Inter-Am Ct HR Series C No 83 (3 September 2001)

Cantoral Benavides Case (Reparations: Art 63(1) ACHR) Inter-Am Ct HR Series C No 88 (3 December 2001)
Castillo Petruzzi et al Case (Judgment) Inter-Am Ct HR Series C No 52 (30 May 1999)
Cayara Case (Preliminary Objections) Inter-Am Ct HR Series C No 14 (3 February 1993)

Gangaram Panday Case (Preliminary Objections) Inter-Am Ct HR Series C No 12 (4 December 1991)

19 Merchants Case (Preliminary Objections) Inter-Am Ct HR Series C No 93 (12 June 2002)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Avocats Sans Frontières (on behalf of Bwampamye) v Burundi (Comm 231/99) African Comm Hum & Peoples' Rights (2000)

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v Aleksovski (Judgement) (Appeals Chamber) ICTY-95-14/1-A (24 March 2000)
Prosecutor v Aleksovski (Decision on Prosecutor's Appeal on Admissibility of Evidence) (Appeals Chamber) ICTY-95-14/1 (16 February 1999)

Prosecutor v Delalic (Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence) (Trial Chamber) ICTY-96-21 (4 February 1998)
Prosecutor v Delalic (Judgement) (Appeals Chamber) ICTY-96-21-A (20 February 2001)

Prosecutor v Halilović (Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses) (Trial Chamber) ICTY-01-48-T (9 May 2005)

Prosecutor v Krajišnik & Plavšić (Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65 *ter*, 66(B) and 67(C)) (Trial Chamber) ICTY-00-39 & 40-PT (1 August 2001)

Prosecutor v Milutinović (Decision on Interlocutory Appeal on Motion for Additional Funds) (Appeals Chamber) ICTY-99-37-AR73.2 (13 November 2003)

Prosecutor v Šešelj (Decision on Appeal against the Trial Chamber's Decision (No 2) on Assignment of Counsel) (Appeals Chamber) ICTY-03-67-AR73.4 (8 December 2006)
Prosecutor v Slobodan Milošević (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel) (Appeals Chamber) ICTY-02-54-AR73.7 (1 November 2004)

Prosecutor v Tadić (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) (Trial Chamber) (ICTY-94-1) 10 August 1995
Prosecutor v Tadić (Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements) (Trial Chamber) ICTY-94-1 (27 November 1996)
Prosecutor v Tadić (Judgement) (Appeals Chamber) ICTY-94-1-A (15 July 1999)

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Prosecutor v Akayesu (Judgement) (Appeals Chamber) ICTR-96-4-A (1 June 2001)

Prosecutor v Bagilishema (Judgment) (Trial Chamber) ICTR-95-1A-T (7 June 2001)

Prosecutor v Kambanda (Judgement) (Appeals Chamber) ICTR-97-23-A (19 October 2000)
Prosecutor v Kayishema and Ruzindana (Judgement: Reasons) (Appeals Chamber) ICTR-95-1-A (1 June 2001)

Prosecutor v Nahimana (Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana) (Trial Chamber) ICTR-99-52-T (5 June 2003)

SPECIAL COURT FOR SIERRA LEONE

Prosecutor v Norman et al (CDF Case) (Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone) (Trial Chamber) SCSL-04-14-PT (19 April 2004)

INTERNATIONAL CRIMINAL COURT

Situation in the Democratic Republic of the Congo (Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1–6) (Pre-Trial Chamber I) ICC 01/04-135 (31 March 2006)

INTERNATIONAL COURT OF JUSTICE

Application for Review of Judgement No 158 of the United Nations Administrative Tribunal (Advisory Opinion) [1973] ICJ Rep 166

Application for Review of Judgement No 273 of the United Nations Administrative Tribunal (Advisory Opinion) [1982] ICJ Rep 325
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Counter-Claims: Order) [1997] ICJ Rep 243

Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgement) [1985] ICJ Rep 13

Judgements of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO (Advisory Opinion) [1956] ICJ Rep 77

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Order) [1999] ICJ Rep 983

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility: Judgement) [1994] ICJ Rep 112
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits: Judgement) [1986] ICJ Rep 14

North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands) (Judgement) [1969] ICJ Rep 3

Oil Platforms (Islamic Republic of Iran v US) (Counter-Claim: Order) [1998] ICJ Rep 190

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) *Case* (Order) [1995] ICJ Rep 288

NATIONAL

Attorney-General's Reference (No 82a of 2000) [2002] EWCA Crim 215; [2002] 2 Cr App R 24

Barber v Page 390 US 719 (1968)
Bushel's Case (1670) 6 State Tr 999

California v Green 399 US 149 (1970)
Coffin v US 156 US 432 (1895)
Coy v Iowa 487 US 1012 (1988)
Crawford v Washington 541 US 36 (2004)

Davie v Magistrates of Edinburgh 1953 SC 34
Douglas v Alabama 380 US 415 (1965)

Government of the Virgin Islands v Aquino 378 F2d 540 (3rd Cir 1967)

Hinds v Attorney General of Barbados [2001] UKPC 56; [2002] 1 AC 854

Kastigar v United States 406 US 441 (1972)
Kentucky v Stincer 482 US 730 (1987)

Lilly v Virginia 527 US 116 (1999)

Maryland v Craig 497 US 836 (1990)
Mattox v United States 156 US 237 (1895)
McKinley's Case (1817) 33 State Tr 275
McLean and another v Buchanan and another [2001] UKPC D3; [2001] 1 WLR 2425
McNabb v US 318 US 332 (1943)
Mechanical & General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Company [1935] AC 346 (HL)

INTERNATIONAL AND NATIONAL LEGAL INSTRUEMENTS CITED

INTERNATIONAL[1]

United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945)

Charter of the International Military Tribunal (adopted and entered into force 8 August 1945)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) UN Doc A/810 71

European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953, as amended by Protocols Nos 11 and 14) 213 UNTS 221

Protocol No 1 European Convention on Human Rights (adopted 20 March 1952, entered into force 18 May 1954, as amended by Protocol No 11) 213 UNTS 262

Standard Minimum Rules for the Treatment of Prisoners (adopted 30 August 1955, First UN Congress on the Prevention of Crime and the Treatment of Offenders) UN Doc A/CONF/611 (1955)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

Conference on Security and Co-operation in Europe: Final Act (adopted 1 August 1975, Helsinki) (1975) 14 ILM 1292

Rules of Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978, as amended 29 September 2005)

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted 29 November 1985) UNGA Res 40/34 Annex 40 GAOR Supp (No 53) 214 UN Doc A/40/53 (1985)

[1] Instruments without full citation are available as online materials as referred to in the Bibliography.

Protocol No 7 European Convention on Human Rights (adopted 22 November 1984, entered into force 1 November 1988) 1525 UNTS 195

Recommendation No R (85) 11: The Position of the Victim in the Framework of Criminal Law and Procedure (adopted by Committee of Ministers 28 June 1985) (Council of Europe, Strasbourg 1985)

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 14 November 1988, entered into force 16 November 1999) (1989) 28 ILM 156

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128 Annex 44 GAOR Supp (No 49) 207 UN Doc A/44/49 (1989)

Basic Principles on the Role of Lawyers (Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1 118 (1990)

Statute of the International Criminal Tribunal for the former Yugoslavia (adopted and entered into force 25 May 1993, as amended 7 July 2009)

Rules of Evidence and Procedure of the International Criminal Tribunal for the former Yugoslavia (adopted 11 February 1994, entered into force 14 March 1994, as amended 8 December 2010) UN Doc IT/32/Rev.45 (2010)

Protocol No 11 European Convention on Human Rights (adopted 11 May 1994, entered into force 1 November 1998) ETS 155

Protocol No 14 European Convention on Human Rights (adopted 13 May 1994, entered into force 1 June 2010) ETS 194

Statute of the International Criminal Tribunal for Rwanda (adopted and entered into force 8 November 1994, as amended 7 July 2009).

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (adopted 29 June 1995, as amended 1 October 2009)

Recommendation No R (97) 13: Intimidation of Witnesses and the Rights of the Defence (adopted by Committee of Ministers 10 September 1997) (Council of Europe, Strasbourg 1998)

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Rules of Procedure and Evidence of the International Criminal Court (adopted and entered into force 9 September 2002)

NATIONAL[2]

Twelve Tables 449 BC

Codex Theodosianus 438 AD

Codex Justinianeus 529 AD

Digesta 533 AD

Novellae Constitutiones 535–564 AD

Constitutions of Clarendon 1164

Assize of Clarendon 1166

Canons of the Fourth Lateran Council 1215

Bull *Ad extirpanda* 1252

Magna Carta 1297

French Criminal Ordinance 1670

Virginia Declaration of Rights 1776

Constitution of Pennsylvania 1776

Constitution of Maryland 1776

Constitution of North Carolina 1776

Constitution of Vermont 1777

US Constitution 1787

French Declaration of the Rights of Man and the Citizen 1789

French Law of 16 September 1791

US Bill of Rights 1791

French Code of Offences and Punishments 1795

French Law of 27 January 1801

French Napoleonic Code of Criminal Instruction 1808

French Law of 17 July 1856

French Law of 19 June 1881

French Law of 8 December 1897

[2] All 20th and 21st century national instruments are 'as amended'.

Basic Law for the Federal Republic of Germany 1949

French Code of Criminal Procedure 1958

Criminal Code of Canada 1985

German Criminal Procedure Code 1987

Special Immigration Appeals Commission Act 1997

Access to Justice Act 1999

Youth Justice and Criminal Evidence Act 1999

Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003/1034

US Code 2006

ABBREVIATIONS

AC	Appeal Cases Law Reports
ACHR	American Convention on Human Rights
African Comm Hum & Peoples' Rights	African Commission on Human and Peoples' Rights
AJA	Access to Justice Act
AJIL	American Journal of International Law
All ER	All England Law Reports
All ER (D)	All England Direct Law Reports (Digests)
Am Crim L Rev	American Criminal Law Review
Am Hist Rev	American Historical Review
Am L Rev	American Law Review
Am U L Rev	American University Law Review
Aust YBIL	Australian Yearbook of International Law
BIICL	British Institute of International and Comparative Law
CA	Court of Appeal
CCA	Court of Appeal Criminal Division
CD	Collection of Decisions of the European Commission on Human Rights
Colum L Rev	Columbia Law Review
Cornell L Rev	Cornell Law Review
CPS	Crown Prosecution Service
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CUP	Cambridge University Press
Digest	Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights
DR	Decisions and Reports of the European Commission of Human Rights
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
ECHR	European Convention on Human Rights; European Court of Human Rights (in case citations)
ECHR (with year and vol no)	European Court of Human Rights: Reports of Judgements and Decisions
EComHR	European Commission of Human Rights
EHRR	European Human Rights Reports
Emory LJ	Emory Law Journal
ER	English Reports
ETS	European Treaty Series
EWCA Crim	England and Wales Court of Appeal (Criminal Division)
F2d	Federal Reporter Second Series
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GAOR	General Assembly Official Records (United Nations)

Harv Int'l LJ	Harvard International Law Journal
Harv L Rev	Harvard Law Review
HC	House of Commons
Heythrop J	Heythrop Journal
HL	House of Lords
HMSO	Her Majesty's Stationery Office
HRC	Human Rights Committee
HRQ	Human Rights Quarterly
Hum Rts L Rev	Human Rights Law Review
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ Rep	International Court of Justice Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
Ind LJ	Indiana Law Journal
Indian J Int'l L	Indian Journal of International Law
Int CLR	International Criminal Law Review
Inter-Am Ct HR Series C	Inter-American Court of Human Rights Series C: Judgements and Decisions
Int'l J Evidence & Proof	International Journal of Evidence and Proof
J Int'l Comm Jurists	Journal of the International Commission of Jurists
J Pub L	Journal of Public Law
Jur Rev	Juridical Review
KB	King's Bench Division (Court of Appeal); King's Bench Law Reports
Law & Contemp Probs	Law and Contemporary Problems
Law & Psychol Rev	Law and Psychology Review
Legal Stud	Legal Studies
LHR	Law and History Review
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review
Mich J Int'l L	Michigan Journal of International Law
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
Monogr Soc Res Child Dev	Monographs of the Society for Research in Child Development
Nat LF	Natural Law Forum
Neb L Rev	Nebraska Law Review
NC L Rev	North Carolina Law Review
NILQ	Northern Ireland Legal Quarterly
Notre Dame L	Notre Dame Lawyer
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
OUP	Oxford University Press
PC	Privy Council
PII	Public interest immunity
PL	Public Law

QB	Queen's Bench Division (Court of Appeal)
Russ & Ry	Russell & Ryan's Crown Cases Reserved
SA	South African Law Reports
SC	Session Cases
SCSL	Special Court for Sierra Leone
Series A	European Court of Human Rights Series A: Judgments and Decisions
Seton Hall Const LJ	Seton Hall Constitutional Law Journal
State Tr	State Trials
StPO	German Criminal Procedure Code
Sydney L Rev	Sydney Law Review
TLR	Times Law Reports
tr(s)	translator(s)
Tul L Rev	Tulane Law Review
U Chi L Rev	University of Chicago Law Review
U Fla L Rev	University of Florida Law Review
U Ill L Rev	University of Illinois Law Review
U Pa L Rev	University of Pennsylvania Law Review
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UP	University Press
US (in case citations)	United States Supreme Court Reports
Va J Int'l L	Virginia Journal of International Law
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Reports
Wm & Mary L Rev	William and Mary Law Review
Yale LJ	Yale Law Journal
Yearbook	Yearbook of the European Convention on Human Rights
YJCEA	Youth Justice and Criminal Evidence

INTRODUCTION

The plight of one subject to a criminal charge is most precarious. His reputation, livelihood and freedom are susceptible to jeopardy as the state pursues the 'general justifying aim' of the administration of criminal justice, namely the control of crime which is manifested as detecting, convicting and duly sentencing the guilty.[1] Single-minded attempts to realise this aim would be inconsistent with a civilised society's interest in also ensuring that respect be afforded the interests of those of its members against whom criminal proceedings are being conducted. The challenge for the state, therefore, at its most basic level, is to balance its pursuit of crime control with adequate respect for the interests of the accused.[2]

It is an expression of this respect that an accused is granted the fundamental right to fair trial under Article 6 of the European Convention on Human Rights (ECHR).[3] This provision reflects a commitment to the rule of law.[4] Drawing on the spirit of Hayek's definition,[5] Raz postulates that the rule of law broadly has two aspects: people should be ruled by and obey the law; and the law must be capable of guiding the behaviour of its subjects if it is to be obeyed.[6] Crucially, both aspects require correct application of the law and '[o]pen and fair hearing, absence of bias and the like...' is essential if confidence is to be had that this has been carried out.[7] The rule of law is an integral element of democratic

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[1] AJ Ashworth, 'Concepts of Criminal Justice' [1979] Crim LR 412, 412. See also *R v Brown (Winston)* [1994] 1 WLR 1599 (CA) 1606 (Steyn LJ).

[2] This tension is reflected in the competing crime control and due process models in HL Packer, *The Limits of Criminal Sanction* (Stanford UP, Stanford 1969) 153–154, 158–159, 163–164.

[3] (adopted 4 November 1950, entered into force 3 September 1953, as amended by Protocols Nos 11 and 14) 213 UNTS 221.

The Court has found more violations of Art 6 than any other right, even excluding cases on length of proceedings (1959–2009): European Court of Human Rights, '50 Years of Activity: The European Court of Human Rights: Some Facts and Figures' (2010) <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf> 6, 14–15.

[4] *Golder v UK* (App 4451/70) (1975) Series A no 18 [34]; *The Sunday Times v UK (No 1)* (App 6538/74) (1979) Series A no 30 [55]; *Salabiaku v France* (App 10519/83) (1988) Series A no 141-A [28]; *Stran Greek Refineries and Stratis Andreadis v Greece* (App 13427/87) (1994) Series A no 301-B [46].

On Art 6 and the rule of law, see M Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (EM Meijers Instituut, Leiden 2004) 79–83.

[5] FA Hayek, *The Road to Serfdom* (Routledge, London 1944) 54: '...the Rule of Law... means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.'

See further on the meaning of the rule of law GQ Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne UP, Carlton 1988) Ch 1.

[6] J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 198.

[7] ibid 201.

governance. Accordingly, the right to fair trial is also acknowledged as holding a prominent place in a democratic society.[8]

The nature of fairness in Article 6 is procedural. The European Court of Human Rights (Court) lacks competence to entertain cases where a national court decision is wrong on the merits (error of fact or law), unless and insofar as the error impacts upon the procedural requirements of Article 6; it not an appeal court of fourth instance.[9] It must also be sensitive to the diversity in criminal procedure between states implementing their own historical traditions.[10] Accordingly, it has not sought that a particular model of criminal procedure be implemented: '...Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6.'[11] Instead, the Court seeks to ascertain whether the procedure chosen by the state led to results consistent with a fair trial.[12] In doing so, the procedure is considered in its entirety.[13]

The procedural rights of Article 6 were not formulated in a vacuum but are the product of historical influence. Chapter 1 draws attention to certain influential historical developments in the trial rights of the accused before the creation of Article 6. These developments serve to illustrate a historical evolution in standards of procedural fairness and encourage a keener understanding of the background of the rights in the provision. Biblical divine law is rejected as an inspirational source for procedural fairness at the outset. The thrust of the chapter is on historical developments in trial rights at the national, constitutional and international law levels, before ending with an outline of the rationale for the ECHR and of the content, and applicability, of Article 6.

Inherent in and at the core of the Article 6 right to fair trial is the concept of equality of arms, the construct to which this thesis is devoted within the context of criminal proceedings. This concept is intended to ensure that parties to such proceedings, as far as their respective roles permit, are afforded equal procedural opportunities to prepare and present their cases. It thus refers to 'procedural equality'[14]

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[8] eg *Airey v Ireland* (App 6289/73) (1979) Series A no 32 [24]; *Deweer v Belgium* (App 6903/75) (1980) Series A no 35 [44]; *Adolf v Austria* (App 8269/78) (1982) Series A no 49 [30]; *Hermi v Italy* (App 18114/02) EHCR 2006-XII [76].

[9] eg *Anderson v UK* (App 44958/98) ECHR 5 October 1999 [3] ('The Law'); *García Ruiz v Spain* (App 30544/96) ECHR 1999-I [28]; *FC Mretebi v Georgia* (App 38736/04) ECHR 31 July 2007 [31]; *Timergaliyev v Russia* (App 40631/02) ECHR 14 October 2008 [62].

[10] See further S Maffe, *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses* (Europa Law, Groningen 2006) 3: 'Criminal law, procedure and evidence do not fully participate of the movement towards a unified European legal area as Member States seem almost stubbornly attached to their own way of prosecuting, judging and punishing those who have allegedly committed a criminal offence.'

[11] *Hadjianastassiou v Greece* (App 12945/87) (1992) Series A no 252 [33]; *Ryakib Biryukov v Russia* (App 14810/02) ECHR 17 January 2008 [31].

[12] *Quaranta v Switzerland* (App 12744/87) (1991) Series A no 205 [30].

[13] Ch 2 text to n 28.

[14] eg *Ofner and Hopfinger v Austria* (Apps 524/59; 617/59) (1963) 6 Yearbook 676 (EComHR) 696; *Pataki and Dunshirn v Austria* (Apps 596/59; 789/60) (1963) 6 Yearbook 714 (EComHR) 731–732; *Kuopila v Finland* (App 27752/95) ECHR 27 April 2000 [27]; *Cyprus v Turkey* (App 25781/94) ECHR 2001-IV [105], [211], [339].

or a 'fair balance between the parties',[15] a condition to be realised irrespective of the particular model of criminal procedure adopted within a state.[16]

A thorough theoretical insight on equality of arms within a criminal context under Article 6 is offered in Chapter 2. Whereas most could readily accept as axiomatic that procedural equality should pertain between state and accused, the chapter opts instead to investigate the actual value of such equality. It also identifies a contemporary legal basis for this equality in Article 6 and wider international law. Furthermore, the chapter cites the well-established definition of equality of arms, as formulated at Strasbourg, and elaborates on the fundamental elements thereof to clarify the nature of the concept, including its underpinning relationship with Article 6(3). The most important of these elements is the requirement that the accused have suffered 'disadvantage' for a violation to be registered. In this regard, the thesis argues that the Court does not equate the term with inequality in itself (unequivocal inequality) but with inequality that gives rise to actual or, in some circumstances, inevitable prejudice. This is the key proposition in the work, for it is the golden thread that runs through the analytical heart of the survey of case-law in the three subsequent chapters.

Chapters 3–5 rely on Article 6(3) as the context in which to demonstrate and assess the Court's approach to procedural equality in practice. This provision contains a catalogue of minimum rights which '...exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases...'.[17] Of the case-law concerning these rights, it is that on sub-paragraphs (b)–(d) that raises the range and depth of issues that are most conducive to getting right to the heart of the Strasbourg approach to the equality of arms doctrine. Each chapter corresponds to one of these three rights. The nexus between each right and procedural equality is established at the beginning of the corresponding chapter.

Chapter 3 considers the Court's approach to equality of arms in the light of the Article 6(3)(d) right to challenge and call witness evidence. Those who can occupy the position of witness or examiner are defined. Analysis of the right to question adverse witnesses predominates the chapter as this component of Article 6(3)(d) attracts most attention of the Court. In this regard, an examination model that is a benchmark of compliance with the article is outlined to serve as a point of reference for a discussion on derogations therefrom. Derogations have been permitted to secure the safety and well-being of victims and witnesses and their ability to testify freely. The Court's approach to equality of arms within the context of derogations from the benchmark examination model is discussed, focussing on three categories of witness for whom derogations have been made: absent, anonymous and vulnerable. The

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[15] eg *Salov v Ukraine* (App 65518/01) ECHR 6 September 2005 [87]; *Perić v Croatia* (App 34499/06) ECHR 27 March 2008 [19]; *Batsanina v Russia* (App 3932/02) ECHR 26 May 2009 [22]; *Laska and Lika v Albania* (Apps 12315/04; 17605/04) ECHR 20 April 2010 [60].

[16] See further SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart, Oxford 2007) 104: '...the Court does not believe this principle [of equality of arms] to be culturally specific. It has applied it in criminal and civil cases concerning, *inter alia*, the United Kingdom, France, Austria, Belgium, the Netherlands, Switzerland and Finland.'

[17] *Can v Austria* (App 9300/81) EComHR Report 12 July 1984 [48]. See also *Artico v Italy* (App 6694/74) (1980) Series A no 37 [32].

remainder of the analysis is devoted to the right to call witness evidence under the same conditions as the prosecution.

Chapter 4 investigates the Strasbourg approach to equality of arms when complaints of inadequate time and facilities are assessed under Article 6(3)(b). Whereas the key matters taken into account in assessing adequacy of time are identified, greater regard is had in the chapter for the right to adequate facilities which predominates the jurisprudence. Examples of several facilities necessary for procedural equality are given but it is the facility of disclosure that features most prominently in the case-law. An outline of the character of disclosure is followed with a discussion on the Court's approach to equality of arms as applied to cases of non-disclosure of evidence and written observations.

Chapter 5 finally examines the Court's approach to equality of arms in the application of the Article 6(3)(c) right to legal assistance. The Court's response to domestic restrictions on the right to privately retained counsel is assessed before turning to the right to legally aided assistance. Eligibility for the latter and whether those who are eligible are entitled to influence the selection of appointed counsel are issues addressed. Also addressed is whether states can insist upon counsel for an accused wishing to represent himself. Thereafter, the chapter considers the Court's approach to pre-trial legal assistance and complaints of ineffective assistance.

The basic structure of this thesis, therefore, comprises context (Chapter 1), theoretical insight (Chapter 2) and analysis of case-law (Chapters 3–5). The conclusions to each chapter provide a comprehensive summary of the findings therein, necessitating only a brief concluding overview at the end of the thesis. Though this work is based on Article 6 decisions of the Court and, to a lesser extent, the former European Commission of Human Rights (Commission),[18] references are made throughout to other national and international legal instruments and judgements whenever instructive. Nonetheless, in the international fora, it is the Strasbourg organs that have articulated the most fully-developed jurisprudence on equality of arms, the influence of which has extended to other international tribunals.[19]

Given the importance of equality of arms under Article 6, it is unsurprising that it is the object of much commentary.[20] This thesis is intended, however, to distinguish itself by offering a greater depth of

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[18] Abolished by ECHR Protocol No 11 (adopted 11 May 1994, entered into force 1 November 1998) ETS 155.

[19] eg *Prosecutor v Tadić* (Judgement) (Appeals Chamber) ICTY-94-1-A (15 July 1999) [44], [48]–[49]; *Prosecutor v Kayishema and Ruzindana* (Judgement: Reasons) (Appeals Chamber) ICTR-95-1-A (1 June 2001) [80]; *Prosecutor v Norman et al* (CDF Case) (Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone) (Trial Chamber) SCSL-04-14-PT (19 April 2004) text associated with fn 1; *Situation in the Democratic Republic of the Congo* (Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1–6) (Pre-Trial Chamber I) ICC 01/04-135 (31 March 2006) text associated with fn 50.

[20] eg S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 52–54; M Wąsek-Wiaderek, *The Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View* (Leuven UP, Leuven 2000) 23–32, 39–42, 50–54; S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 94–102; P van Dijk and M Viering, 'Right to a Fair and Public Hearing (Article 6)' in P van Dijk and others (eds), *Theory and Practice of the*

theoretical and jurisprudence based treatment of the subject. Not only is this readily evident in the degree of consideration given to the value, legal basis and definition of the concept of equality of arms (Chapter 2), but also in the fact that an examination of three rights within Article 6(3) is conducted distinctly from an equality of arms perspective (Chapters 3–5). Additionally, the wider context of equality of arms is not ignored, for a synthesis of a range of historical developments not found in any one account is presented to establish the background for Article 6 (Chapter 1). On this basis, it is hoped that this work will provoke new reflection on the concept of equality of arms in criminal proceedings under Article 6.

European Convention on Human Rights (4th edn Intersentia, Antwerpen 2006) 580–584; Summers (n 16) 103–112; D Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 251–254.

There are also useful accounts on equality of arms outside the Art 6 context: eg JS Silver, 'Equality of Arms and the Adversarial Process: A New Constitutional Right' [1990] Wis L Rev 1007, 1032–1041; G McIntyre, 'Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia' (2003) 16 LJIL 269, 271–320; S Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 Int CLR 513, 522–571; S Negri, 'Equality of Arms—Guiding Light or Empty Shell?' in M Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, London 2007) 16–19, 22–73.

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A BACKGROUND FOR ARTICLE 6: HISTORICAL DEVELOPMENTS IN TRIAL RIGHTS

A. INTRODUCTION

Procedural rights in criminal proceedings are intended to safeguard the accused from the arbitrary exercise of state power. It is thus said that '[t]he history of liberty has largely been the history of observance of procedural safeguards.'[1] The procedural rights of the accused, and his capacity to exercise them, represent the content and standard of procedural fairness available in the particular society in which the proceedings occur. The content and standard of this fairness is relative to the level of civilisation prevailing within that society at the time. Accordingly, procedural rights securing this fairness are evolutionary in nature. Though this evolution through history can be slow and interrupted by periods of regression, Article 6 is a product thereof. History reveals certain procedural rights that have proven useful or essential to a just and fair adjudication, and the consequences for the individual of their absence, hence their inclusion in Article 6.

This chapter identifies certain influential historical developments in the trial rights afforded accused persons before the birth of Article 6. These developments are intended to demonstrate a gradual historical evolution in standards of procedural fairness in an attempt to promote a better understanding of the background of the rights in Article 6. Once this general context for Article 6 is established, the remainder of the thesis devotes itself to a specific aspect thereof: the concept of equality of arms. The historical developments identified in this chapter are Western, for Article 6 is a construct of liberal Western democracies.[2] Whereas the Bible has undoubtedly been influential to the development of Western civilisation, Part B rejects divine law as an inspirational source for procedural fairness. Part C focuses on national law developments, discussing in particular the rights of the accused in classical antiquity; medieval trials by oath, ordeal and combat; ecclesiastical inquisitorial procedure; heresy inquisitions; the French Criminal Ordinance 1670; English jury trials; and the French Napoleonic Code of Criminal Instruction 1808. Part D

[1] *McNabb v US* 318 US 332, 347 (1943) (Frankfurter J).

[2] See further AH Robertson and JG Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (4th edn Manchester UP, Manchester 1996) 2: 'When we consider the philosophical foundations of the concept of human rights, it is clear that the mainstream has its origins in the liberal democratic tradition of Western Europe—a tradition which is itself the product of Greek philosophy, Roman law, the Judeo-Christian tradition, the humanism of the Reformation and the Age of Reason.'

thereafter concerns constitutional law developments and draws attention to Magna Carta and trial rights in American and French revolutionary instruments. Finally, Part E considers international law developments, dealing specifically with the rights afforded accused persons in the Nuremberg trials and under the Universal Declaration of Human Rights (UDHR)[3] and International Covenant on Civil and Political Rights (ICCPR).[4] It culminates in a discussion on the rationale for the ECHR and on the express and implied content, and applicability, of Article 6.

B. REJECTION OF DIVINE LAW

The first invocation of the fundamental principle of the common law concept of natural justice,[5] that both sides shall be heard before judgement (*audi alteram partem*), has been attributed to divine law. Justice Fortescue, in a view earlier enunciated by Bishop Lucifer of Cagliari in the fourth century,[6] traced the principle to the Garden of Eden:

> The laws of God and man both give the party an opportunity to make his defence … [E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (says God) "where art thou? Hast thou not eaten from the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also.[7]

Nonetheless, there is a general lack of biblical support for the hearing principle as originating in divine law.[8] Rather than allowing Cain to make a defence to the killing of Abel, God invites an explanation from him only rhetorically: "What have you done? Hark! Your brother's blood… is crying out to me from the ground. Now you are accursed… . You shall be a vagrant and a wanderer on earth."[9] At King Belshazzar's feast, a divine hand inscribed that he had 'been weighed in the balance and found wanting'.[10] Divine judgement was made without Belshazzar being heard.[11] Similarly, within the context of the Last Judgement, there is no indication that those judged will be heard before being condemned to eternal punishment.[12] Furthermore, associating the right to be heard with divine law is flawed at a more theological level. If God is

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[3] (adopted 10 December 1948) UNGA Res 217 A(III) UN Doc A/810 71.
[4] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[5] For analysis of the concept, see HH Marshall, *Natural Justice* (Sweet & Maxwell, London 1959) Chs 1–3; P Jackson, *Natural Justice* (Sweet & Maxwell, London 1979) Chs 1–3.
[6] JM Kelly '*Audi Alteram Partem*' (1964) 9 Nat LF 103, 109.
[7] R *v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 93 ER 698, 704 (KB).
[8] Kelly (n 6) fn 38.
[9] *Genesis* 4:10–12. Translation in CH Dodd (ed), *The New English Bible: Old Testament* (OUP, Oxford 1970).
[10] *Daniel* 5:1–5, 12, 17–28. Translation ibid.
[11] RFV Heuston, *Essays in Constitutional Law* (2nd edn Stevens & Sons, London 1964) 185.
[12] *Matthew* 25:31–46. Translation in CH Dodd (ed), *The New English Bible: New Testament* (OUP, Oxford 1961); Kelly (n 6) fn 38.

accepted as omniscient, a hearing process to determine truth is unnecessary. Divine law is not, therefore, a convincing source of inspiration for procedural fairness and one must instead look to national law developments.

C. NATIONAL LAW DEVELOPMENTS

A brief historical sketch of the treatment of the accused at trial at the national law level allows one to trace the origins of certain rights of the accused resembling those of Article 6. Safeguards for accused persons at this level seem to have been implemented as a means of either achieving a correct outcome or giving irrational guilty verdicts a fig-leaf of legitimacy. The gradual evolution in standards of procedural fairness in national law is characterised by both progressive and regressive developments. Even in the case of the latter, there was an appreciation that the accused should be afforded at least some rights, albeit rights that could not necessarily be exercised effectively in practice. Progressive and regressive developments are both useful to law-makers of the future. Not only do they reveal and reaffirm rights that are demonstrably important to procedural fairness, but also expose the negative impact on society of their absence and thereby discourage reoccurrence of the same.

1. Classical Antiquity

Recognition that accused persons require a degree of procedural protection when being judged is rooted in classical antiquity.

(a) Athens

The principle that both parties be heard is reflected in classical Grecian thought. Rather than regarding the principle merely as a precept of justice, however, the Greeks also considered it a pragmatic construct for good decision-making.[13] Although justice and good decision-making both entail reaching an accurate outcome and treating similar cases alike, they are distinguishable notions. The former refers to the effect of an outcome as perceived by the affected actors; the latter is associated with the 'quality of mind' of the decision maker.[14]

Several examples may be cited of the application of the hearing principle either in the pursuit of justice or as an aid for wise decision-making. In respect of justice, the orator Demosthenes referred to the prescription in Athenian law that both prosecutor and defendant should be

[13] Kelly (n 6) 103.
[14] ibid.

equally heard in his speech in *On the Crown*.[15] In his speech at the prosecution of Timocrates in *Against Timocrates*, Demosthenes also highlights the Heliastic judicial oath which requires judges to ensure that a hearing is enjoyed by prosecutor and defendant alike.[16] Additionally, *Wasps* by Aristophanes, based on the Athenian passion for court proceedings, involves attention being drawn to the hearing principle by the character Bdelycleon: "In the gods' name, father, don't prejudge him guilty; wait till you've heard both sides".[17] It is within the same work that one also finds the hearing principle associated with wise decision-making when the chorus leader pronounces that: 'Truly it seems he was a wise man who said, "Until you have heard the tale of both parties, you should not judge"'.[18] Similarly, in *The Children of Heracles*, Euripides refers to the hearing principle in a manner more suggestive of its close relationship with good decision-making than justice: "Who can decide a plea or judge a speech until he has heard a clear statement from both sides?"[19] He reinforces this close relationship in *Andromache* when Orestes tells Hermione: "Wise was the advice of him who taught men to listen to reports from their enemies".[20]

The prevalence of the hearing principle in classical Athens should not be underestimated. Whilst a modern day defendant may be inclined to take such a right for granted, even allowing the other side to be heard at all is a significant step for any society to take towards ensuring procedural fairness. Indeed, the establishment of this right evidences one of the earliest efforts by a civilization to limit the possibility of arbitrary decision-making.

Despite the provision of an opportunity to be heard, the relativist nature of fairness, in light of modern proceedings, is evident in other elements of the Athenian judicial process.

A permanent, professional judicial body did not exist and, instead, Athens was served by a judiciary of 6000 citizens, appointed annually by lot, sitting in committees of 200 to 2000.[21] Whilst such a degree of public participation in the process may, prima facie, display a keenness to uphold public confidence in the system, the judiciary did not enjoy a reputation for independence and impartiality. The distinction between the judicial and legislative bodies was extremely blurred, resulting in a justice system tainted by politically motivated prosecutions and judgements.[22] In addition to the challenges to impartiality by self-interest,[23] judges were often familiar with the parties pre-trial[24] and, as demonstrated in Aeschines's oration *Against Timarchus*, were called upon to make judgements based on their own knowledge and extra-judicial investigations rather than

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[15] CA Vince and JH Vince (trs), *Demosthenes: De Corona and De Falsa Legatione* (Heinemann, London 1926) [1]–[2], [6]–[7].
[16] JH Vince (tr), *Demosthenes: Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton* (Heinemann, London 1935) [149]–[151].
[17] AH Sommerstein (ed) (tr), *Aristophanes: Wasps* (Aris & Phillips, Warminster 1983) [919]–[920].
[18] ibid [725]–[726].
[19] D Kovacs (ed) (tr), *Euripides* (Harvard UP, Cambridge 1995) vol 2 [179]–[180].
[20] ibid [957]–[958].
[21] J Macdonell, *Historical Trials* (Clarendon, Oxford 1927) 6.
[22] ibid 6–7; JW Jones, *The Law and Legal Theory of the Greeks* (Clarendon, Oxford 1956) 128–130.
[23] Jones (n 22) 135.
[24] Macdonell (n 21) 6.

purely on evidence presented at trial.[25] Decisions made on these grounds were lawful.[26] Due to the size and non-professional make-up of court membership, life and death decisions were made in an environment more prone to fickleness and sentimentality than the interests of justice.[27]

With respect to evidence, Athenian law did not permit defendants to provide evidence on their own behalf, other than that extracted during prosecutorial questioning.[28] Witnesses were not subject to verbal examination[29] and, consequently, their evidence was read from written statements, the veracity of which the authors were summonsed to confirm.[30] Although hearsay evidence was inadmissible, unless extenuating circumstances existed,[31] evidence procured through the torture of slaves, despite its inherent unreliability, was admissible.[32]

Further unfavourable conditions to defendants included the ambiguity of indictments, a prime example of which is found in a trial rank with political passions, that of Socrates in 399 BC. His brief indictment stipulated that he 'does not believe in the gods whom the city believes in, but introduces other new deities. He corrupts the youth'.[33] The absence of precise particulars of offences would, of course, adversely affect a defendant's ability to refute formal charges effectively.[34]

It was with the aim of challenging charges effectively that defendants sought representatives, from relatives to professional orators, to advocate on their behalf.[35] Whilst representation was permitted, professional advocates, because of the absence of blood-ties or friendships with their clients, were sometimes viewed in courts as legal mercenaries skilled in oratory, thus untrustworthy, disinterested in justice and a potential liability for clients.[36] Of course, in an environment where representation was not deemed essential to ensuring fairness at trial, a formal system of legal aid did not exist and defendants were compelled to use their own initiative in seeking assistance.

It appears, therefore, that the Athenian justice system had at least two features associated with contemporary procedural fairness: allowing representation and a right to be heard.

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[25] CD Adams (tr), *Aeschines: The Speeches* (Heinemann, London 1919) [92]–[93].
[26] Jones (n 22) 135–136.
[27] Macdonell (n 21) 6; Jones (n 22) 122.
[28] Demosthenes, *Apollodorus Against Stephanus 2* in AT Murray (tr), *Demosthenes: Private Orations* (Heinemann, London 1939) vol 5 [9]–[10].
[29] Demosthenes, *On the False Embassy* in Vince and Vince (n 15) [176].
[30] Lycurgus, *Against Leocrates* in JO Burtt (tr), *Minor Attic Orators* (Heinemann, London 1962) vol 2 [19]–[20].
[31] Demosthenes (n 28) [7]. Extenuating circumstances included a witness that was dead, sick or absent from the country.
[32] Jones (n 22) 141.
[33] Macdonell (n 21) 9.
[34] ibid. See also R Allen, 'The Trial of Socrates: A Study in the Morality of the Criminal Process' in ML Friedland, *Courts and Trials: A Multidisciplinary Approach* (Toronto UP, Toronto 1975) 18: 'the charges provided no standard by which empirically ascertainable fact could be adduced either to support or refute them; they admitted neither proof or disproof.'
[35] Jones (n 22) 144–145; R Pound, 'What is a Profession? The Rise of the Legal Profession in Antiquity' (1944) 19 Notre Dame L 203, 212–214.
[36] Jones (n 22) 145–146; Lycurgus (n 30) [138].

(b) Rome

The principle of *audi alteram partem* was also entrenched in the mindset of ancient Romans.

The Athenian distinction between the use of hearings in the interests of justice or for good decision-making was shared in Rome, with an emphasis on the former.[37] Seneca the Younger in *Medea* reinforces this emphasis: "If someone makes a decision without hearing the other side, even if his decision is just, *he* is not just".[38] An intention to promote justice through hearings is evident in positivist Roman law. Thus, one finds in the *Digesta* 533 AD (code of law compiled from juristic works) the rules that a 'father cannot kill his son without giving him a hearing'[39] and that defendants could not be condemned in absentia because 'justice does not permit of a person's being condemned without his case being heard'.[40] The hearing principle as a rule of law is also referred to by Seneca the Elder in regard to Iphicrates on trial: "Everything the law prescribed was carried out. The accuser spoke in his turn, the defendant replied in his; the trial was completed in all its details".[41]

Adherence to the hearing principle for justice was also customary. Thus, Suetonius in *Divus Claudius* refers to a representative's remark that "it is usual" for a client to be allowed to present a defence.[42] Apuleius's *Metamorphoses* describes magistrates, facing an imminent act of mob justice against an accused, advising that "a verdict ought to be rendered with due process and customary procedure" and "that the allegations of both sides should be examined". They add that the crowd must not "condemn a man unheard".[43] Furthermore, Tacitus recounts, in respect of the informer Faustus, the Senate opine "that no matter how odious and guilty the defendant might be, yet he must be heard according to precedent".[44] 'Precedent' in this context is synonymous with customary practice.

Despite the emphasis on justice, the role of hearings in good decision-making is not ignored by Tacitus. In his *Annals*, he remarks: "What man of ordinary prudence… would force death upon a son whose defence was unheard...?"[45] Similarly, Cicero in a letter concerning a debt owed

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[37] Kelly (n 6) 105.
[38] HM Hine (tr), *Seneca: Medea* (Aris & Phillips, Warminster 2000) [199]–[200].
[39] A Watson (ed) (tr), *The Digest of Justinian* (Pennsylvania UP, Philadelphia 1998) vol 2 book 48 [8.2].
[40] ibid [17.1], [19.5].
[41] M Winterbottom (tr), *The Elder Seneca: Declamations: Controversiae Books 1–6* (Harvard UP, Cambridge 1974) vol 1 book 6 [5].
[42] JC Rolfe (tr), *Suetonius* (Harvard UP, Cambridge 1998) vol 2 book 5 [15].
[43] JA Hanson (ed) (tr), *Apuleius: Metamorphoses Books 7–11* (Harvard UP, Cambridge 1989) vol 2 book 10 [6].
[44] CH Moore (tr), *Tacitus: The Histories Books 1–3* (Heinemann, London 1980) vol 2 book 2 [10]. See also Festus, the Roman procurator of Judea: "It is not Roman practice to hand over any accused man before he is confronted with his accusers and given an opportunity of answering the charge": *Acts* 25:16. Translation from Dodd (n 12).
[45] J Jackson (tr), *Tacitus: The Annals Books 4–6, 11–12* (Heinemann, London 1986) vol 4 book 4 [11].

by his brother to his friend Atticus and a resulting grievance appreciates that both sides should be heard before he judges the situation.[46]

Aspects of Roman imperial, inquisitorial criminal procedure reveal the existence of safeguards for defendants beyond the basic provision of a hearing, indeed much more so than in classical Athens.

Foremost amongst these safeguards was the requirement of an impartial decision-maker. This reflects the second fundamental principle of natural justice: no man shall be judge in his own cause (*nemo iudex in sua causa*). Thus, a magistrate or judge was considered to have acted improperly if he arranged for false evidence to be given against a defendant or accepted a bribe to find the defendant guilty.[47] In *A Dialogue on Oratory*, Tacitus refers to a remark by Secundus promoting impartiality: "I shall follow the usual practice of upright and conscientious judges, who ask to be excused from acting in cases where it is obvious that one of the two parties stands higher in their good graces than the other".[48] Previously, even under the Republic, the Twelve Tables 449 BC, a foundation instrument of Roman law, stipulated that a judge would incur capital punishment if he accepted a bribe for his decision.[49] An impression existed, however, that infringements of the impartiality requirement in Imperial Rome were rife.[50] Further to the dwindling of jury courts, politically-appointed single judges, special senatorial court proceedings and the judicial supremacy of the Emperor took prominence in an inquest-based process.[51] The absence of a strict separation of powers was an affront to independent decision-making, particularly in view of the Emperor's jurisdiction and law creating capacity. Moreover, a defendant's social status impacted on his procedural treatment by the decision-maker,[52] and provincial decision-making assumed an arbitrary character.[53] Whilst impartiality was not, therefore, always upheld in practice, the fact remains that it was accepted as a requirement of fair treatment.

Safeguards were also implemented in respect of the basis of a charge. The *Digesta* reveals that, in addition to defendants being notified pre-trial of the alleged offence and its factual basis,[54]

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[46] DR Shackleton Bailey (ed) (tr), *Cicero: Letters to Atticus* (Harvard UP, Cambridge 1999) vol 2 book 7 [18.4]: 'I like to follow the maxim… "judge not a cause...,"[3]' (fn 3: "'Do not judge a case until you hear both sides…'"). Pliny the Younger provides evidence of the same: "… you can hear both sides of the case and be better able to decide what is to be done.": B Radice (tr), *Pliny: Letters and Panegyricus* (Harvard UP, Cambridge 1975) vol 2 book 10 [59].

[47] Watson (n 39) book 48 [8.1]–[8.1.1].

[48] M Hutton and W Peterson (trs); RM Ogilvie, EH Warmington and M Winterbottom (revised), *Tacitus: Agricola; Germania; Dialogus* (Harvard UP, Cambridge 1980) vol 1 [5].

[49] Table IX.3. Available at: The Avalon Project Yale Law School, 'Ancient, Medieval and Renaissance Documents' <http://avalon.law.yale.edu/subject_menus/medmenu.asp>.

[50] J Harries, *Law and Empire in Late Antiquity* (CUP, Cambridge 1999) Ch 8. See further JM Kelly, *Roman Litigation* (Clarendon, Oxford 1966) Chs 2, 5.

[51] Harries (n 50) 53, 101; JL Strachan-Davidson, *Problems of the Roman Criminal Law* (Clarendon, Oxford 1912) vol 2, 156–159.

[52] P Garnsey, *Social Status and Privilege in the Roman Empire* (Clarendon, Oxford 1970) 95–100.

[53] WL Burdick, *The Principles of Roman Law and their Relation to Modern Law* (Lawbook Exchange, Clark New Jersey 2004) 699–700.

[54] Watson (n 39) book 48 [2.3]; Burdick (n 53) 698.

accusers were required to ensure the integrity of the allegation by disclosing their identity and rendering themselves susceptible to punishment if the charge was unmeritorious.[55] It was with the integrity of the allegation in mind that, earlier in the Principate, Emperor Trajan professed that anonymous accusations should not be admissible as "[t]hey create the worst sort of precedent and are quite out of keeping with the spirit of our age".[56] Indeed, accusers were obliged to be in the defendant's presence in court for their assertions to have effect.[57] Additionally, it was decreed in the *Codex Justinianeus* 529 AD (compilation of imperial legislation) that charges should only be pressed if supported by competent witnesses or compelling documentary evidence, or 'by circumstantial evidence which amounts to indubitable proof and is clearer than day',[58] a standard of proof more akin to absolute certainty than beyond reasonable doubt. The combined effect of the burden of proof borne by the accuser,[59] the defendant not being condemned in absentia and, in cases of factual doubt, the more generous interpretation being preferred[60] supports the view that the presumption of innocence was a notion familiar to imperial Roman law.[61] Freedom from self-incrimination, however, despite its close link to the presumption of innocence, was not a recognised principle.[62]

Competent witnesses were compellable[63] and required to testify in the presence of the judge.[64] Defendant and accuser were afforded an opportunity to hear this testimony in their presence[65] but cross-examination by the parties became an obsolete procedure.[66] It was permissible for the testimony of slaves to be adduced at trial through torture, with the qualification that such testimony should be treated cautiously and not be relied upon as a sole basis of conviction.[67] Such caution also extended to hearsay evidence which was generally inadmissible.[68]

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[55] Watson (n 39) book 48 [2.7]–[2.7.1].
[56] Radice (n 46) book 10 [97].
[57] 'If anything should be spoken by an accuser alone against an absent person, the accusation must not immediately be considered true, as though spoken against a person present and convicted': *Codex Theodosianus* 438 AD (pre-Justinian compilation of imperial legislation) 11.39.9. Translation from C Pharr (tr), *The Theodosian Code and Novels and the Sirmondian Constitutions* (Greenwood, New York 1969).
[58] Book 4 [20.25] cited in *Coffin v US* 156 US 432, 454 (1895) (White J).
[59] Burdick (n 53) 693; 'Proof lies on him who asserts, not on him who denies.': A Watson (ed) (tr), *The Digest of Justinian* (Pennsylvania UP, Philadelphia 1998) vol 1 book 22 [3.2].
[60] Watson (n 39) book 50 [17.56], [17.155] ('the milder interpretation is to be adopted.'), [17.192] ('to follow the milder interpretation is no less just than safe.').
[61] *Coffin* (n 58) 454 (White J).
[62] Burdick (n 53) 694.
[63] Watson (n 59) book 22 [5.1.1]. Individuals not considered competent are identified throughout book 22 [5].
[64] *Novellae Constitutiones* 535–564 AD (legislation supplementing *Codex Justinianeus*) 90.5. Translation available in: SP Scott (tr), *The Civil Law* (Central Trust, Cincinnati 1932) vol 16.
[65] ibid 90.9.
[66] FR Herrmann and BM Speer, 'Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause' (1994) 34 Va J Int'l L 481, 488–490.
[67] Watson (n 39) book 48 [18.1]–[18.1.2], [18.1.23].
[68] CA Morrison, 'Some Features of the Roman and the English Law of Evidence' (1959) 33 Tul L Rev 577, 587.

Defendants were also permitted to benefit from representation.[69] In the Dominate, advocates assumed professional status and laid the foundations of modern advice provision and advocacy.[70]

2. Medieval Trial by Oath, Ordeal and Combat

Rather than improving upon the Roman standard of procedural fairness, however, subsequent Medieval accusatorial criminal procedure of Germanic origin, and riding the expanding wave of Latin Christendom, took in Western Europe a more primitive, superstitious and pragmatic stance. Defendants were subjected to trial by oath and/or ordeal or battle.

The widespread practice of trial by oath and/or ordeal[71] peaked in the ninth to thirteenth centuries. Following an accuser's plea to the court by corroborated oath,[72] the defendant was required to take an exculpatory oath[73] either on his own or supported by compurgators attesting to his good character.[74] Guilt was determined upon whether or not the defendant was of good status and his oath properly taken.[75] If these conditions were met, the defendant was acquitted; if not, he was referred to the ordeal.[76] However, if, on formal accusation, the defendant was known to be of ill-repute or he could not rally a sufficient number of compurgators or produce supporting evidence, oaths were considered improper and he faced trial by ordeal at first instance.[77] The procedural merits of trial by oath were that defendants confronted their accusers, written evidence was examined and, by the early thirteenth century, accusers were obliged to support allegations with a minimum of two witnesses liable to defence cross-examination.[78]

Recourse to the ordeal was designed to test publicly the defendant's innocence by requiring divine intervention.[79] Common ordeals included a defendant holding a hot iron or putting a hand in boiling water, his innocence being acknowledged if the injuries healed after three days,[80] or a bound defendant being lowered into water, whereby sinking indicated innocence, thus an honourable death.[81]

Procedural equality between accuser and defendant was achieved, however, by the involvement of both parties appealing for divine judgement through trial by battle. This armed

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[69] Burdick (n 53) 698.
[70] Pound (n 35) 223, 228; JA Crook, *Legal Advocacy in the Roman World* (Duckworth, London 1995) 45.
[71] R Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon, Oxford 1986) 25, 42–49.
[72] An example of which is provided in JF Stephen, *A History of the Criminal Law of England* (Burt Franklin, New York 1964) vol 1, 70.
[73] Example provided ibid.
[74] D Pollitt, 'The Right of Confrontation: Its History and Modern Dress' (1959) 8 J Pub L 381, 385.
[75] Stephen (n 72) 70.
[76] ibid.
[77] Bartlett (n 71) 26–27, 30.
[78] Pollitt (n 74) 385–386.
[79] Stephen (n 72) 73.
[80] Pollitt (n 74) 385.
[81] ibid; Stephen (n 72) 73.

practice,[82] the result of which was death or serious injury, was prevalent amongst the Germanic peoples and was imported to England by the Normans in 1066.[83] Cases involving odious and surreptitious crimes, such as treason and arson, and cases based upon heavily clashing evidence came within the remit of judicial combat, which reinforced the preceding oaths taken by the parties.[84] Defendants could challenge accusers and witnesses, the norm being that one could only contest another of equal societal status.[85] Over time, the right of parties to professional representation by champions fighting in their stead became established.[86] Whilst criticism may be raised as to the possible inequality of fighting skill between the parties or their champions, an analogous inequality of advocacy skill exists amongst modern advocates. This difference in skill, nevertheless, is not relevant to procedural equality.

The irrationality of the above modes of trial to demonstrate guilt is obvious—piety overshadowed wisdom—and unjust outcomes would have been frequent. In view of this irrationality and its contrast with the procedures of classical Athens and Imperial Rome, the standard of procedural fairness had taken a retrogressive step and was at one of its lowest points in history. It was clerical challenges to the legitimacy of ordeals by fire and water that led to their eventual abandonment after 1215.[87] These challenges were repeated to gradually erode the practice of trial by battle which became almost obsolete by the fifteenth century.[88] As this erosion occurred, the use of alternative procedures such as trial by jury or inquisition grew.[89]

3. Ecclesiastical Inquisitorial Procedure

Trial by inquisition had already been implemented in European ecclesiastical courts in 1198. The ecclesiastical procedure provided an influential model for the subsequent procedural evolution in Continental secular courts from accusatorial to inquisitorial modes of trial.

The essence of the *inquisitio* procedure was that judges could, ex officio, proceed on their own, without accusers and on the strength of public rumours of guilt (*infamia*), to actively investigate offences, amass evidence and prosecute suspects, thus contrary to the predominantly passive arbiters associated with accusatory systems. Originally instituted by Pope Innocent III to investigate clerical corruption, the inquisitorial procedure was favoured in ecclesiastical courts

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[82] For an example of a judicial combat, see Bartlett (n 71) 111.
[83] ibid 104–105.
[84] ibid 106.
[85] ibid 109–110.
[86] ibid 112; TFT Plucknett, *A Concise History of the Common Law* (5th edn Butterworth, London 1956) 117.
[87] Bartlett (n 71) 77, 81, 83, 86, 88, 100. England abandoned ordeals of this type in 1219. The 18th canon of the Fourth Lateran Council 1215 (ecumenical council) cemented ecclesiastical opinion through a decree prohibiting the involvement of clerics in ordeals. Available at: P Halsall (ed), 'The Canons of the Fourth Lateran Council, 1215' (Fordham University Internet Medieval Sourcebook 1996) <http://www.fordham.edu/halsall/basis/lateran4.html>.
[88] Bartlett (n 71) 116–118, 120, 122–123. The final judicial combat in England was in 1492: G Neilson, *Trial by Combat* (Hodge, Glasgow 1890) 203.
[89] Bartlett (n 71) 126, 137–142.

because it was regarded as offering less protection to defendants and dispensed with requiring accusers, thereby representing a more efficient means of securing convictions.[90]

The procedure was divided into two inquiries, the preliminary one of which was to establish *infamia*. Witnesses were examined by a judge and evidence gathered, in the absence of the suspect, to attest to the presence of public suspicion against the latter.[91] On summons, this testimony was disclosed to the suspect and he was entitled to refute it and adduce witness evidence of his good reputation whilst demanding that adverse witnesses be re-examined.[92] These safeguards would, of course, have been strengthened if suspects could confront adverse witnesses.

If *infamia* was proved, the suspect was summoned to a second inquiry to determine guilt. Certain procedural safeguards were afforded to defendants. They were entitled to be present at the hearing and notified of and given time to peruse the charges.[93] A guilty plea resulted in an interrogation of the defendant by a judge, the former being permitted the aid of counsel, and evidence was presented.[94] Although adverse witnesses were examined privately without the defendant being present, their names and testimony were disclosed, providing an opportunity for the defendant to respond, request re-examination and call witnesses in defence.[95] Whereas disclosure of the names and testimony of adverse witnesses later became a discretionary right during the papacy of Pope Innocent IV, this fundamental safeguard was abolished in the ecclesiastical courts by sixteenth century Popes Paul III and Pius IV.[96] Defendants were, nonetheless, very often granted the opportunity to confront witnesses but a right of the same was not available.[97] Impliedly, therefore, confrontation was considered extremely useful but not essential for wise decision-making and ensuring justice. Surprisingly, for a church opposed to the violence of judicial combats, the administration of torture in ecclesiastical courts as a mode of proof, after the mid-thirteenth century, was lawful.[98]

The above demonstrates that ecclesiastical inquisitorial procedure entertained useful rights of defence at its inception and in its later habitual use of confrontation, demonstrating a degree of appreciation for procedural fairness. Yet, the possibility remained that if the judge chose lawfully not to permit confrontation, a defendant would be unfamiliar with the origins of any adverse testimony, thereby eradicating any opportunity to object to the admissibility and credibility of a witness and, consequently, hampering the effectiveness of his defence. This possibility, and the use of torture, obviously dilutes the measure of procedural fairness furnished on defendants.

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[90] Herrmann and Speer (n 66) 523.
[91] A Esmein, *A History of Continental Criminal Procedure* (J Murray, London 1914) 89.
[92] ibid 89, 92.
[93] ibid 89; eighth canon of the Fourth Lateran Council: Halsall (n 87).
[94] Esmein (n 91) 90–91.
[95] ibid; eighth canon of the Fourth Lateran Council: Halsall (n 87).
[96] Esmein (n 91) 92.
[97] ibid 93.
[98] ibid 91–92; FL Cheyette, 'Inquest, Canonical and French' in JR Strayer (ed), *Dictionary of the Middle Ages* (Scribner, New York 1985) vol 6, 479.

4. Heresy Inquisitions

Drastically extending this dilution to the extent that procedural fairness was almost completely disregarded was the implementation in thirteenth century Western Europe of a special inquisitorial procedure for heresy prosecutions.

Constituting a crime against both church and state, heresy involved proactive rejection of orthodox Catholic doctrine. New intellectual enlightenment spread heretical thought, posing an intolerable challenge to the established church order and, by virtue of their interdependence with the latter,[99] states themselves.

Further to the codification of existing heresy legislation in the third canon of the Fourth Lateran Council,[100] Pope Gregory IX provided the momentum for the adoption and adaptation of the *inquisitio* procedure of the ecclesiastical courts to identify heretics more effectively. Consequently, a decentralized set of special inquisitorial tribunals were employed to prosecute and suppress heresy.[101]

Tasked with presiding over these tribunals, usually as single inquisitors and under direct papal authority, were members of the Franciscan or Dominican Orders.[102] Their appointment was made with a view to ensuring some impartiality. Inquisitors were not local to the tribunals, thereby limiting any possible receptiveness to community prejudices.[103] Obliged to poverty, inquisitors of the mendicant orders were also less susceptible to bribery.[104] Indeed, bias was taken sufficiently seriously so as to warrant an inquisitor's deposition and excommunication.[105] The requirement of impartiality stretched to witness and defendant testimony. Testimony could be given only in the presence of two impartial individuals, usually clerics, who were unconnected to the tribunal.[106]

Notwithstanding this appreciation for a degree of impartiality, trial proceedings assumed an authoritarian character whereby defendants were deprived of even the most fundamental procedural safeguards. Indeed, rather than for wise decision-making or prevention of injustice, the procedure was aimed at extracting admissions of guilt and reconciling defendants with the Church, thereby rendering most essential safeguards unnecessary.[107] Although Lea suggests incorrectly that defendants 'had no rights',[108] the safeguards in existence were admittedly

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[99] M Bévenot, 'The Inquisition and its Antecedents, II' (1966) 7 Heythrop J 381, 384–389; B Hamilton, *The Medieval Inquisition* (Edward Arnold, London 1981) 16–17.
[100] Halsall (n 87).
[101] As to the background of the tribunals, see M Bévenot, 'The Inquisition and its Antecedents' (1966) 7 Heythrop J 257 (Pt 1), 381 (Pt 2); (1967) 8 Heythrop J 52 (Pt 3), 152 (Pt 4).
[102] HC Lea, *A History of the Inquisition in the Middle Ages* (Macmillan, London 1908) vol 1, 299–302, 374; Hamilton (n 99) 36–39.
[103] AL Maycock, *The Inquisition: From its Establishment to the Great Schism* (Constable, London 1926) 130.
[104] Hamilton (n 99) 38.
[105] Maycock (n 103) 127–128.
[106] Lea (n 102) 376.
[107] ibid 443.
[108] ibid 417.

ineffective; they were usurped by the arbitrary, abusive practices of inquisitors. Accordingly, an assertion that defendants were unable to exercise their rights effectively is more accurate.

For example, proper procedure in heresy tribunals dictated that defendants be informed pre-trial of the nature of the charge against them with an accompanying written statement of the incriminating evidence.[109] However, this safeguard was habitually ignored in practice and defendants at trial were questioned on their beliefs and coerced into speculating the rationale for their summons, the aim being to support prevailing suspicions or provide grounds for alternative charges.[110]

Additionally, suspects were entitled to instruct trial counsel.[111] This right, nonetheless, was entirely illusory. If a suspect was convicted, advocates faced prosecution for abetting their heretical clients.[112] Such a powerful disincentive ensured that advocates chose not to act in heresy cases.[113] Consequently, unrepresented, unlearned laymen were interrogated by trained, sharp-minded inquisitors acting as judge and prosecutor. There was certainly no equality of arms in this respect.

Procedural fairness did not appear to be integral to the treatment of suspects also in other respects. Whereas defendants were entitled to defend themselves at hearing, the tribunal sat in camera.[114] This interference with open justice was exacerbated by non-disclosure to the defendant of the identity of prosecution witnesses,[115] the primary rationale being to protect the lives of informers.[116] In recognition of the danger of false witnesses, defendants were permitted to name individuals bearing enmity towards them; if the named individual was a prosecution witness, his testimony was withdrawn after investigation.[117] Witnesses considered in the medieval era to be incompetent to testify were, nonetheless, compellable to give evidence against suspected heretics.[118] Save for proving enmity, defence witnesses could not be called.[119] Thus existed secretive hearings where only prosecuting inquisitors were privy to the origins of adverse witness testimony and the only effective form of defence rested on proving enmity.

Yet, it was not within the context of witness testimony that that standard of procedural fairness was at its most base. To induce confessions, the greatest infamy in the trial process was protracted detention without conviction and lawful[120] administration of torture. If an acceptable

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[109] Maycock (n 103) 148–149.
[110] HA Kelly, *Inquisitions and Other Trial Procedures in the Medieval West* (Ashgate, Aldershot 2001) 449 (essay 1).
[111] Hamilton (n 99) 44.
[112] Lea (n 102) 444–445.
[113] Hamilton (n 99) 44.
[114] ibid 43.
[115] Lea (n 102) 437.
[116] Maycock (n 103) 150.
[117] ibid 436, 446; Hamilton (n 99) 44.
[118] Lea (n 102) 434–435. Categories of witnesses incompetent to testify in regular criminal proceedings are outlined in W Ullmann, 'Medieval Principles of Evidence' (1946) LQR 77, 80–82.
[119] Hamilton (n 99) 44.
[120] By virtue of Pope Innocent IV's bull of 1252, *Ad extirpanda*: Lea (n 102) 421–422.

confession could not be obtained at the initial trial hearing, defendants could be remanded to deliberately harsh prison conditions, sometimes for three, five or ten years, until a confession was forthcoming on further hearing.[121] Continuously obstinate defendants that refused to confess and denounce their accomplices were tortured until they were willing to cooperate at hearing.[122]

Thus, the procedural position of suspects in the special inquisitorial trial process for heresy was unduly weak; they were simply at the mercy of inquisitorial discretion. It was, nonetheless, almost inevitable that this process, dependent upon strict adherence to Catholicism throughout Europe, became inactive in the sixteenth century as the Protestant reform movement, advocating doctrinal, administrative and legal reforms of church and state, spread.

5. French Criminal Ordinance 1670

As had been the case in the special procedure for heresy prosecutions, the *inquisitio* procedure of the ecclesiastical courts provided a framework that was subsequently adapted in the thirteenth century by the evolving secular criminal procedure of the European continent.

The exposure and prosecution of crime, formerly by private enterprise in accusatorial ordeals, became a matter of public interest; crimes could not tolerably remain unpunished for want of a private accuser.[123] Consequently, the inquisitorial procedure was considered the most effective means of catering for this newfound concern. Whereas this procedure was accepted into the secular jurisprudence of Italy, Spain, Germany, the Netherlands and France, the latter deserves particular prominence because '[n]owhere had the forms become better settled, or the rules more clearly and firmly established'.[124] Subsequent to the continuous development of French secular inquisitorial practice from the thirteenth to sixteenth centuries,[125] the codifying and authoritative Criminal Ordinance of 1670 (Ordinance)[126] introduced in France a precise and comprehensive statement of inquisitorial procedure.

The trial procedure opened with a preparatory inquiry, the first component of which was for judges to conduct a crime scene investigation, establishing the nature of the offence committed and gathering real and witness evidence.[127] Witnesses were later summonsed to be heard separately and secretly.[128] Thereafter, suspects could be summonsed or arrested for secret

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[121] ibid 418–421; J Given, 'The Inquisitors of Languedoc and the Medieval Technology of Power' (1989) 94 Am Hist Rev 336, 344–347.
[122] Maycock (n 103) 157–161.
[123] RM Fraher, 'The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Crimina Remaneant Impunita"' [1984] U Ill L Rev 577, 581–583, 585–589.
[124] Esmein (n 91) 288–322.
[125] ibid 94–99, 104–121, 125–161.
[126] French text available at: J-P Doucet, '*Ordonnance Criminelle du Mois D'Août 1670*' (Le Droit Criminel) <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm>.
[127] RM Andrews, *Law, Magistracy, and Crime in Old Regime Paris 1735–1789* (CUP, Cambridge 1994) vol 1, 425.
[128] ibid.

interrogation by the judge to determine whether formal accusation would be justified.[129] Suspects remained unacquainted with the exact allegations, or the sources thereof, against them.[130] Though granted the essential safeguard of an interpreter,[131] if required, the consultative and advocacy services of counsel were prohibited for suspects in capital cases throughout the entire trial procedure.[132] This was not considered to be a hindrance to the defence as the judge was responsible for both defending and directing the prosecution of suspects.[133] Nonetheless, a defence advocate is better suited to building an effective defence than a judge playing the aforementioned conflicting roles. Legal consultation after interrogation could be permitted by judicial discretion for non-capital offences or finance related crimes of technical complexity, such as fraudulent bankruptcy or embezzlement.[134] Adverse real evidence was put before suspects and explanations could be advanced in defence.[135] Endorsing a principle earlier established in medieval inquisitions, in the majority of cases in the present procedure, suspects could not be condemned at this stage, irrespective of the strength of the evidence of guilt.[136] Yet, the suspect was only summonsed or detained if there was reasonable evidence arising in the preliminary inquiry of his guilt.[137] Accordingly, the preparatory inquiry was not permeated by a strict presumption of either innocence or guilt.[138]

If the suspect faced subsequent formal accusation, he proceeded to definitive inquiry, the main body of the trial procedure. To encourage testimonial accuracy, witnesses were heard anew, separately and in secret, to provide final depositions.[139] Thereafter, adverse witnesses were confronted by the defendant who could object to their inclusion in the proceedings and challenge their written and oral testimony, inconsistencies in which were grounds for indictment for perjury, a capital offence.[140] The inclination was present, therefore, for witnesses not to concede that an error in their testimony had been made and, instead, support their original claims with untruths to avoid indictment.[141] Accordingly, the procedure strongly compromised the right to challenge. Moreover, the effectiveness of this right was, of course, reduced further without legal representation. It was during confrontation that the defendant finally became aware of the charges against him.[142] Real evidence was also disclosed, offering the defendant an opportunity to

[129] ibid 427–428.
[130] ibid 428.
[131] ibid.
[132] Esmein (n 91) 227.
[133] ibid 229.
[134] ibid 227.
[135] Andrews (n 127) 428.
[136] ibid 431; W Ullmann, 'Some Medieval Principles of Criminal Procedure' (1947) 59 Jur Rev 1, 20.
[137] Andrews (n 127) 428.
[138] ibid 428.
[139] ibid 432.
[140] ibid 433.
[141] AL Lowell, 'The Judicial Use of Torture' (1897) 11 Harv L Rev 220, 227.
[142] Esmein (n 91) 230.

react.[143] Thus, it was only during the definitive inquiry that defendants became cognizant of the nature and sources of the charges and new related evidence. Without pre-trial disclosure of the same, defendants would not have had adequate time and facilities to prepare an effective defence. Nonetheless, defendants were able to present written submissions post-confrontation.[144] Upon completion of confrontation, civil claimants to the prosecution—victims—could make written recommendations for the outcome of the trial; defendants were entitled to respond in writing.[145]

The final part of the definitive inquiry involved a trial review by an assembly of judges unfamiliar with the case, before which the defendant was heard once more.[146] The bench did not call witnesses, receiving only depositions, and thus could not conduct a re-examination where they could observe demeanour, which adds to or taints the value of testimony, or probe for any further clarifying information, both of which would have made for wiser decision-making. Witnesses that gave evidence either neutral or favourable to the defendant's position were never confronted by the latter, their depositions being transferred directly to trial review for consideration.[147] The effectiveness of the defence was potentially hampered somewhat in this regard. It is important for defendants in such a procedure to confront even favourable witnesses; only by doing so are they offered an opportunity to provoke from witnesses crucial evidence not already elicited by judges and comment thereon or, if required, repair any oral or depositional damage unexpectedly done by a witness. This observation should, perhaps, have been recognised given that confrontation, albeit between defendants and adverse witnesses, was accepted by the Ordinance to be a beneficial truth-finding tool in the definitive inquiry. The assembled bench also considered the public prosecutor's written submissions and desired outcomes sought in writing by claimant and original judge.[148] Prosecutors were not entitled to cross-examine defendants or be present during the hearing of witness testimony, trial review and judgement; their submissions were sourced solely upon case documentation.[149] Accordingly, prosecutors were not procedurally advantaged over defendants. Nonetheless, the true opponent of the defendant was not the prosecutor but the judge with whom procedural equality was impossible.

From review, the trial procedure advanced to either definitive or interlocutory judgement. Interlocutory judgements were ordered when it was concluded from the review that there was insufficient proof to justify either a guilty or not guilty verdict.[150]

Three types of interlocutory judgements could be made, the first of which was to order that facts, arising only from the preceding procedures and constituting grounds for acquittal, be

[143] Andrews (n 127) 433.
[144] ibid.
[145] ibid 434.
[146] ibid.
[147] ibid 433.
[148] ibid 434–435.
[149] ibid 494.
[150] ibid 436.

proved by further inquiry.[151] The facts to be investigated were chosen by judges themselves, or at the defendant's request, and communicated to the latter, who could call witnesses in support to testify out of his presence.[152] Again, the absence of confrontation with defendant's own witnesses potentially limited the effectiveness of his defence. Following the prosecutor's submissions, the court moved to definitive inquiry.[153]

Constituting a customary measure rather than an express Ordinance provision, the second species of interlocutory judgement deferred definitive judgement for periods from one month to indefinitely to provide for further evidence to materialise.[154] By prolonging the trial procedure in this fashion, procedural fairness suffered; little consideration was given to conducting the trial within a reasonable time or the burden of the defendant's protracted anxiety in legal limbo. Nonetheless, as compelling evidence did not emerge in most cases,[155] a climate was, perhaps, created whereby anxieties were somewhat alleviated. Whilst prosecutors sought evidence to progress the procedure to definitive judgement, defendants were either imprisoned or released with an undertaking to return to court on summons, or both, during the extendible, deferred period.[156] Although both situations entailed dishonourable stigma, detention was applicable only to the most serious offences, hence the inclusion of capital cases.[157] The process was such, therefore, that defendants could be subjected to long-term measures that were effectively punishments through the backdoor for probable but unproven guilt;[158] a presumption of guilt clearly existed.

Andrews maintains that the procedure 'filled the gap between considerable evidence of guilt and formal proof of guilt, in a manner that was prudent and scrupulous'.[159] It is submitted, however, that a process that punishes defendants on the basis of considerable evidence of guilt rather than satisfying the standard of proof earlier made widespread during the Middle Ages,[160] or even the lesser present-day standard, is oppressive and does not encourage the pursuit of full truth, thereby undermining its very purpose. The gap referred to by Andrews should have been filled by an acquittal. Yet, it was the availability of the procedure that allowed judges to save defendants from judicial torture in capital cases;[161] being the lesser of two evils, nevertheless, is hardly deserving of procedural merit.

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[151] ibid.
[152] Esmein (n 91) 234, 236.
[153] Andrews (n 127) 436.
[154] ibid 437.
[155] ibid 438.
[156] ibid 437–438.
[157] ibid.
[158] ibid 439.
[159] ibid.
[160] *'in criminalibus probationes debent esse luce clariores'*: Ullmann (n 118) 78. 'In criminal cases, proofs ought to be clearer than the light.'
[161] Andrews (n 127) 439.

Judicial torture, the most odious procedural measure, represented the third form of interlocutory judgement. Confession was considered the 'queen of proofs' earlier in the Middle Ages and torture a legitimate means to extort it.[162] Under the Ordinance, however, the probative value of confessions, whether obtained under duress or otherwise, was treated with greater caution given the inherent risk of partial or absolute unreliability.[163] Accordingly, the probative value of confessions was dependent on preceding corroborative proofs. Torture, applicable exclusively to capital cases and essentially a punishment for the unconvicted, could be sanctioned to extract a confession only if the occurrence of the offence had been proved and there was a sufficient alliance of testimonial, real, circumstantial and character evidence so as to conclude that a defendant's guilt, though unproven, was very likely.[164] The procedure, therefore, demanded the pre-existence of a considerable presumption of guilt. The defendant was subjected to three interrogations, only one of which could be under torture, before the case proceeded to definitive judgement.[165]

Whilst trial procedures involving torture are intrinsically unfair, several mitigating safeguards were incorporated into the Ordinance. First, torture could not be administered without authorisation from the relevant *parlement* (appeal court), which received the defendant and case bundle for hearing and review.[166] *Parlements* were competent to uphold the decision to torture or reverse it and instruct inferior courts to move to definitive or an alternative provisional judgement, or render final judgement themselves.[167] Second, in instances where confessions were retracted after torture, thereby voided, or not provided at all, defendants could not face the death penalty.[168] Third, confessions had to coherently include the particulars of a defendant's guilt in relation to the evidence rather than a mere guilty plea.[169] Fourth, if new proof later emerged, defendants could not be tortured again for the same issue; and torture could not be reverted to if the defendant had earlier been withdrawn from it.[170]

Notwithstanding the application of torture, interlocutory judgements of this and the aforementioned types were delivered in only a minority of cases; most cases after trial review proceeded immediately to definitive judgement.[171] Here, the three review judges concluded the trial and rendered judgement by vote.[172]

Thus, in this example of early modern inquisitorial procedure, many features of which were shared elsewhere in Europe, defendants were met by a non-public process orientated towards

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[162] Herrmann and Speer (n 66) 522.
[163] Andrews (n 127) 445.
[164] ibid 445–446.
[165] ibid 447.
[166] ibid 446.
[167] ibid 446–447.
[168] ibid 446, 449.
[169] ibid 449.
[170] Esmein (n 91) 234.
[171] Andrews (n 127) 473.
[172] ibid 475.

discovering the truth, whilst repressing opportunities for effective defence, to apparently reach a just outcome. The procedure provided some consideration to defendants, such as the entitlement to be heard at every stage of the proceedings and a right of confrontation, but it was strongly diluted and, accordingly, favourable to the prosecution. Only by allowing defendants a fair opportunity of defence can adverse evidence be properly tested and truth made bare, thereafter encouraging wiser and just final judgement; pursuit of truth and free defence are not incompatible ideals.

6. English Jury Trials

Continental European enthusiasm for the inquisitorial process, as primitive modes of trial fell into desuetude, was not shared in England where, instead, the institution of trial by jury evolved and prevailed in an accusatorial judicial system.

Continental sovereign rulers in the High Medieval Ages had succumbed to Romano-canonical influences partly because the associated inquisitorial practices offered an additional mechanism to assert and legitimise their political supremacy in an era of power struggles.[173] Whilst these struggles raged, however, the royal government of England was already the most centralized in Europe.[174] Consequently, royal justice reigned supreme throughout the entire country, displacing the local courts and ensuring that Romano-canonical influences could not achieve an overwhelming foothold in the judicature.[175]

The power of the Crown was exerted through royal judges accompanied by fact-determining juries and, accordingly, the jury system spread as rapidly and as widely as the common law making royal courts.[176] Indeed, the spread of this system was hastened by early views as to its relative fairness when contrasted with primitive ordeals.[177] The classic Brunner thesis as to the origin of the English jury derives from the inquisitions initiated by the ninth century Carolingian kings where the most distinguished and credible inhabitants of a relevant district were summoned and compelled to disclose upon oath any information connected with the Crown interest at issue as a means of proof. This device was, apparently, inherited and employed by the Normans following their invasion of Neustria (Normandy), from where it was imported to England in 1066.[178] This proposition, however, has attracted significant criticism and alternative theories,

[173] W Holdsworth, *A History of English Law* (7th edn Methuen, London 1956) vol 1, 315–316; Given (n 121) 341.
[174] Holdsworth (n 173) 316.
[175] ibid.
[176] ibid.
[177] JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown & Co, Boston 1898) 60.
[178] ibid 47–48, 50; F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (2nd edn CUP, Cambridge 1968) vol 1, 140–141, 143.

including English juries being of indigenous, Anglo-Saxon derivation.[179] Whatever its origins, Glanvill confirmed in the twelfth century that there was only minor engagement of jurors in the English criminal justice system; by the fourteenth century, this instrument achieved greater penetration.[180]

Criminal juries were divided into an accusing (grand) and trial (petty) jury in a justice system where the standard of procedural protection afforded to the defence at common law became more sophisticated over a long process of evolution.

Early accusing juries, the general applicability of which in the machinery of criminal justice was first provided for in the Assize of Clarendon 1166,[181] were a large selected body of representatives from the relevant hundred (subdivision of a county) obliged to assert from their own knowledge, inquiries or private accusations received whether an individual was suspected by common repute of having committed a specified offence.[182] The requirement of *infamia*, as abovementioned, also featured in the preliminary inquiries of the Continental ecclesiastical inquisitions. Grand jurors were certainly not created to protect suspects or exercise any degree of impartiality.

The function of the grand jury, however, had changed by the 1700s, as had its composition which was likely considered impractical for effective investigations.[183] Upon formal accusation by the Crown, either independently or at the request of a private subject, a panel of between 12 and 23 jurors was convened, and presented with an indictment, to return a majority decision of 12 as to whether there was a case to answer, rendering trial appropriate, not on the basis of their own knowledge or inquiries, but on the adequacy of prosecution evidence, including witnesses, presented before them.[184] Accordingly, this non-public preliminary procedure was dominated by prosecution evidence. The accused played no active role nor produced evidence; effectively, he was unable to defend himself. The only safeguard provided for suspects would have been the grand jury's supervisory capability of preventing a prosecution proceeding on baseless or purely oppressive political grounds.

Yet the English grand jury was not to last. In the 1800s, the police formed the principal authority for conducting criminal investigations, displacing justices of the peace, who had

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[179] W Forsyth, *History of Trial by Jury* (JW Parker, London 1852) Ch 1; M Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17 LHR 537, 537–590.
[180] Thayer (n 177) 67–68; R de Glanvill and GDG Hall (ed) (tr), *The Treatise on the Laws and Customs of the Realm of England* (Nelson, London 1965) book 14 [1], [3].
[181] Clause 1. Available at: The Avalon Project Yale Law School (n 49). The accusing jury was first introduced in criminal cases but given only limited application by the Constitutions of Clarendon 1164. Accusing juries could be employed in cases where no individual wished or dared to accuse a suspected layman (Clause 6). Available at: The Avalon Project Yale Law School (n 49).
[182] Pollock and Maitland (n 178) 642, 648; Holdsworth (n 173) 321–322.
[183] W Blackstone and W Morrison (ed), *Commentaries on the Laws of England* (Cavendish, London 2001) vol 4 [302].
[184] ibid [302]–[303], [308]–[309].

previously assumed the same role.[185] Justices, thereafter, became independent from the prosecution and acquired a judicial character in a new preliminary examination procedure established in 1848.[186] It was a procedure resembling modern-day committal proceedings, designed to determine whether or not a prima facie case existed. Features associated with procedural fairness for an accused were prevalent within it, effectively rendering it a 'preliminary trial': the examination by a magistrate was usually public and always in the presence of the accused; a right to silence could be exercised; advocacy by counsel and submissions by the accused were permitted; and prosecution witnesses could be cross-examined and defence witnesses produced, the attendance of all relevant witnesses being procedurally secured.[187] Following the examination, the grand jury heard evidence presented at an independent inquiry held in camera.[188] Jurors rarely did not endorse the decision of the examining magistrate.[189] This was unsurprising given that accused persons were able freely and effectively to present their submissions and evidence of no case to answer at the preliminary examination. The grand jury merely served to duplicate the preliminary examination and its existence could not be justified on the ground that it may very occasionally reach a different conclusion.[190] Consequently, the grand jury became redundant, suffering eventual abolishment in 1933.[191] The standard of pre-trial procedural protection for accused persons had significantly evolved ensuring that the stresses of trial were not inevitable.

Further to the involvement of the grand jury, the accused proceeded to trial. At the time of the early grand juries, trial by ordeal was the norm. The demise of ordeals ensured that, by the fourteenth century, an accused stood before petty juries as the necessary mode of trial for determining guilt or innocence. Defendants were, therefore, to be tried by a sworn body intended to represent the opinion of the country.[192] The standard of procedural fairness for an accused facing a petty jury was, predictably, subject to gradual development.

The petty jury was originally composed of men from the neighbourhood in which the offence had occurred but gradually became drawn in practice, and thereafter formally in 1826, from the county at large.[193] It was established practice that some of the jurors faced by a defendant at trial were those that sat and indicted him on the grand jury,[194] impartiality at trial not being requisite. However, by the thirteenth century, the accused was granted the right to object to the presence of a juror considered a personal enemy and, by the fourteenth century, it was recognised that grand and trial juries should have a distinct composition and the accused could object to indicting

185 P Devlin, *The Criminal Prosecution in England* (OUP, London 1960) 4, 7.
186 ibid 6–7.
187 FW Maitland, *Justice and Police* (Macmillan, London 1885) 129–130.
188 ibid 139.
189 ibid.
190 Devlin (n 185) 7–9.
191 ibid 7, 9.
192 Pollock and Maitland (n 178) 624.
193 Thayer (n 177) 90–91; Holdsworth (n 173) 332.
194 Thayer (n 177) 82–83.

grand jurors sitting on the trial jury.[195] The right of challenge suggests that ensuring a degree of impartiality eventually became a consideration at trial.

It was in the 1300s that the requirement of 12 jurymen became a settled principle.[196] This number was probably fixed upon because of the necessity of reducing the large and cumbersome numbers of jurors in past juries, thereby maintaining feelings of personal responsibility, and that grand jurors essentially numbered 12.[197] The intended protection granted to defendants is that the wisdom of a collective group is relied upon for the verdict rather than a single decision-maker, lessening the scope for the integrity of the latter to be compromised. Further protection was provided by the eventual requirement for a unanimous verdict in the late 1300s, a majority verdict having sufficed in the past.[198]

More remarkably, for a substantial period of its development, trial by jury could only be proceeded with in felony cases upon the express consent of the accused.[199] This requirement did not, however, manifest itself properly in early practice and some accused persons were tried by jury and punished without consent.[200] The situation arises, therefore, that where the condition is adhered to as a settled principle, malicious refusal to consent would result in offenders remaining unconvicted and unpunished. Though consent was granted in most cases,[201] this unendurable outcome necessitated relief. Whilst the simplest solution is to abolish the requirement of consent, this was not feasible in the context of a people long accustomed to primitive modes of trial. The introduction of criminal juries was viewed initially as 'an impertinence, an intrusion into private rights, popular privilege, and individual honour'.[202] Formal consent was viewed as legitimising the procedure and confirming the renunciation by the accused of the right to trial by battle,[203] which was not formally abolished until 1819. Refusal of consent was, consequently, remedied by extracting consent by duress, beginning with 'strong and hard imprisonment' in 1275 and developing thereafter into *peine forte et dure*: torturous practices with increasing severity.[204] Thus, torture was a procedural characteristic shared by both Continental inquisitions and English jury trials. Yet, the issue of consent provides a prime example of the evolution of procedural fairness. Only in 1772 was the practice of torture abolished and the accused, on refusal to consent to trial

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[195] Holdsworth (n 173) 324–325.
[196] Thayer (n 177) 88–90.
[197] CL Wells, 'The Origin of the Petty Jury' (1911) 27 LQR 347, 356–357.
[198] Thayer (n 177) 86–90.
[199] Stephen (n 72) 297. In cases of treason or misdemeanours, however, refusal to consent resulted in automatic conviction (298).
[200] Thayer (n 177) 69–70.
[201] ibid 81.
[202] CL Wells, 'Early Opposition to the Petty Jury in Criminal Cases' (1914) 30 LQR 97, 101; Holdsworth (n 173) 326–327.
[203] Esmein (n 91) 333.
[204] Thayer (n 177) 74–77. In one 1726 case, a suspected murderer refused to plead and was pressed for an hour and 45 minutes with nearly 400 pounds of iron, after which he pleaded not guilty, was convicted by jury and hung: Stephen (n 72) 298.

by pleading guilty or not guilty, treated as if convicted by verdict or confession.[205] By 1827, however, if the accused remained silent on plea, an automatic plea of not guilty was entered into and the trial proceeded with.[206] Five centuries had passed before such a logical, procedurally fair rule was implemented.

It was also only after a lengthy period, involving the use of witnesses, that juries assumed by the nineteenth century their sole function as judges of fact, acting only upon evidence presented at public trial, an eventual consequence of which was greater procedural fairness for defendants.

Originally, the petty jury had returned its verdict solely on the basis of its own knowledge and investigations, rather than on witness or other evidence presented in court.[207] Jurors were thus investigative, testimonial actors rather than impartial and solely adjudicative. They were not expected to be eye-witnesses but were chosen as being likely to be already cognisant of some of the relevant circumstances of a case, the means by which they acquired such information deemed irrelevant in law.[208] Given the susceptibility of human nature to form prejudice and accept hearsay or rumours as truth in these circumstances, it is likely that many verdicts were not founded upon objective and reasonable evidence. The original procedure by which these verdicts were reached was manifestly unfair.

However, societal growth and development in the late Middle Ages rendered jurors less likely to have adequate personal knowledge of an incident and, consequently, voluntary witnesses were admitted in court.[209] The increasing importance of witness testimony ensured that by 1555, prosecution witnesses could be compelled to testify against and in the presence of defendants.[210] The defendant's capacity to challenge adverse testimony was severely restricted in treason cases until the early seventeenth century when the right to cross-examine and confront witnesses was made available.[211] Despite its obvious affront to the principle of equality of arms, defence witnesses were not permitted to be heard, the restriction then considered proper because conviction required a high standard of proof: 'so clear and manifest, as there can be no defence to it'.[212] The prosecution, therefore, bore the burden of proof and defendants were presumed innocent. The aforementioned restriction eventually came to be recognised by the courts in the 1600s as unreasonable and oppressive and, consequently, it became practice that defence witnesses were heard, but not upon oath.[213] The consequence of this lesser procedural inequality was that greater credence was assigned to testimony given under oath, thus prosecution

[205] Thayer (n 177) 77–78 and accompanying fn 1.
[206] ibid.
[207] Esmein (n 91) 326–327, 334.
[208] Holdsworth (n 173) 333–334.
[209] WR Cornish, *The Jury* (Penguin, Harmondsworth 1971) 12.
[210] Holdsworth (n 173) 335 fn 2; Plucknett (n 86) 436.
[211] Pollitt (n 74) 388–389.
[212] E Coke, *The Third Part of the Institutes of the Laws of England* (6th edn W Rawlins, London 1680) 29; Esmein (n 91) 342.
[213] Blackstone and Morrison (n 183) [359]–[360].

evidence.[214] Yet, this too was remedied eventually by allowing defence witnesses to be sworn in cases of treason in 1695 and thereafter, with wider applicability, in cases of felony and treason in 1701.[215] Inevitably, the investigative and testimonial roles of jurors became redundant with the steady rise in the admission of witnesses. Though it was acknowledged that jurors were permitted to rely solely upon their own knowledge for a verdict in 1670 without fear of penal consequences,[216] by the nineteenth century, this was prohibited and, instead, uninformed jurors were to rely solely upon evidence presented in open court.[217] This completed the transformation of jurors to judges of fact, entitling defendants to be heard before an impartial audience.

A transformation in the standard of procedural fairness also took place in several other respects.

Being heard in the trials of the 1500s and 1600s partially meant that defendants were entitled to make statements in defence, and they were examined by judges, but their evidence in both cases was unsworn as oaths were considered to give undue weight to their submissions and involved moral compulsion.[218] Again the prosecution, which could present sworn evidence, was provided a procedural advantage. In the 1700s, however, defendants were no longer subject to examination but their submissions could still be heard.[219] Clearly, there had been a dramatic increase in procedural respect for defendants.

This respect also extended eventually to permitting representation by counsel. It was a long established principle that counsel could not be instructed for defendants in treason or felony cases as the judge assumed that additional role.[220] The same rationale, of course, was applied to the refusal of counsel in the 1670 French Ordinance. Counsel had, nonetheless, been permitted to argue points of law on behalf of defendants, usually concerning objections to the indictment, in the late 1400s.[221] On this basis, defendants, opposed by Crown advocates, were examining and cross-examining witnesses without the necessary expertise, hence without equality of arms, compromising the effectiveness of their defence. By 1695, however, counsel was allowed in high treason cases, and there appeared to be a growing practice of admitting counsel in the 1700s, but representation in felony cases only became a legal right in 1837.[222]

The benefit of skilled counsel in the preparation of an effective defence is obvious and other useful facilities for the same were also provided but only after eventual reform. In Elizabethan criminal procedure, in instances when bail was not granted, the accused had been confined in

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[214] ibid [360].
[215] ibid.
[216] *Bushel's Case* (1670) 6 State Tr 999, 1011–1012.
[217] Thayer (n 177) 170.
[218] JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn Little, Brown & Co, Boston 1940) vol 8, 294 and accompanying fn 81; Plucknett (n 86) 437.
[219] Plucknett (n 86) 437.
[220] Coke (n 212) 29, 137.
[221] Plucknett (n 86) 434–435.
[222] Thayer (n 177) 161 fn 4; Stephen (n 72) 416.

almost secrecy pending trial without any means of preparing his case.[223] Moreover, there was no pre-trial disclosure or notice of prosecution evidence.[224] Accordingly, prosecutors held a procedurally unfair advantage over defendants facing adverse evidence for the first time at trial. It is difficult enough for a competent advocate to plead a case on the basis of evidence seen only at trial and more so for an untrained, unadvised, possibly uneducated defendant in a case where liberty or even life is at stake. This is particularly the case with respect to cross-examination. Whilst a degree of probing is appropriate, the prudent questioner should already know the answers to the bulk of the questions posed in cross-examination. Without pre-trial disclosure of witness evidence, unpredictability ensues at trial and adverse answers may unintentionally be drawn from the witness, damaging the defence case. Providing defendants the opportunity of a free defence for trial preparation is indicative of the application of wisdom to the trial process, encouraging the court to demonstrate awareness of the full merits of the defence case. Moreover, full awareness of such merits by the court is more likely to result in a just outcome. Fortunately, after the Revolution of 1688, procedural progress in respect of case preparation was evident in trials for treason. In 1695, the accused was provided a copy of the indictment five days before trial and in 1708 the names of witnesses and jurors were disclosed to him ten days in advance.[225] Whilst depositions would have been of greater use, both aforementioned privileges would, at least, allow defendants to take a more purposeful approach to case preparation.

Yet whatever privileges are afforded a defendant, their impact would have been severely restricted if a presumption of innocence did not exist. That this presumption was developing as a principle was certainly evidenced by both Lord Hale in the latter part of the 1600s and Blackstone in the 1700s, both of whom maintained that presumptive evidence should be admitted cautiously, for it is better that that five or even ten guilty persons escape unpunished than one innocent person suffer.[226] In 1817, the principle was applied in *McKinley's Case* where, in response to the prosecutor's denial of the existence of a presumption of innocence, Lord Gillies professed that:

> I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; …To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty.[227]

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[223] Stephen (n 72) 350.
[224] ibid.
[225] ibid 416.
[226] M Hale and S Emlyn (eds), *The History of the Pleas of the Crown* (Nutt and Gosling, London 1736) vol 2, 289; Blackstone and Morrison (n 183) [359].
[227] (1817) 33 State Tr 275, 506.

Such conviction ensured that by 1820, the presumption of innocence had certainly become a fundamental principle of English criminal trials.[228]

Thus far, most of the principal dramatis personae of the trial have been referred to in the context of achieving greater procedural fairness; judges remain. It was after the 1688 Revolution that judges acquired a greater degree of independence. The appointment of judges was no longer dependent upon the grace and favour of the sovereign but upon the competence and conduct of the former.[229]

It is from this aspect and all the aforementioned characteristics of jury trial that one may conclude that the 1700s and 1800s provided the sea change necessary to transform English common law criminal procedure from a process heavily weighted against the defendant to one that became, relatively speaking, the 'grand bulwark of his liberties',[230] fundamentally reforming the standard of procedural fairness. The public mood in the revolutionary late seventeenth century was such that it would no longer accept judicial corruption and obsequiousness to the Crown, and procedurally unfair political prosecutions for treason.[231] Thus, a protracted period of evolution resulted in defendants facing a preliminary examination and public trial displaying rationality and featuring rights resembling some of those in Article 6.

7. French Napoleonic Code of Criminal Instruction 1808

The standard of procedural fairness exhibited by trial by jury in England contrasted very favourably with the 1670 Ordinance and, consequently, served as an inspirational model for radical reform of French inquisitorial criminal procedure at a time of political upheaval.

Procedural unfairness associated with the Ordinance in the 1700s bred philosophic discontentment,[232] and wider appeals for reform disseminated principally through a series of influential memorials,[233] and the Revolution of 1789 provided fertile ground for the implementation of a more liberal procedure offering greater protection to the accused. The inquisitorial form of trial by jury was established in France by the Law of 16 September 1791 but this legislation was soon replaced by the greater precision of the Code of Offences and Punishments 1795. Both enactments radically increased procedural safeguards for defendants,

[228] JM Beattie, *Crime and the Courts in England 1660–1800* (Princeton UP, Princeton 1986) 341.
[229] ibid.
[230] Blackstone and Morrison (n 183) [349].
[231] Stephen (n 72) 415–416.
[232] Esmein (n 91) 362–369. Voltaire, for example, in a philosophic movement also headed by Montesquieu and Beccaria, argues that the Ordinance 'seems on several points to have been directed only towards the destruction of those accused. …Should it not be as favourable to the innocent as it is terrible to the guilty?' (365).
[233] ibid 382–390.

including provision for a public trial where verdicts were based upon oral rather than solely written evidence, the aid of counsel and facilities for the preparation of a defence.[234]

However, revolution-induced social instability attracted a far-reaching plague of criminality which could not be effectively repressed by the prevailing procedure.[235] It is in a climate of strife that tendencies to resort to harsher measures emerge, in the interests of restoring social order, which dilute the protection afforded an individual. Such was the case in France, for example, with the enactment of the Law of 27 January 1801. Contrary to the 1791 Law and the Code of Offences and Punishments, the secret character of the preliminary examination in the Ordinance was revived by the 1801 Law, whereby witnesses were to be heard secretly and the accused was not informed of the charges against him.[236] Furthermore, the 1801 Law provided that the grand jury procedure was to be based upon written depositions and evidence rather than oral testimony,[237] the latter being open to deeper scrutiny and would have been of greater assistance in determining accurately the existence of a prima facie case.

In view of all the aforementioned legislation and social insecurities, it is unsurprising that the Napoleonic Code of Criminal Instruction 1808 (Code),[238] which laid out the criminal procedure for the entire country, was a compromised blend of pre-revolutionary and revolutionary law. This Code provides the focus of the present analysis. Not only did the Code serve as an influential model for much of the criminal procedure worldwide[239] but, having already considered the standard of procedural fairness in the 1670 Ordinance, it is logical to chart the next seminal stage in the evolution of French criminal trial procedure. Indeed, the Code would form the basis of the 1958 Code of Criminal Procedure which replaced it.

The preliminary examination in the Code to determine whether there was a case to answer certainly bore a strong resemblance to the pre-revolutionary law of the Ordinance. The accused was provided a procedural safeguard, nonetheless, through the requirement of a prompt hearing. Following summons or warrant, the accused was to appear before the *juge d'instruction* (investigating magistrate) at once or within 24 hours respectively.[240] This protection does not appear to have been reproduced in other aspects of the procedure. The magistrate, searching for and scrutinising incriminatory and exculpatory evidence with equal conviction, first summoned witnesses familiar with the circumstances of the alleged offence to be heard secretly without the accused being present.[241] The latter was also interrogated in secret by the magistrate and was not entitled, though a discretionary power existed, to be made aware of the charges or of any witness

[234] ibid 408–419, 426–435.
[235] ibid 437, 447–451.
[236] ibid 439–440.
[237] ibid 440.
[238] French text available at: J-P Doucet, '*Code d'Instruction Criminelle de 1808*' (Le Droit Criminel) <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1929.htm>.
[239] J Hatchard, B Huber and R Vogler (eds), *Comparative Criminal Procedure* (BIICL, London 1996) 8–9. Belgium is an apt example.
[240] Stephen (n 72) 531.
[241] ibid.

statements or other evidence against him.[242] This interrogation could take place as often as the magistrate required, the latter having a discretionary power to place the accused in solitary confinement indefinitely during the entire period of the examination.[243] Thus, whilst torture had been abolished in the 1780s, it had been replaced by another means of procedural duress to ensure that the accused did not remain silent. He could also neither call his own expert or regular witnesses nor challenge court-appointed expert witnesses unless judicial discretion was applied.[244] Written submissions to the magistrate could be made but there was no right to representation.[245] The preliminary examination by the magistrate was essentially a procedure tainted by secrecy where only the prosecuting authority was familiar with the evidence and procedural fairness for the accused was left to the mercy of judicial discretion.

Eventual fundamental amendments to the procedure were fortunately made. By the Law of 8 December 1897, the accused was entitled to instruct or be assigned counsel, the latter being permitted to communicate freely with his client, become acquainted with the case documents before any interrogation and be present therein.[246] This law, however, did not go so far as to grant defence counsel an automatic right to address the magistrate.[247]

In the Napoleonic Code procedure, if the accused was not discharged by the investigating magistrate, a further stage in the preliminary examination existed involving the arraigning *Chambre d'Accusation*, rather than a grand jury. Consisting of at least five judges, the purpose of the Chamber was to consider, independently of the investigating magistrate, whether the accused should be discharged or tried.[248] On receipt of the case bundle from the investigating magistrate, the *procureur-général* (public prosecutor) made a verbal or written report to the Chamber detailing his recommendations.[249] Only he appeared before the Chamber, but not during its deliberations; the accused, the civil party and witnesses were never confronted or examined.[250] The secret character of the preceding inquiry was clearly reproduced here. The parties were permitted, nonetheless, to provide written submissions and the Chamber could peruse the case documents and order further inquiries.[251] The procedure was, therefore, reliant on the written word rather than confrontation. Had confrontation and defence counsel been permitted in the present or preceding inquiries, thereby ensuring a free defence, greater opportunities for the merits of the prosecution case to be tested at a preliminary stage would have ensued, saving trial stress and

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[242] Esmein (n 91) 507–508; Stephen (n 72) 533–534.
[243] Stephen (n 72) 533.
[244] Esmein (n 91) 505–506.
[245] Stephen (n 72) 533–534.
[246] Esmein (n 91) 555.
[247] ibid.
[248] Stephen (n 72) 536–537. Eventually, by virtue of the Law of 17 July 1856, the Chamber no longer assumed this role and the investigating magistrate was solely responsible for pronouncing a dismissal or referring the case to trial: Esmein (n 91) 541.
[249] Stephen (n 72) 536.
[250] Esmein (n 91) 509; ibid.
[251] Stephen (n 72) 536.

state resources where evidence was insufficient. If a prima facie case was established, justifying trial, the subsequent indictment was communicated to the accused, permitting him to finally become fully aware of the nature of the offence and aggravating or mitigating circumstances thereof.[252] Whilst this notification was a positive step in respect of procedural fairness, the preliminary procedure of the Code was for the most part favourable to the prosecuting authority.

It is in the subsequent procedure of the Code, beginning with an intermediate stage, that the influence of the higher standard of procedural fairness in the revolutionary law begins to become apparent. Within 24 hours of being notified of the indictment, the accused was transferred to the courthouse for the transitional phase of the trial process.[253] Here he was subjected to a secret interrogation within 24 hours of his arrival by the president of the court.[254] At this point, the accused appears vulnerable. He is not represented by counsel and any inconsistencies between his past and present answers can be exploited by the president during his subsequent questioning at trial. In such circumstances, it is difficult to view the president as entering the trial entirely impartial. On the other hand, opposing counsel was not involved, hence not advantaged, and the interrogation provided the accused an opportunity to reassert his arguments and highlight any improper treatment suffered. Irrespective of this, an important purpose of the intermediate stage was for the president to advise the accused of his right to challenge the validity of the proceedings[255] and ensure that he was provided with the facilities to make an effective defence. After interrogation, the accused could confer freely with counsel and if he did not have representation, counsel was assigned by the court, a practice not mirrored in England at that time.[256] Furthermore, there was full disclosure, entitling the accused to copies of all case documents, exhibits, reports and witness statements.[257] The focus on allowing him the means to prepare a defence appears to be an implied acknowledgement in the Code that the trial itself would, consequently, become more conducive to ascertaining the truth and result in wise and just decision-making. The tone of the Code, in respect of procedural fairness, had significantly changed from the preliminary inquiries.

This is most evident in the standard of procedural fairness in the jury trial itself, infiltrated by English influence, which lies in stark contrast to the Ordinance procedure.

From a general list of qualifying individuals, a panel of at least 30 jurymen was convened, the identities of whom were communicated to the defendant a day before trial.[258] At trial, the names of the jurymen were randomly drawn and the accused and the *procureur général* could exercise their right of peremptory challenge until 12 jurors remained.[259] The defendant was protected to the

[252] ibid 537–538.
[253] Esmein (n 91) 511.
[254] ibid.
[255] ibid.
[256] ibid.
[257] ibid 511–512.
[258] Stephen (n 72) 540.
[259] ibid 540– 541.

extent that whoever remained would form a decision-making body independent of the prosecuting authorities. Whereas jurors under both the Code and later English procedure were solely judges of fact, juries in France differed in that a mere majority rather than unanimous verdict was considered sufficient for conviction, a rule that Esmein considered 'logical and reasonable'.[260] His view seems misguided. Unanimity, as required in English jury trials of the same period, is a greater guarantor of a reliable conviction. A reliable conviction is essential in ensuring that justice is served and, accordingly, only the truly guilty are condemned. Under the Code, seven jurors were sufficient to convict, irrespective of the reasonable doubt held by the minority five. It is not reasonable to assume that the majority seven are correct; there is sufficient doubt in the jury that a conviction is unreliable. At the very least, if the Code had stipulated that a majority of 10 from 12 jurors was sufficient, one could reasonably accept the verdict procedure as fair, the conviction as reliable and maintain public confidence in the process. This solution better reflects a label of logical and reasonable.

The secrecy associated with the Ordinance did not form part of the trial under the Code, which instead specified publicity of proceedings where judgement was to be predominantly based upon oral evidence presented in court.[261]

Whilst this aspect of the procedure evades criticism, the role of judges under the Code does not, specifically in relation to ensuring impartiality. Rather than judges acting as umpires between competing advocates and deciding questions of law, a characteristic of English trials, the president under the Code, who was independent of the prosecution, played a more active and investigative role by interrogating defendants himself to discover truth.[262] Whilst impartiality was requisite, balanced questioning could not be assured in such circumstances, the outcome likely being unfavourable to the defendant.[263] Inevitably, impartiality may be severely compromised. Moreover, the president performed the summing up, which included reminding the jury of the main prosecution and defence evidence.[264] Where presidential questioning was not balanced, it is unsurprising that the summing up was often not presented in an even-handed and impartial manner.[265] This bias, which could not be responded to by the defendant, would have likely influenced the decision-making jury, especially in view of the authoritative status of the president. This particular weakness in the Code appears to have been eventually acknowledged by the Law of 19 June 1881 which abolished the presidential summing up.[266]

The impact of the more active role of the president was also felt in relation to witnesses, a list of whom was communicated to the defendant 24 hours before trial.[267] Prosecution and defence

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[260] Esmein (n 91) 513.
[261] ibid 510, 514–515.
[262] Stephen (n 72) 543. The president was accompanied by two other judges (518).
[263] ibid 543–544.
[264] ibid 553.
[265] Esmein (n 91) 534.
[266] ibid.
[267] Stephen (n 72) 544.

witnesses could be called but direct cross-examination was solely the preserve of the president; defence and prosecution could only cross-examine witnesses indirectly through him.[268] Nevertheless, whether state assigned or otherwise, counsel could always fully represent the accused at trial.[269]

The Code procedure was thereby one where the standard of procedural fairness increased as the accused progressed through the trial system. Whereas the influence of the Ordinance impressed itself upon the preliminary examination with negative implications, the accused was met in the intermediate stage by a secret interrogation but thereafter afforded facilities for the preparation of his defence, and the trial, irrespective of its criticisms, was an oral and public procedure where impartiality was mandatory and a fair balance between prosecution and defence rights intended. The safeguards at trial were certainly interwoven with a post-revolutionary spirit for procedural fairness and wise and just decision-making, essential in any enlightened civilisation holding dear the liberty of the individual.

D. CONSTITUTIONAL LAW DEVELOPMENTS

In the aforementioned Code and all trial procedures outlined before it, it was understood by their architects that even a modicum of procedural fairness was necessary to determine with any degree of confidence whether a charge was substantiated. Aside from their impact in determining truth, however, rights of accused persons also became associated with or entrenched in instruments of constitutional significance, thereby eventually elevating their status to that of constitutional requirements. Accordingly, these instruments provide an implied acknowledgement that the achievement of a just political order and good governance is inextricably linked to procedural fairness. Indeed, a perceived absence of the latter may compel recourse by the disaffected to rebellion against existing authority.

1. Magna Carta

It was with the intention of placating the open revolt arising from baronial grievances against the King that Magna Carta, a non-exact[270] restatement of existing law and custom in England, came into existence in 1215.[271]

The Charter certainly exhibited the characteristics of a document of constitutional significance. Not only was it 'used as a yardstick of legality against which new measures could be

[268] ibid 547.
[269] Esmein (n 91) 510–511.
[270] JC Holt, *Magna Carta* (2nd edn CUP, Cambridge 1992) 297–300.
[271] Reissued and revised in 1216, 1217 and 1225, Magna Carta became statute law in 1297. Definitive 1297 text available in: M Evans and RI Jack, *Sources of English Legal and Constitutional History* (Butterworths, Sydney 1984) 51–55.

assessed, and accepted or rejected', but 'the sense of the Charter was repeatedly re-interpreted to ensure that it conformed to new social and political conditions'.[272]

More specifically, its Chapter 29 was a statement of a fundamental constitutional principle directed at addressing grievances stemming from acts sanctioned by the King without judicial process, including arbitrary disseisin, arrests and imprisonment:

> No free man shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice.

Essentially, the clause was intended to guarantee that a penalty could be imposed only after judgement rendered in accordance with the law of the land (previously established law and custom[273]). It certainly did not have any association whatever with trial by jury[274] and instead referred to the right to be judged by those of equal societal status (peers).[275] The arbitrary exercise of sovereign prerogative was to be superseded by a positive and binding obligation on state decision-makers to observe lawful trial procedures before condemnation. The rule of law was to prevail and the legal status of the individual was elevated. This chapter, nonetheless, originally had limited applicability, dismissing the principle of equal rights for everyone. Its protection could be secured solely by freeholders (free men) and it was only through centuries of subsequent interpretation that the right was secured for all Englishmen.[276]

Chapter 29 has long been associated in legal scholarship with the concept of due process of law, most notably by Coke in the seventeenth century.[277] This concept is formed of two constituent parts: substantive and procedural. The substantive aspect embraces firstly the principle of legality, requiring that the law be properly applied and upheld, and secondly places restraints on the state drawn from, for example, constitutional or treaty based principles, in respect of the type, authorship and content of legislation it enacts.[278] Procedural due process requires the state to adhere to certain procedures and principles necessary for the fair treatment

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[272] ibid 14.
[273] CH McIlwain, 'Due Process of Law in Magna Carta' (1914) 14 Colum L Rev 27, 49.
[274] W Clark, 'Magna Carta and Trial by Jury' (1924) 58 Am L Rev 24, 24–44.
[275] WS McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (J Maclehose, Glasgow 1914) 377–379.
[276] ibid 115 and accompanying fn 2.
[277] E Coke, *The Second Part of the Institutes of the Laws of England* (6th edn W Rawlins, London 1681) 50; P van Dijk, *The Rights of the Accused to a Fair Trial Under International Law* (SIM, Utrecht 1983) vol 1, 1. Even in the fourteenth century the phrase 'law of the land' was interchanged with 'due process of law': F Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629* (Minnesota UP, Minneapolis 1948) 69.
[278] DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon, Oxford 1996) 172–173.

of persons.[279] The concept of procedural fairness is the modern British counterpart of procedural due process, a doctrine now primarily associated with the American constitutional tradition.[280]

Whereas substantive due process is certainly implied in Chapter 29—the law of the land must be applied without breach or alteration by sovereign will—the procedural content of the clause seems weak.[281] The absence of specific procedural safeguards leaves any suggestion of procedural due process unqualified. Although the clause maintains that justice should not suffer delay, it is an imprecise procedural safeguard. An appreciation appears to exist, nonetheless, that delay may compromise the achievement of effective justice and legal certainty for the accuser and an anxious accused. The sentiment of the principle is reflected in the Article 6 requirement of a hearing within a reasonable time.

In view of the status of procedural due process in Magna Carta, one may understandably question the significance of Chapter 29 in respect to procedural fairness. The application of substantive law requires procedure; fair application of the law requires the creation of and adherence to fair procedures. Accordingly, without substantive due process, any requirement for procedural fairness or procedural due process is left redundant. The value of the clause lies in its link to substantive due process, which in turn assures the existence of a requirement for procedural fairness for accused persons.

2. American and French Revolutionary Instruments

The emergence of the constitutional entrenchment of procedural fairness can be associated more readily with instruments of the eighteenth century American and French revolutions. Article 9 of the French Declaration of the Rights of Man and the Citizen 1789 enshrined the presumption of innocence.[282] A stronger expression of procedural fairness had already been evidenced in the Virginia Declaration of Rights 1776, the first American constitutional enactment protecting individual rights.[283] Its Article 8 granted the accused '…a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury…'. Not only was similar provision made subsequently in other state constitutions,[284] but the Virginia Declaration was also an influential precursor to the Bill of Rights 1791 attached to the US Constitution 1787.[285] The Sixth Amendment provides that:

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[279] ibid 74, 172.
[280] ibid 73.
[281] ibid 173.
[282] Available at: The Avalon Project Yale Law School, '18th Century Documents: 1700–1799' <http://avalon.law.yale.edu/subject_menus/18th.asp>.
[283] Available ibid. It has been described as '…the first true Bill of Rights in the modern American sense…': B Schwartz, *The Roots of the Bill of Rights* (Chelsea House, New York 1980) vol 2, 231.
[284] eg Constitution of Pennsylvania 1776 Art 9; Constitution of Maryland 1776 Art 19; Constitution of North Carolina 1776 Art 7; Constitution of Vermont 1777 Art 10. Available at: The Avalon Project Yale Law School (n 282).
[285] Available ibid.

> …the accused shall enjoy the right to a speedy and public trial, by an impartial jury…, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It is from the American instruments, influenced by Western European thinking, that one can discern efforts to place the accused in a position of equality with the prosecution, namely in the right to know the charge, confront adverse witnesses, call defence witnesses and instruct counsel. These instruments and the French Declaration would serve as an example to other countries to constitutionalise procedural safeguards for the accused to create a supreme barrier against the wielding of naked power by the state.

E. INTERNATIONAL LAW DEVELOPMENTS

Whereas, traditionally, standards of procedural fairness were matters for national competence, World War II propelled states into addressing seriously the rights of accused persons at an international level.

1. Nuremberg Trials

Some concern for the accused was already evident in the Nuremberg trials of war criminals. Provision for fair trial was made in Article 16 of the Charter of the International Military Tribunal 1945[286] which afforded the right to be informed of the charges within reasonable time and follow the proceedings in a language understood by the accused; to give any explanation relevant to the charges; to conduct his own defence or have legal assistance; and to present defence evidence and cross-examine witnesses. The cumulative effect of these rights, however, offered a level of protection rightly regarded as minimal.[287] There was, for example, no right to silence, no right to challenge a judge, no express presumption of innocence and no duty on the prosecution to disclose exculpatory material.[288] The standard of fairness must, nevertheless, be viewed in the light of the surrounding circumstances at the time. Not only was there a strong

[286] (adopted and entered into force 8 August 1945). Available at: The Avalon Project Yale Law School, 'Charter of the International Military Tribunal' <http://avalon.law.yale.edu/imt/imtconst.asp>.
[287] eg DM Amman, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context' (2000) 75 Ind LJ 809, 819; S Zappalà, *Human Rights in International Criminal Proceedings* (OUP, Oxford 2003) 45.
[288] Zappalà (n 287) 20–21.

Allied desire to punish the former enemy, manifested as victor's justice, but concrete international proclamations of standards of fairness did not yet exist.[289]

2. UDHR and ICCPR

It was following the Nuremberg trials that procedural fairness for accused persons emerged as a fundamental concern to be entrenched in multilateral instruments and thereby contribute to the preservation of the Western liberal order. The first of these was the UDHR. Though this instrument was neither intended to be nor is in itself legally binding, it is arguably an authoritative interpretation of the human rights provisions of the United Nations Charter (Articles 55(c) and 56)[290] or has become in part an expression of customary international law.[291] It makes provision for full equality at a fair and public hearing by an independent and impartial tribunal; the presumption of innocence; and all the guarantees necessary for a defence.[292] A more elaborate statement of rights was unnecessary, for the UDHR was the first segment of the International Bill of Human Rights which also contained the ICCPR, an instrument binding for ratifying states. Its Article 14 provides a more thorough catalogue: equality before the courts; fair and public hearing by a competent, independent and impartial tribunal; presumption of innocence; to be informed of the charge; adequate time and facilities to prepare a defence; to be tried without undue delay; to be present at trial; to defend oneself in person or through legal assistance; to examine and call witnesses; free interpreter assistance; to remain silent; entitlement to appeal; compensation for any miscarriage of justice; and freedom from double jeopardy.

3. ECHR

As the aforementioned rights were being deliberated upon in the drafting stages of the ICCPR, the ECHR was being formulated. Its drafting by the Council of Europe in 1950 was motivated

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[289] ibid 21–22, 46. See also Amman (n 287) 820.

[290] (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16. See 'Montreal Statement of the Assembly for Human Rights, 22–27 March 1968' (1968) 9 J Int'l Comm Jurists 94, 95 reproduced in RB Lillich and FC Newman, *International Human Rights: Problems of Law and Policy* (Little, Brown and Co, Boston 1979) 67; MGK Nayar, 'Human Rights: The United Nations and United States Foreign Policy' (1978) 19 Harv Int'l LJ 813, 817; MS McDougal, HD Lasswell and L-C Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale UP, New Haven 1980) 325; International Law Association, 'Report of the Sixty-Sixth Conference' (Buenos Aires 1994) cited in H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 Ga J Int'l & Comp L 287, 323.

[291] JP Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 Wm & Mary L Rev 527, 529, 540; Nayar (n 290) 817; McDougal, Lasswell and Chen (n 290) 274; LB Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am U L Rev 1, 17; RB Lillich, 'Civil Rights' in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon, Oxford 1984) vol 1, 116; P Thornberry, *International Law and the Rights of Minorities* (Clarendon, Oxford 1991) 237.

[292] Arts 10–11(1).

primarily to guard against two concerns. The first was to prevent reoccurrence of the acute disregard for human rights, and associated dictatorship, evidenced in World War II.[293] The second was to prevent communism from spreading to Western Europe.[294] It was hoped that these concerns could be met through the promotion of a human rights agenda which would unify to a greater extent 'likeminded' states which had '...a common heritage of political traditions, ideals, freedom and the rule of law...'.[295] The Convention was, therefore, essentially '...designed to maintain and promote the ideals and values of a democratic society.'[296] Amongst these ideals and values was the right to a fair trial.

In preparing Article 6, its architects derived inspiration from earlier drafts of the ICCPR.[297] In criminal proceedings, it expressly provides the following guarantees: Article 6(1): a hearing which is fair, public and held within a reasonable time; an independent and impartial tribunal established by law; a publicly pronounced judgement; Article 6(2): a presumption of innocence; Article 6(3): prompt notification of the charge in a language understood by the accused; adequate time and facilities for defence preparation; to defend oneself or through legal assistance, the latter being given free if the interests of justice necessitate; to examine or have examined adverse witnesses and to obtain the attendance and examination of defence witnesses; and free interpreter assistance when required. The content of the 'fair hearing' guarantee in Article 6(1) is undefined but the rights of Articles 6(2) and (3) represent some essential elements thereof.[298] Other elements have been implied in this open-ended guarantee, including the principle of equality of arms;[299] the right to adversarial proceedings;[300] the right to a reasoned judgement;[301] the right to be present at and participate effectively in the hearing;[302] and the right not to incriminate oneself.[303] It does not, however, imply a right to jury trial.[304] Neither does it require a right of

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[293] JG Merrills and AH Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn Manchester UP, Manchester 2001) 3; D Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 1.
[294] ibid respectively 4; 1.
[295] ECHR Pmbl.
[296] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Apps 5095/71; 5920/72; 5926/72) (1976) Series A no 23 [53].
[297] See further D Harris, 'The Right to Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 ICLQ 352, 353; P van Dijk, 'Universal Legal Principles of Fair Trial in Criminal Proceedings' in A Rosas and J Helgesen (eds), *Human Rights in a Changing East-West Perspective* (Pinter, London 1990) 109; Merrills and Robertson (n 293) 7.
[298] *Nielsen v Denmark* (App 343/57) (1961) 4 Yearbook 494 (EComHR) 548; *Deweer v Belgium* (App 6903/75) (1980) Series A no 35 [56].
[299] *Neumeister v Austria* (App 1936/63) (1968) Series A no 8 [22] ('The Law').
[300] *Eskelinen and others v Finland* (App 43803/98) ECHR 8 August 2006 [31].
[301] *Hadjianastassiou v Greece* (App 12945/87) (1992) Series A no 252 [33].
[302] *Colozza v Italy* (App 9024/80) (1985) Series A no 89 [27]; *Stanford v UK* (App 16757/90) (1994) Series A no 282-A [26].
[303] *Saunders v UK* (App 19187/91) ECHR 1996-VI [68]. Additional elements are identified in Harris and others (n 293) 256–259, 264–267, 269–271.
[304] *X and Y v Ireland* (App 8299/78) (1980) 22 DR 51, 73; *Callaghan and others v UK* (App 14739/89) (1989) 60 DR 296 [1] ('The Law').

appeal, though where domestic law provides for such a right, Article 6 is applicable.[305] It is, nevertheless, guaranteed in ECHR Protocol No 7, alongside the right to compensation for wrongful conviction and the right not to be subject to double jeopardy,[306] though it has not been ratified by all Council of Europe members. It is thus the express and implied rights of Article 6 which constitute a minimum catalogue to be accommodated by all 47 ratifying Member States. The willingness of so many states to expose their judgements to review at Strasbourg reinforces the belief that the rights of the accused are no longer solely a matter for national sovereignty but also deserve protection at international level.

To benefit from all the aforementioned guarantees of Article 6, an applicant must first have been involved in proceedings concerning a 'criminal charge'. It will suffice for present purposes to only elaborate upon the term briefly, for it has been discussed extensively elsewhere.[307]

'Criminal' assumes an autonomous meaning for the Court to ensure that the classification of an offence in domestic law is not used to evade application of Article 6.[308] It formulated in *Engel and others v the Netherlands* three criteria to be applied in determining whether proceedings are criminal,[309] the second and third of which are alternative and not necessarily cumulative:[310]

(1) Domestic classification: The classification of the offence as criminal within the respondent state renders Article 6 automatically applicable. If it is not classified as such, the second and third criterions apply.

(2) Nature of offence: A greater likelihood exists of an offence being viewed as criminal if it is classified as such in most Contracting States[311] and/or it is applicable to all citizens rather than a particular group possessing a special status.[312] If the offence is only applicable to a restricted group, and concerns the internal regulation of the group's

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[305] *M v UK* (App 9728/82) (1983) 36 DR 155, 159; *Eckle v Germany* (App 8130/78) (1982) Series A no 51 [76].

[306] (adopted 22 November 1984, entered into force 1 November 1988) 1525 UNTS 195 Arts 2–4.

[307] eg CJF Kidd, 'Disciplinary Proceedings and the Right to a Fair Criminal Trial Under the European Convention on Human Rights' (1987) 36 ICLQ 856, 857–872; S Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 1–39; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 406–418; S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 13–36, 137–140; Harris and others (n 293) 204–210.

[308] *Engel and others v the Netherlands* (App 5100/71 et seq) (1976) Series A no 22 [81].

[309] ibid [82].

[310] *Ezeh and Connors v UK* (Apps 39665/98; 40086/98) ECHR 2003-X [86]; *Matyjek v Poland* (App 38184/03) ECHR 2006-VII [47]. If either criterion is not in itself conclusive on the matter, a cumulative approach may be adopted.

[311] *Öztürk v Germany* (App 8544/79) (1984) Series A no 73 [53]; *Putz v Austria* (App 18892/91) ECHR 1996-I [33].

[312] *Öztürk* (n 311) [53]; *Demicoli v Malta* (App 13057/87) (1991) Series A no 210 [33]; *Lauko v Slovakia* (App 26138/95) ECHR 1998-VI [58].

conduct, the offence will most likely be considered disciplinary. The minor nature of an offence does not in itself exclude its classification as criminal.[313]

(3) Nature and severity of penalty: The nature of a penalty is criminal if its purpose is primarily 'deterrent and punitive'.[314] Compensatory sanctions or those of a principally precautionary or preventative character[315] are not criminal. The severity of the penalty is judged not by that actually imposed but by reference to the maximum potential penalty.[316] Deprivation of liberty generally justifies criminal status, unless its 'nature, duration or manner of execution' is such that it could not be 'appreciably detrimental'.[317] Also capable of criminal status are fines,[318] disqualification from standing for public election,[319] and the deduction of points from driving licences.[320]

'Charge' has also been given an autonomous interpretation, the Court preferring to attach a substantive rather than formal meaning thereto.[321] One is considered charged upon receiving 'official notification by the competent authority of an allegation that he has committed a criminal offence' or when he has been the subject of 'measures which carry the implication of such an allegation and which likewise substantially affect... [his] situation.'[322] Examples include: officially learning of the investigation or beginning to be affected by it;[323] when arrest is made or ordered;[324] when first questioned as a suspect;[325] when notified of being charged;[326] and when a search is conducted[327] or evidence seized.[328]

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[313] *Öztürk* (n 311) [53]; *Ezeh and Connors* (n 310) [104]; *Maresti v Croatia* (App 55759/07) ECHR 25 June 2009 [59].

[314] *Öztürk* (n 311) [53]; *Lauko* (n 312) [58]; *Janosevic v Sweden* (App 34619/97) ECHR 2002-VII [68].

[315] eg *Escoubet v Belgium* (App 26780/95) ECHR 1999-VII [37]: 'The immediate withdrawal of a driving licence appears to be a preventive measure for the safety of road-users, designed to take a driver who is potentially dangerous to other road-users temporarily off the roads... and there is nothing to indicate that its purpose is punitive.' Additionally, '... its application is totally independent of any criminal proceedings which may subsequently be brought.'

See also *Blokker v the Netherlands* (App 45282/99) ECHR 7 November 2000 [1] ('The Law'): Drink driving awareness course not considered criminal.

[316] *Ezeh and Connors* (n 310) [120]; *Sergey Zolotukhin v Russia* (App 14939/03) ECHR 10 February 2009 [56].

[317] *Engel and others* (n 308) [82]. See further *Campbell and Fell v UK* (Apps 7819/77; 7878/77) (1984) Series A no 80 [72]: Forfeiture of remission (570 days) for prisoner was criminal since it caused the detention to continue beyond the period legitimately expected.

[318] eg *Bendenoun v France* (App 12547/86) (1994) Series A no 284 [47]; *Lauko* (n 312) [58]; *Janosevic* (n 314) [69], [71]. This is more likely when the fine can be converted into imprisonment for non-payment: eg *Weber v Switzerland* (App 11034/84) (1990) Series A no 177 [34]; *Ravnsborg v Sweden* (App 14220/88) (1994) Series A no 283-B [35].

[319] *Matyjek* (n 310) [55]–[58]. Contrast *Pierre-Bloch v France* (App 24194/94) ECHR 1997-VI [56]–[57].

[320] *Malige v France* (App 27812/95) ECHR 1998-VII [39]–[40].

[321] *Deweer* (n 298) [44].

[322] eg *Corigliano v Italy* (App 8304/78) (1982) Series A no 57 [34]; *Escoubet* (n 315) [34].

[323] *Eckle* (n 305) [74]; *Kangasluoma v Finland* (App 48339/99) ECHR 20 January 2004 [26].

[324] *Wemhoff v Germany* (App 2122/64) (1968) Series A no 7 [19]; *Boddaert v Belgium* (App 12919/87) (1992) Series A no 235-D [35]; *Heaney and McGuinness v Ireland* (App 34720/97) ECHR 2000-XII [42].

[325] *Hozee v the Netherlands* (App 21961/93) ECHR 1998-III [45].

[326] *Pedersen and Baadsgaard v Denmark* (App 49017/99) ECHR 2004-XI [44].

[327] *Coëme and others v Belgium* (App 32492/96 et seq) ECHR 2000-VII [133].

[328] *TK and SE v Finland* (App 38581/97) ECHR 31 May 2005 [27].

F. CONCLUSION

Before delving into a specific analysis of concept of equality of arms, the above discussion was intended to first establish a background for Article 6, the provision under which the concept is considered in the thesis.

The procedural rights therein are not virginal but the mature product of Western historical influence, hence some resemble those introduced in one form or another in older laws. Certain influential historical developments in trial rights, occurring well before Article 6 was drafted, demonstrate a gradual evolution in standards of procedural fairness. These standards are relative to the degree of societal development existing at the time that bore them.

The development of Western civilisation undoubtedly drew influence from the Bible but it is unconvincing to hold divine law as an inspirational source for procedural fairness.

Procedural fairness is rooted first in national law developments. The right to be heard, for example, can be traced back to classical antiquity. There were certainly some progressive developments in rights afforded the accused as a means of securing a correct outcome, albeit very gradual, but there was also regression, most notably in the medieval trials by oath, ordeal and combat, and heresy inquisitions. Yet, even during regressive periods, it was recognised that the accused should have some procedural rights, if only to give a fig-leaf of legitimacy to irrational verdicts. Whether a particular development is progressive or regressive, both types are useful in demonstrating which rights are important to fair trial and the consequences of their absence, thus Article 6 has benefitted from this experience. Whilst, admittedly, procedural rights in national laws often could not be exercised effectively in practice, the existence of such rights in the first place indicates that the seeds for the content of Article 6 were already sown.

Article 6 was not only influenced by procedural rights in national laws but also those in constitutional instruments. Procedural fairness evolved to become associated with a just political order and good governance. It was not Magna Carta but American and French revolutionary instruments that gave certain rights in Article 6 constitutional protection. Magna Carta afforded constitutional status to the rule that lawful trial procedures must be followed before condemnation. This rule is the first step in developing a constitutional requirement that such procedures must also be fair.

Not only a matter for national competence, the rights of accused persons also evolved after World War II into a concern to be protected at an international level. Whilst some concern for the accused had already been demonstrated at the Nuremberg trials, it was the UDHR and early drafts of the ICCPR that reflected the emergence of a shared respect between states for the inherent worth of the individual in international law. Both influenced the ECHR, which

subsequently would become a 'constitutional instrument of European public order'[329] or a 'European bill of rights',[330] as well as a model of reference for other regional treaties.[331]

Its Article 6 does not define exhaustively the notion of fair trial:[332] 'It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.'[333] Fairness in Article 6 is thus an overarching concept requiring that the accused have an adequate opportunity to exercise certain minimum procedural rights. These rights are not merely those entrenched expressly in the article but also those implicit in the Article 6(1) fair hearing guarantee, such as the concept of equality of arms. The open-ended character of this guarantee is prudent for its capacity to evolve the standard of procedural fairness in Article 6 in line with new developments in criminal justice thinking and practice. Of course, evolving standards of procedural fairness would be devalued in practice if states were able to place undue thresholds on applicability. The European Court has thus adopted the correct approach in attaching an autonomous meaning to 'criminal charge'.

Having established a background for Article 6, it falls next to discuss the value, legal basis and definition of the concept of equality of arms therein.

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[329] *Loizidou v Turkey (Preliminary Objections)* (App 15318/89) (1995) Series A no 310 [75].
[330] Harris and others (n 293) 2.
[331] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[332] *Nielsen* (n 298) 548.
[333] *Golder v UK* (App 4451/70) (1975) Series A no 18 [28].

2

EQUALITY OF ARMS: VALUE, LEGAL BASIS AND DEFINITION

A. INTRODUCTION

The present discussion focuses on equality of arms in criminal proceedings under Article 6 ECHR from a predominantly theoretical standpoint. Whilst procedural equality between parties to proceedings appeals to our intuitive sense of procedural fairness, a deeper exploration of its value is deserved. Part B reveals its instrumental and intrinsic value and assesses which of these has primacy. Together these values induce a collateral value which is outlined thereafter. In order for the value of procedural equality to manifest itself in an adjudicatory process, such equality must first be given effect in law. Part C identifies a contemporary legal foundation for equality of arms in Article 6 and wider international law. The legal obligation assumed in criminal proceedings under the concept of equality of arms in Article 6 has been enunciated recurrently as requiring that '...each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent'.[1] Part D defines each essential element of this formula to elucidate in detail the nature of the concept before its application is assessed critically in the chapters hereafter.

B. THE VALUE OF PROCEDURAL EQUALITY

The contribution of the concept of equality of arms to fair treatment is manifested principally in its service of two significant but distinct species of value: instrumental and intrinsic. The collateral consequence of these values is the generation of another value: procedural legitimacy.

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[1] eg *Bulut v Austria* (App 17358/90) ECHR 1996-II [47]; *Foucher v France* (App 22209/93) ECHR 1997-II [34]; *Josef Fischer v Austria* (App 33382/96) ECHR 17 January 2002 [18]; *Lanz v Austria* (App 24430/94) ECHR 31 January 2002 [57]; *Öcalan v Turkey* (App 46221/99) ECHR 2005-IV [140].

See further the definition in Human Rights Committee (HRC), 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial' (2007) UN Doc CCPR/C/GC/32 [13]: '...equality of arms... means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.'

1. Instrumental Value

The concept of equality of arms serves an instrumental value by rendering more probable a correct judicial decision (result-orientated). A guarantee of the same is unattainable because process features implementing fair treatment in criminal trials are susceptible to Rawls's notion of 'imperfect procedural justice',[2] whereby an incorrect outcome may be reached notwithstanding their strict observance. Alternatively, it cannot be guaranteed that an absence of procedural equality will result in an incorrect outcome, particularly if the inequality is minor in nature. Nevertheless, process features provide the structural mediums by which evidence, interpretations of law and representations of fact are communicated to the decision-maker(s), affecting as a direct consequence the trial outcome. A correct judicial decision, an attribute of fair treatment,[3] is one where only the true perpetrator of the offence is convicted. It requires accuracy, rationality and reliability, all of which are encouraged by the realisation of procedural equality between opponents. Such equality in the abilities of the parties to prepare and present their cases ensures that the opportunity to represent to the decision-maker the merits of their case and expose the weaknesses of the other side is an equal one. The imposition of non-reciprocal restrictions on the enjoyment of their procedural rights increases the likelihood that submissions presented by the disadvantaged party constitute an inaccurate reflection of the true merits of his case. Such may be the occurrence, for instance, if the accused was denied counsel or equal cross-examination opportunities to discredit witnesses. On this basis, the decision-maker is exposed to the contentions of the parties in equal measure and can adopt a balanced perspective, the consequence of which is the increased possibility that a correct decision will be made and an erroneous conviction averted. This possibility is valuable also to the extent that it contributes to instilling in society reasonable confidence that justice not only has been done, but appears to have been done. Whereas the value of hearing the parties on equal terms to the administration of justice is evident in these respects, it remains only a contributor to a complex process of causation in which influences on outcome justice are generated also by important factors external to regulatory procedure such as, for example, judicial discretion or the calibre of the courtroom strategies employed by the advocates.

2. Intrinsic Value

The instrumental value of the concept of equality of arms may be contrasted with the intrinsic value it serves (non-result-orientated) in addition to the former. Though the instrumental ends of procedural equality in returning a correct verdict may either equitably satisfy (acquittal) or be

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[2] J Rawls, *A Theory of Justice* (OUP, Oxford 1999) 74–75.
[3] DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon, Oxford 1996) 78.

contrary (guilty) to defence interests, the intrinsic value is distinctly beneficial to the accused. This value lies in the concept of equality of arms performing a dignitarian function; it is an expression of societal respect for the dignity of the individual amidst the adverse circumstances thrust upon him. The notion of human dignity has long infused the sphere of human rights, the inextricable nexus evident in several international and regional legal instruments and underpinning the rights therein.[4]

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[4] eg UN Charter Pmbl: 'We the peoples of the United Nations determined… to reaffirm faith in fundamental human rights… [and] the dignity and worth of the human person… have resolved to combine our efforts to accomplish these aims.'

UDHR Art 1: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Dignity is also recognised in Arts 22, 23(3) and twice in the Pmbl.

ECHR Pmbl: Whereas the promotion of dignity is not referred to expressly, it is implied in the Convention's endorsement of the UDHR. See also *Pretty v UK* (App 2346/02) ECHR 2002-III [65]: 'The very essence of the Convention is respect for human dignity and human freedom.'; *I v UK* (App 25680/94) ECHR 11 July 2002 [70]; *Christine Goodwin v UK* (App 28957/95) ECHR 2002-VI [90]; *Jehovah's Witnesses of Moscow v Russia* (App 302/02) ECHR 10 June 2010 [135]. Respect for human dignity not only underlies Art 6 but is also most prominently associated with Arts 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 8 (right to respect for family and private life), 9 (freedom of thought, conscience and religion), 11 (freedom of assembly and association), 12 (right to marry and found a family), 14 (prohibition of discrimination) and Art 2 (right to education) of Protocol No 1 to the ECHR (adopted 20 March 1952, entered into force 18 May 1954, as amended by Protocol No 11) 213 UNTS 262: D Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] PL 682, 690–696; C Gearty, *Principles of Human Rights Adjudication* (OUP, Oxford 2004) 91–92.

Standard Minimum Rules for the Treatment of Prisoners (adopted 30 August 1955, First UN Congress on the Prevention of Crime and the Treatment of Offenders) UN Doc A/CONF/611 (1955) Annex 1 Rule 60(1): 'The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.'

Conference on Security and Co-operation in Europe: Final Act (adopted 1 August 1975, Helsinki) (1975) 14 ILM 1292 Principle 7: 'The participating States will… promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person…'. Contrast O Schachter, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848, 853: 'The general idea that human rights are derived from the dignity of the person is… [not] truistic…'. He considers it more probable that 'the idea of dignity reflects sociohistorical conceptions of basic rights and freedoms, not that it generated them.'

ICCPR Art 10(1): 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Dignity features twice in the Pmbl, including the declaration that '…the equal and inalienable rights of all members of the human family… derive from the inherent dignity of the human person...', and appears in the preface to the Second Optional Protocol to the ICCPR (adopted 15 December 1989, entered into force 11 July 1991) UNGA Res 44/128 Annex 44 GAOR Supp (No 49) 207 UN Doc A/44/49 (1989): '…abolition of the death penalty contributes to enhancement of human dignity…'.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 Art 13(1): '…education shall be directed to the full development of the human personality and the sense of its dignity…'. The Pmbl contains references to dignity identical to the ICCPR Pmbl.

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 Art 11(1): 'Everyone has the right to have his honor respected and his dignity recognized.' Arts 5(2) (identical to aforementioned ICCPR Art 10(1) reference) and 6(2) herein and Art 13(2) and the Pmbl of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (adopted 14 November 1988, entered into force 16 November 1999) (1989) 28 ILM 156 also contain dignitarian provisions.

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 Pmbl: '…discrimination against women violates the principles of equality of rights and respect for human dignity…'. The Pmbl also refers to dignity in relation to the UN Charter and UDHR.

Whereas a definition remains elusive in such instruments, perhaps to the advantage of achieving political consensus and scope for evolutionary development,[5] the eighteenth century Kantian conception of human dignity provides an instructive term of reference upon which to draw. Kant identified dignity as the intrinsic worth of a human being, absolute in character.[6] Pritchard adds that 'having a sense of dignity includes concern to achieve and maintain various forms of integrity, as well as attitudes of self-respect, self-esteem, pride, shame, resentment, and indignation.'[7] Within the Kantian tradition, dignity resides without exception in all human beings because of man's capacity, as an intelligible (moral) being, for autonomous rational agency, a trait that elevates him above all other animals.[8] It is by virtue of his dignity that man is entitled to respect and not be used merely as a means to others' ends; he is to be treated as an end in himself.[9] Applied in the context of criminal proceedings, an accused is not to be estimated as an instrument of the will of the state,[10] but rather a valued subject of the process, irrespective of the character of the charges laid against him. Whilst such proceedings, by their very nature, pose an acute limitation on the accused's capacity for autonomous self-determination, and to this extent

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African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 Art 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.' Dignity is also mentioned in the Pmbl on two occasions.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 Art 37(c): '…Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person…'. Dignity finds itself in Arts 23(1), 28(2), 39 and 40(1), and thrice in the Pmbl.

A notable constitutional addition to these examples is the German Basic Law 1949 (as amended) Art 1(1): 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Available at: German Bundestag (April 2010) <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

[5] D Shultziner, 'Human Dignity: Functions and Meanings' in J Malpas and N Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, Dordrecht 2007) 78: '…human dignity is used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground. …[T]he content of human dignity is a corollary of a political agreement and compromise set in each legal document by the cultural, political, constitutional and other conditions, which can evolve and change in the course of history.'

[6] I Kant and M Gregor (ed) (tr), *The Metaphysics of Morals* (CUP, Cambridge 1996) [435], [462]; J Hruschka, 'Kant and Human Dignity' in BS Byrd and J Hruschka (eds), *Kant and Law* (Ashgate, Aldershot 2006) 70, 82.

[7] MS Pritchard, 'Human Dignity and Justice' (1972) 82 Ethics 299, 300.

[8] Kant and Gregor (n 6) [213]–[214], [239], [392], [418], [420], [434]–[435], [462]–[463]; Hruschka (n 6) 70–76, 79–81. See also Pritchard (n 7) 303: 'The connection between autonomy and dignity is shown in the resentment often felt when one believes his autonomy is being interfered with.'; Schachter (n 4) 851: Human dignity '…includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility.'

[9] Kant and Gregor (n 6) [434]–[435], [462]; Hruschka (n 6) 70, 81–82. See also eg *Paul v Davis* 424 US 693, 734–735 (1976) (Diss Op Brennan J): '…one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the… safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.'

[10] The link between respect for human dignity and freedom from totalitarianism was acknowledged in J Locke, *Two Treatises of Government* (Dent, London 1986) book 2 [23]: '…freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together.'

compromise necessarily an aspect of his dignity, he must not be faced in the interaction by arbitrariness. To promote the dignity of this subject is to accord him fair treatment.[11]

Observance of equality of arms demonstrates a commitment to respect this dignity and accord fair treatment by contributing to the implementation of dignitarian process values within an adjudicatory regime. These values 'refer to standards of value by which we may judge a legal process to be good *as a process*, apart from any "good result efficacy" it may have.'[12] Given the width of this definition, any catalogue of process values is non-exhaustive but several values may be proposed as examples: participatory governance; procedural legality; process peacefulness; humaneness; autonomy; personal privacy; consensualism; procedural predictability, transparency and rationality; timeliness and finality; revelation (of reasons for unfavourable treatment); and participation.[13] It is the latter value in particular that is furthered by the realisation of procedural equality. The strength of implementing such equality is that it not only invites participation, but it admits participation on equal terms with an opponent, essentially constituting a procedural avenue for interchange that is both effective and somewhat alleviatory of feelings of powerlessness against state machinery. Whereas participation may assume several guises, affording the accused procedural equality in his ability to prepare and present arguments and counterarguments allows him to genuinely engage the adjudicating organ and sustain his position effectively in a process wherein his fundamental interests are in jeopardy. Participation is, essentially, a necessary condition of 'meaningful consultation'[14] and equality of arms contributes to rendering this possible, enabling the accused to be respected as an end in himself, with partial control over his fate, and not a passive subject of societal instrumentalization.

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[11] Galligan (n 3) 75–76. See also Pritchard (n 7) 308: 'One's genuine conviction that others are entitled to fair treatment in itself shows that he regards others as having dignity, as being worthy of respect. Taking positive steps to promote justice for others (or prevent injustice) can indicate respect for their dignity.'; R Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) 198: '…the vague but powerful idea of human dignity… supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.'; RB Saphire, 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection' (1978) 127 U Pa L Rev 111, 118–119, 124: '…fairness in government-individual relations can never be defined solely in terms of outcomes…; rather, the processes of interaction themselves are always important in their own right.'

[12] RS Summers, 'Evaluating and Improving Legal Processes—A Plea for "Process Values"' (1974) 60 Cornell L Rev 1, 3.

[13] ibid 20–27; FI Michelman, 'Formal and Associational Aims in Procedural Due Process' in JR Pennock and JW Chapman (eds), *Due Process* (New York UP, New York 1977) 127; Saphire (n 11) 122; JL Mashaw, *Due Process in the Administrative State* (Yale UP, New Haven 1985) 175–181; MD Bayles, *Procedural Justice: Allocating to Individuals* (Kluwer, Dordrecht 1990) 130–134, 139.

[14] EL Pincoffs, 'Due Process, Fraternity, and a Kantian Injunction' in Pennock and Chapman (n 13) 180: '…consultation that is not merely a blind for action that takes no account of him, his interests, his desires.' See also LH Tribe, *American Constitutional Law* (2nd edn Foundation Press, Mineola New York 1988) 666: '…to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.'

3. Primacy of Value: Instrumental v Intrinsic

Admitting the co-existence of this intrinsic value and its instrumental counterpart is not to accord them equal import. The theoretical primacy of one value over the other begs consideration and encroaches upon the wider debate concerning the true nature of legal processes.

Galligan is a particularly keen exponent of the subordinacy of non-outcome values to procedural instrumentalism: dignitarian values are to be respected but procedural rights are first and foremost a means for securing accurate outcomes.[15] Alternatively, the thrust of the dignitarian account asserts that procedures intrinsically upholding dignitarian values are justified, irrespective of contribution to outcome; accuracy of result is not more than ancillary to these values.[16] Galligan evinces a scepticism towards this 'dignitarian challenge' resting on alleged failures to establish a direct link between respect for individuals and certain procedures, and to recognise that accuracy of outcome is itself an important aspect of respect for the individual, thus is unduly depreciated.[17]

Though in response one may refer to the link between dignity and procedural equality presented above, there is further scope to strengthen the dignitarian cause. The superiority of a dignitarian rather than instrumental foundation for the concept of equality of arms possesses intuitive merit. Human intuition is such that '[w]e all feel that process matters to us irrespective of result.'[18] A prohibition against torture, for instance, is compelled by the affront to the dignity of coerced individuals, despite the possibility of obtaining reliable evidence; the former concern takes precedence over the latter. Accordingly, denial of an equal opportunity for two opponents to prepare and present their cases offends the disadvantaged party's sense of worth and generates, intuitively, a feeling of unfair treatment, regardless of the outcome reached. His legitimate expectation to equal treatment, born of intuition, remains unfulfilled.

Beyond this intuitive level, the relationship between the concept of equality of arms and human dignity may be explained by reference to two further arguments. The first puts forward the following: as the law recognises the rational agency (a source of dignity) of individuals, obligations imposed upon them are required to be justified to earn acceptance; the criminal trial must respect this rational agency to adhere to the law and also purports to be a rational enterprise itself; accordingly, the court's verdict must be justified to the accused affected by it.[19] The absence of an opportunity for a say on equal terms leaves an unconvincing justification for the verdict in the eyes of the accused and society. Thus, the requirement of justification places a

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[15] A proposition recurrent throughout the work: Galligan (n 3) eg 55, 72, 81, 92–94, 131–143, 349–351. Another instrumentalist is TC Grey, 'Procedural Fairness and Substantive Rights' in Pennock and Chapman (n 13) 184, 204–205 fn 17.
[16] eg Summers (n 12) 3, 14, 21–27; Mashaw (n 13) 158–160, 204.
[17] Galligan (n 3) 77–78, 81 and eg 135–140.
[18] Mashaw (n 13) 162.
[19] RA Duff, *Trials and Punishments* (CUP, Cambridge 1986) 115–116.

higher value on the process employed to justify the outcome, a dignitarian focus, rather than upon the correctness of the outcome itself.

The second line of argument finds the indictment addressed to the accused to be a charge which *he must answer* to society through its courts; to deny him the opportunity to respond is to reject his very status as an accused.[20] Requiring the accused to answer the charge, which he can do meaningfully only in conditions of procedural equality, signals primarily a respect for his dignity.

Though it is true that procedures throughout history were directed fundamentally at achieving correct outcomes, the nineteenth century Benthamite theory of adjudication providing some evidence to this effect,[21] Galligan's principal claim is certainly not in consonance with the modern human rights ideal, grounded upon the abovementioned dignitarian agenda to, above all, protect personal dignity. ECHR jurisprudence, nevertheless, presents somewhat of a paradox in this regard, diverting from the dignitarian ideal to requiring evidence of prejudice (outcome-orientated) for a violation of the concept of equality of arms.[22] A strictly dignitarian approach would dictate that a procedural inequality in itself was sufficient for a breach, irrespective of the occurrence of prejudice. Despite the present response to procedural instrumentalism, the second component of Galligan's view is readily acceptable: accurate outcomes are demonstrative of respect. However, what he fails to recognise is that process values such as participation are a superior expression of respect because, as indicated above, they exist to benefit the accused whereas a correct result can either be to his favour or detriment.

In view of the above analysis, equal import is not to be afforded to the instrumental and intrinsic contribution to fair treatment generated by the concept of equality of arms. Instead, it is suggested that its modern raison d'être is first and foremost to uphold the dignity of the individual; it is a dignitarian construct, the presence of which would be justified even if it had a nil impact on outcome justice.

4. Collateral Value

The dignitarian role of the concept of equality of arms and its theoretically subordinate instrumental end are not the only relevant values in co-existence. These values give rise jointly to a collateral value: procedural legitimacy.[23] Societal approval of a criminal process is required

[20] ibid 116–118.
[21] eg J Bentham, 'Principles of Judicial Procedure' in J Bowring (ed), *The Works of Jeremy Bentham* (Tait, Edinburgh 1843) vol 2, 6, 99; J Bentham, 'An Introductory View of the Rationale of Evidence' in J Bowring (ed), *The Works of Jeremy Bentham* (Tait, Edinburgh 1843) vol 6, 171–172; J Bentham, 'Rationale of Judicial Evidence' in Bowring vol 6 (n 21) 212–213, 286, 352, 458–459. Galligan (n 3) 11 suggests incorrectly that Bentham considered rectitude of decision to be the sole object of legal processes. Bentham also viewed minimization of delay, vexation and expense as collateral or subordinate ends.
[22] Ch 2 Pt D s 4(b)–(c).
[23] Summers (n 12) 21–22.

because prosecutions are conducted on its behalf and each member is a potential subject thereof. As potential subjects of such a process, the public identify with the accused and thus will acquiesce only in proceedings that reflect this: '…from the moment the offender is perceived as a surrogate self, this identification calls for a "fair trial" for him before he is punished, as we would have it for ourselves.'[24] Indeed, a perception of legitimacy in adjudicatory procedures is fundamental to democratic rule.[25] Procedural equality strengthens indirectly this perception by contributing positively to correctness of outcome, the implication being that such outcomes cannot be sought by any means necessary, and the fraternal concern for the protection of individual dignity. These instrumental and intrinsic values demonstrate to society that all its members will be afforded fair treatment in their involuntary engagement with the state. Such commitment to fair treatment for all encourages a perception of procedural meaningfulness and legitimacy, the absence of which would undermine the entire trial process. By serving this crucial perception, the concept of equality of arms justifies itself as an essential ingredient in any reasonable fair trial standard.

C. A CONTEMPORARY LEGAL BASIS FOR PROCEDURAL EQUALITY

Having explored the value of the concept of equality of arms, it falls presently to also identify a contemporary legal basis for it. A basis in Article 6 and thereafter in international law is considered.

1. Basis in Article 6

The inclusion of the concept of equality of arms in Convention jurisprudence was realised by the willingness of the Strasbourg authorities to interpret Article 6(1) with a broad construction, an enlightened approach, reverberated in contemporary judgements,[26] that was certainly in conformity with the spirit of the instrument. The inherent ambiguity of the content of the 'fair hearing' requirement in this provision presented the authorities with scope for positive exploitation. Articles 6(2) and (3) represent specific minimum guarantees that form a constituent part of the 'fair hearing' condition without exhausting its content, thus a hearing may be unfair

[24] AS Goldstein, 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1960) 69 Yale LJ 1149, 1150.
[25] '...bearing in mind the prominent place which the right to a fair trial holds in a democratic society...': *De Cubber v Belgium* (App 9186/80) (1984) Series A no 86 [30]; *Bulut* (n 1) [2] (Partly Diss Op Judge Morenilla); *Belziuk v Poland* (App 23103/93) ECHR 1998-II [37].
[26] eg *AB v Slovakia* (App 41784/98) ECHR 4 March 2003 [54]; *Perez v France* (App 47287/99) ECHR 2004-I [64]; *Bíro v Slovakia* (App 57678/00) ECHR 27 June 2006 [43]: '…the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6§1 restrictively…'.

despite observance of the articles.[27] A determination of whether or not the condition has been complied with must be made in the context of the trial in its entirety ('trial as a whole'),[28] which can include pre-trial[29] and appellate stages.[30] On this basis, the content of the 'fair hearing' requirement has been continually and prudently open to a flexible and evolutionary interpretation, depending on the contemporary interests of criminal justice, and enabled the Convention institutions to incorporate implicit procedural safeguards therein beyond the rights expressly specified in Article 6. Thus, despite the absence of an express reference to the concept of equality of arms in Article 6, both Commission and Court adjudged it from an early stage to be an inherent element of the Article 6(1) 'fair hearing' obligation.[31] By virtue of this inextricable link, disregard for the concept in itself amounts to an infringement of Article 6(1).[32] Regard must be had for it from pre-trial to appellate level proceedings, and irrespective of whether such proceedings are rooted in the adversarial or inquisitorial tradition. Yet, quite reasonably, adherence to it does not automatically assure fulfilment of the 'fair hearing' requirement because the former comprises only one subsidiary feature of the overarching latter.[33] Nevertheless, the concept is the feature most crucial to an evaluation of whether or not a hearing is fair;[34] it impacts upon the distribution of privileges and burdens and thereby lies at the very core of the trial structure.

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[27] *Nielsen v Denmark* (App 343/57) (1961) 4 Yearbook 494 (EComHR) 548; *Deweer v Belgium* (App 6903/75) (1980) Series A no 35 [56].

[28] *Nielsen* (n 27) 548–550; *Vidal v Belgium* (App 12351/86) (1992) Series A no 235-B [33]. See also eg *Isgrò v Italy* (App 11339/85) (1991) Series A no 194-A [31]; *Edwards v UK* (App 13071/87) (1992) Series A no 247-B [34]; *Van Mechelen and others v the Netherlands* (App 21363/93 et seq) ECHR 1997-III [50]; *Gossa v Poland* (App 47986/99) ECHR 9 January 2007 [52].

[29] eg *Imbrioscia v Switzerland* (App 13972/88) (1993) Series A no 275 [36], [38]; *John Murray v UK* (App 18731/91) ECHR 1996-I [62]–[63]; *Brennan v UK* (App 39846/98) ECHR 2001-X [45]; *Öcalan* (n 1) [131].

[30] eg *Delcourt v Belgium* (App 2689/65) (1970) Series A no 11 [25]; *Monnell and Morris v UK* (Apps 9562/81; 9818/82) (1987) Series A no 115 [54]; *Ekbatani v Sweden* (App 10563/83) (1988) Series A no 134 [24]; *Belziuk* (n 25) [37]; *Evrenos Önen v Turkey* (App 29782/02) ECHR 15 February 2007 [28]; *Tudor-Comert v Moldova* (App 27888/04) ECHR 4 November 2008 [35].

[31] *X v Sweden* (App 434/58) (1959) 2 Yearbook 354 (EComHR) 370, 372 (civil); *X v Germany* (App 1169/61) (1963) 6 Yearbook 520 (EComHR) 574; *Neumeister v Austria* (App 1936/63) (1968) Series A no 8 [22] ('The Law').

In *Ofner and Hopfinger v Austria* (Apps 524/59; 617/59) (1963) 6 Yearbook 676 (EComHR) 696, the Commission acknowledged that the legal basis of the concept could, instead, possibly derive from Arts 6(3)(b) and (c). It refused, however, to offer a conclusive view on this issue, 'since it is beyond doubt that in any case the wider and general provision for a fair trial, contained in paragraph (1) of Article 6, embodies the notion of "equality of arms".' This approach is understandable given the absence of any discernible benefit arising from the alternative legal basis. A strict attachment of the concept to these articles would impose a greater limitation on its potential scope of application. The case also serves as the first instance in which an implied right was extracted from Art 6(1).

Although equality of arms is also implied in the fair hearing requirement as applied to civil litigation, states are afforded greater latitude in their application of it: *Dombo Beheer BV v the Netherlands* (App 14448/88) (1993) Series A no 274 [32]–[33]. This may be rationalised on the ground that civil proceedings and sanctions present a lesser impact upon individual autonomy.

[32] *De Haes and Gijsels v Belgium* (App 19983/92) ECHR 1997-I [58]–[59].

[33] *Delcourt* (n 30) [28]. See also eg *Monnell and Morris* (n 30) [62].

[34] A view shared by M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl 1993) 246 and the Trial Chamber in *Prosecutor v Delalic* (Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence) ICTY-96-21 (4 February 1998) [45].

2. Basis in International Law

It is, therefore, unsurprising that jurisprudential recognition of a requirement for procedural equality as an implied component of fair hearing is not exclusive to the Strasbourg organs. It also finds acceptance in international law.

The concept of equality of arms has featured in the jurisprudence of the Human Rights Committee (HRC) and other international tribunals operating as subsidiary and reviewing bodies for domestic procedural fairness standards. In its interpretation of the 'fair hearing' guarantee in Article 14(1) ICCPR, the HRC has oft-reiterated that respect for equality of arms is included therein.[35] Sometimes equality of arms is also associated with the right to be 'equal before the courts' in the same provision,[36] though the latter is predominantly a specific application of the non-discrimination stipulation in Article 26.[37] Equality of arms concerns the improper difference in procedural treatment of parties arising from their opposing roles; discrimination practices, on the other hand, relate to undue distinctions made on non-role grounds, including race, colour, sex or religion. Similarly, the entitlement of an accused to minimum defence guarantees 'with full equality' in Article 8(2) of the American Convention on Human Rights is more strongly allied to the anti-discrimination provisions of Articles 1(1) and 24[38] than the principle of equality of arms. This principle is, nevertheless, acknowledged within the inter-American human rights system. It has been applied by the Inter-American Court most prominently in relation to its own practice and procedure and that of the Inter-American Commission, rather than in respect of its analysis of domestic proceedings.[39] The African Commission on Human and Peoples' Rights has also

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[35] eg *Morael v France* (Comm 207/1986) UN Doc Supp No 40 (A/44/40) 210 (1989) [9.3]; *Wolf v Panama* (Comm 289/1988) UN Doc CCPR/C/44/D/289/1988 80 (1992) [6.6]; *John Campbell v Jamaica* (Comm 307/1988) UN Doc CCPR/C/47/D/307/1988 (1993) [6.4]; *Fei v Colombia* (Comm 514/1992) UN Doc CCPR/C/53/D/514/1992 (1995) [8.4]; *Jansen-Gielen v the Netherlands* (Comm 846/1999) UN Doc CCPR/C/71/D/846/1999 (2001) [8.2]; *Äärelä and Näkkäläjärvi v Finland* (Comm 779/1997) UN Doc CCPR/C/73/D/779/1997 (2001) [7.4].

[36] eg *Frank Robinson v Jamaica* (Comm 223/1987) UN Doc CCPR/C/35/D/223/1987 (1989) [10.4]; D Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, The Hague 2001) 130–131; L Doswald-Beck and R Kolb, *Judicial Process and Human Rights: United Nations, European, American and African Systems: Texts and Summaries of International Case Law* (NP Engel, Kehl 2004) 144; HRC (n 1) [8], [13].

[37] Art 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'; Nowak (n 34) 238–239. See also HRC, 'General Comment No 18: Non-discrimination' (1989) UN Doc A/45/40 [3], [10]; S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 94–95 who considers that the right to equality before the courts refers exclusively to the principle of non-discrimination.

[38] Art 1(1): States Parties are obliged to ensure that all persons are able to exercise their '…rights and freedoms, without any discrimination…'; Art 24: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'

[39] S Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 Int CLR 513, 532. See eg *Gangaram Panday Case* (Preliminary Objections) Inter-Am Ct HR Series C No 12 (4 December 1991) [18], [8] (Concur Op Judge AA Cançado Trindade); *Cayara Case* (Preliminary Objections) Inter-Am Ct HR Series C No 14 (3 February 1993) [13]; *Castillo Petruzzi et al Case* (Judgment) Inter-Am Ct HR Series C No 52 (30 May 1999) [60]; *Barrios Altos Case* (Interpretation of Judgment on the Merits: Art 67 ACHR) Inter-Am Ct HR Series C No 83 (3 September 2001) [6]; *Cantoral*

exercised its interpretative function in ascribing equality of arms to the concept of fair trial in Article 7 of the associated African Charter:

> …the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment...
>
> The right to equal treatment… means… that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing.[40]

The precedence set by the human rights tribunals has found acceptance within non-subsidiary, ad hoc tribunals exercising competence in international criminal law: the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). Entrenched in Articles 20(1) and 21(2) of the ICTY Statute,[41] and in corresponding Articles 19(1) and 20(2) of the ICTR Statute,[42] is the general fair trial guarantee. In *Prosecutor v Tadić*, the ICTY Appeals Chamber held 'that the principle of equality of arms falls within the fair trial guarantee under the Statute',[43] a theme recurrent in the Tribunal's jurisprudence.[44] In so doing, the Chamber exhibited a willingness to consider international case-law, including that of the Strasbourg Court, as an authoritative point of reference for its assessment.[45] Not only does this approach, oft-employed by the ICTY, offer clarity with respect to defining a concept, but it supports the legitimacy of the Tribunal's conclusions and ensures a basic level of consistency with other international practice of significance.[46] Such international practice includes that of the ICTR which has also attributed a legal basis to the concept of equality of arms through the fair trial guarantee in its Statute.[47]

Benavides Case (Reparations: Art 63(1) ACHR) Inter-Am Ct HR Series C No 88 (3 December 2001) [31]; *19 Merchants Case* (Preliminary Objections) Inter-Am Ct HR Series C No 93 (12 June 2002) [28], [31].

[40] *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (Comm 231/99) African Comm Hum & Peoples' Rights (2000) [26]–[27].

[41] (adopted and entered into force 25 May 1993, as amended 7 July 2009) <http://www.icty.org/sid/135>.

[42] (adopted and entered into force 8 November 1994, as amended 7 July 2009) <http://www.unictr.org/tabid/94/default.aspx>.

[43] (Judgement) ICTY-94-1-A (15 July 1999) [44].

[44] eg *Delalic* (n 34) [45]; *Prosecutor v Milutinović* (Decision on Interlocutory Appeal on Motion for Additional Funds) (Appeals Chamber) ICTY-99-37-AR73.2 (13 November 2003) [26] (Diss Op Judge Hunt); *Prosecutor v Halilović* (Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses) (Trial Chamber) ICTY-01-48-T (9 May 2005) [7]–[8].

[45] *Tadić* (n 43) [44]: '…there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments.', [48]–[50]. See also *Prosecutor v Delalic* (Judgement) (Appeals Chamber) ICTY-96-21-A (20 February 2001) [24]: '…the Appeals Chamber will necessarily take into consideration other decisions of international courts…'.

[46] A Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals—Some Methodological Remarks' in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijhoff, Leiden 2003) 24–26, 31–45.

[47] eg *Prosecutor v Kayishema and Ruzindana* (Judgement: Reasons) (Appeals Chamber) ICTR-95-1-A (1 June 2001) [67]; *Prosecutor v Bagilishema* (Judgment) (Trial Chamber) ICTR-95-1A-T (7 June 2001) [14]; *Prosecutor v*

The degree of international acceptance of equality of arms as an aspect of procedural fairness is given greater width in the context of inter-state disputes before the International Court of Justice (ICJ), its former president Shi Jiuyong professing that states are to be guaranteed equality of arms before the Court.[48] Absent an express reference to a right to a fair hearing within in its Statute and Rules of Court, several clauses remain as indicators of a requirement that parties be placed on an equal footing in their case preparation and presentation.[49] The ICJ has, accordingly, endeavoured to ensure equality of arms in contentious cases,[50] including *Military and Paramilitary Activities in and against Nicaragua*:

> …the Court has to emphasize that the equality of the parties to the dispute must remain the basic principle for the Court. …[N]either party should be placed at a disadvantage...
>
> …The Court is careful… to give each of them the same opportunities and chances to produce their evidence; …[it] regards it as essential to guarantee as perfect equality as possible between the parties.[51]

Nahimana (Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana) (Trial Chamber) ICTR-99-52-T (5 June 2003) [4].

[48] UN General Assembly, 'Report of the International Court of Justice: 1 August 2003–31 July 2004' 59th Session Supp No 4 UN Doc A/59/4 (2004) [288].

[49] ICJ Statute (adopted 26 June 1945, entered into force 24 October 1945) <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>: eg Arts 35(2) (conditions under which the Court is accessible to states not party to the Statute must not '...place the parties in a position of inequality before the Court.'); 39(3) ('The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.'); 42(2) (parties '…may have the assistance of counsel or advocates before the Court.'); 43(4) ('A certified copy of every document produced by one party shall be communicated to the other party.').

ICJ Rules of Court (adopted 14 April 1978, entered into force 1 July 1978, as amended 29 September 2005) <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>: eg Arts 56(3) (on production of a late document, '…the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.'); 57 ('…each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. …A copy of the communication shall also be furnished for transmission to the other party.'); 72 (any submissions or evidence by a party '…received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it.'); 76(3) (if a party requests revocation or modification of a provisional measures decision, '…the Court shall afford the parties an opportunity of presenting their observations on the subject.').

See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits: Judgement) [1986] ICJ Rep 14 [59]: 'The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties.'

[50] eg *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility: Judgement) [1994] ICJ Rep 112 [39]; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v France) *Case* (Order) [1995] ICJ Rep 288 [28]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia*) (Counter-Claims: Order) [1997] ICJ Rep 243 [42], 296 (Diss Op Vice-President Weeramantry); *Oil Platforms (Islamic Republic of Iran v US)* (Counter-Claim: Order) [1998] ICJ Rep 190 [45]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Order) [1999] ICJ Rep 983, 986.

[51] (n 49) [31], [59].

Similarly, the presence of a fundamental requirement for the ICJ to observe equality of arms in its binding advisory capacity has also been acknowledged. This was particularly evident when tasked with reviewing employment cases.[52] Accordingly, it opined that '[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal.'[53]

It is particularly interesting that the ICJ had recourse to 'general principles of law' as recognised in Article 38(1)(c) of its Statute in sourcing a legal basis for the concept of equality of arms. 'General principles' have been confirmed widely as representing doctrines underlying the international legal system and/or domestic law.[54] Prevalent articulation of the basic right to a fair trial on the international plane and in major national legal systems is indicative of its status as an accepted general principle of law.[55] Given that the concept of equality of arms is a cogent deduction from this right and fundamental to its effective realisation, it is plausible to afford the concept the same status.

This is not, however, to exclude the concept from possible customary norm status within the meaning of Article 38(1)(b) of the same statute ('general practice accepted as law') for there is considerable overlap between custom and general principles: '…customary practice may emerge from or be based on pre-existing "principles." *Mutatis mutandi*, customs, when consistently practiced, become "principles."'[56] Reflecting this article, the formation of international custom traditionally requires '…extensive and virtually uniform…' state practice accompanied by *opinio juris*: '…a belief that this practice is rendered obligatory by the existence of a rule of law requiring

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[52] eg *Judgements of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, 86: 'The principle of equality of the parties follows from the requirements of good administration of justice.'; *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166 [92]: Equality of arms is one of the '…well recognized…' criterions of procedural fairness; *Application for Review of Judgement No 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 325 [59]: '…elementary principles of judicial procedure…' include equality of arms.

[53] *Application for Review of Judgement No 158* (n 52) [36], [38] ('The Court is… concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court…').

[54] eg NK Hevener and SA Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978) 27 ICLQ 596, 602; MC Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Mich J Int'l L 768, 768, 771–772; B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 Aust YBIL 82, 102; MC Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Int'l L 235, 238–239; A Cassese, *International Law* (OUP, Oxford 2001) 86–88, 158; H Thirlway, 'The Sources of International Law' in MD Evans (ed), *International Law* (2nd edn OUP, Oxford 2006) 128.

[55] American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute, St Paul Minnesota 1987) vol 1, 28–29; Bassiouni 1993 (n 54) 265–286, 292; Cassese (n 54) 104; CJM Safferling, *Towards an International Criminal Procedure* (OUP, Oxford 2001) 27.

[56] Bassiouni 1990 (n 54) 801. For further acknowledgement of the overlap, see eg American Law Institute (n 55) 29; T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, Oxford 1989) 89; Simma and Alston (n 54) 102; Thirlway (n 54) 128.

it.'[57] Playing a supplementary role are multilateral conventions whose function extends to '…recording and defining rules deriving from custom, or indeed in developing them.'[58] The crystallization of the right to a fair trial into customary international law has recurrently been asserted, including by the ICTY and ICTR.[59] Neither of these tribunals are partnered with a treaty and, accordingly, principally apply custom in rendering judgement. Their express recognition of the concept of equality of arms, therefore, serves to evidence a belief that it is part of customary international law. As with general principles, it is the cogency of the deduction from the fair trial right that lends credence to this belief, in addition to the common acceptance of procedural equality in all the international tribunals mentioned hitherto and *in foro domestico*. Of course, one must accept that there will be instances of state conduct infringing upon this requirement of equality. This does not deny the requirement from acquiring customary status, providing a consistent pattern of infringements do not occur within a wide number of states. The establishment of a customary rule is not dependent upon absolute conformity thereto.[60] If, alternatively, one is to postulate that sufficient state practice and *opinio juris* endorsing procedural equality does not exist, the concept of equality of arms still remains suited to classification as a general principle of law: '…the concept of a "recognised" general principle seems to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated.'[61] Nevertheless, the view to be preferred tentatively is that the requisite *opinio juris* confirmed by state practice exists to confer customary status upon the concept of equality of arms. Beyond treaty law, therefore, this concept may be ascribed to both custom and general principles of law,[62] thereby imposing upon states not party to relevant treaties a legally binding obligation in international law to implement equality of arms in their judicial proceedings.

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[57] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Judgement) [1969] ICJ Rep 3 [74], [77].
[58] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgement) [1985] ICJ Rep 13 [27].
[59] eg *Prosecutor v Aleksovski* (Judgement) (Appeals Chamber) ICTY-95-14/1-A (24 March 2000) [104]; *Kayishema and Ruzindana* (n 47) [51]; American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute, St Paul Minnesota 1987) vol 2, 166–167; Meron (n 56) 96–97; H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Ga J Int'l & Comp L 287, 345–346.
[60] *Military and Paramilitary Activities* (n 49) [186].
[61] Simma and Alston (n 54) 102 in reference to American Branch of the International Law Association, Report of the Committee on the Formation of Customary International Law: 'The Role of State Practice in the Formation of Customary and *Jus Cogens* Norms of International Law' (19 January 1989) 10.
[62] S Negri, 'Equality of Arms—Guiding Light or Empty Shell?' in M Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, London 2007) 69–70.

D. THE FUNDAMENTAL ELEMENTS OF EQUALITY OF ARMS DEFINED

The definition of the concept of equality of arms provides a mandate for partially symmetrical procedural treatment of adversaries in the preparation and presentation of their cases. It exposes four fundamental elements requiring elaboration.

1. Opponents

The concept of equality of arms is by definition applicable only to opposing parties ('his opponent').

(a) Accused and the Prosecution

The prosecution and accused are predominantly the only parties to criminal proceedings. They are natural adversaries and occupy inherently unique positions in relation to each other. The role of the prosecution and its counsel is to assist the court in arriving at the objective truth and ensure the effective delivery of justice on behalf of society, rather than endeavouring merely to secure a conviction,[63] by prosecuting cases in which there is sufficient evidence, both in respect of admissibility and weight, to reasonably indicate that a conviction is more likely than not to ensue and when public interest considerations permit.[64] This evidence is the result of a joint enterprise between the prosecution and police. The opponent status of the prosecution not only

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[63] eg in the English legal system: *R v Puddick* (1865) 176 ER 662, 663 (Crompton J): '…counsel for the prosecution… are to regard themselves as ministers of justice, and not to struggle for a conviction…' (affirmed by Avory J in *R v Banks* [1916] 2 KB 621 (CCA) 623); S Rogers, 'The Ethics of Advocacy' (1899) 15 LQR 259, 259: Prosecuting counsel 'should regard himself not as a mere advocate for a party, striving to win a verdict, but as an assistant to the Court in… ascertaining the truth according to the law. He is… "a kind of minister of justice filling a *quasi*-judicial position."'; Bar Standards Board, 'Written Standards for the Conduct of Professional Work' (8th edn, 31 October 2004) <http://www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct/writtenstandardsfortheconductofprofessionalwork/> [10.1]: 'Prosecuting counsel should not attempt to obtain a conviction by all means at his command. He should not regard himself as appearing for a party. He should lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the Court on all matters of law applicable to the case.'; *Randall v The Queen* [2002] UKPC 19; [2002] WLR 2237 [10] (Lord Bingham): 'The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice…'; Crown Prosecution Service (CPS), 'The Code for Crown Prosecutors' (February 2010) <http://www.cps.gov.uk/publications/docs/code2010english.pdf> [2.4]: 'Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.'

In Germany: Criminal Procedure Code 1987 (as amended) (StPO) ss 160(2): Prosecutors '...shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that such evidence is taken the loss of which is to be feared.'; 296(2): Prosecuting counsel '...may also make use of [appellate remedies] for the accused's benefit.' Available at: G Dannemann (ed), Federal Ministry of Justice (tr) and L Schäfer (ed) (German Law Archive, 2001) <http://www.iuscomp.org/gla/statutes/StPO.htm>.

In France: Code of Criminal Procedure 1958 (as amended) Art 33: 'The public prosecutor… is free to make such oral submissions as it believes to be in the interest of justice.' Available at: Legifrance and JR Spencer (trs) (1 January 2006) <http://195.83.177.9/code/liste.phtml?lang=uk&c=34>.

[64] eg in England and Wales: CPS (n 63) [4.5]–[4.6], [4.10]–[4.11], [4.16]–[4.18]. In Germany: StPO (n 63) ss 152(2), 153(1), 153a(1), 153c(1)–(2), 153d(1), 153e(1), 203, 376.

derives from its capacity to prosecute criminal offences but also to discredit the merits of the case for the accused to an extent impacting upon the decision of the court. The accused, by contrast, is the non-state subject of the criminal action, hazarded involuntarily by the possible imposition of punitive measures, and his position is reactionary and effectively one of overt egoistic individualism; the pursuit of self-interest is his exclusive aim. His adversariness is exhibited in his dedication to frustrating by counterargument the prospects of success of his antagonist's cause, either through legal representation or pro se.

(b) Avocat Général or Similar Officer

Accused persons within civil law systems have argued before the Court that an opponent relationship can also exist at appellate level between themselves and an *avocat général* or his equivalent. An *avocat général* or similar officer in such cases is distinct from a conventional prosecutor, though remains affiliated with the prosecuting authority, and tasked with advising the court objectively on the law, in some jurisdictions with a view to ensuring the consistency of judicial precedent. *Delcourt v Belgium*[65] and *Borgers v Belgium*[66] evidence a marked evolution in the response of the Court to such officers. Both concerned an *avocat général* who had made submissions, without an opportunity of reply for the accused, that the appeal be dismissed and attended, without voting rights, the court's deliberations. An opponent relationship was not recognised in *Delcourt* where the Court regarded the *avocat général* merely as an independent and impartial adviser on the law and not concerned with establishment of guilt or innocence, a position not unfairly disadvantageous to the accused.[67] Also influential to the Court was that the challenged procedure formed part of a long-standing and unquestioned tradition.[68]

Whereas *Delcourt* attracted substantial criticism throughout the 1970s,[69] it was not until 1991 that an opportunity arose for the Court to reassess the procedure and depart from its earlier decision. In *Borgers*, the Court reaffirmed the objectivity of the *avocat général* but now considered that, by recommending that the appeal be dismissed, he became objectively speaking an

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[65] (n 30).
[66] (App 12005/86) (1991) Series A no 214-B.
[67] *Delcourt* (n 30) [33]–[35]. See further *Ofner and Hopfinger* (n 31) 704 where the EComHR did not view the *Generalprokurator* (Attorney-General) as an opponent as he merely stamped the report of the Judge-Rapporteur as 'agreed', an act not prejudicial to the accused. However, it observed that an inequality of arms may have occurred had the *Generalprokurator* attempted to influence the court's decision to the disadvantage of the accused without the latter being heard.
[68] *Delcourt* (n 30) [36].
[69] eg Comments, 'Human Rights—Equality of Arms—Presence of Attorney General at Deliberations of Belgian Court of Cassation Held Not Violative of Article 6(1) of the European Court of Human Rights: *Delcourt* Case' (1971) 4 NYU J Int'l L & Pol 124, 130–131, 133; KH Nadelmann, 'Due Process of Law before the European Court of Human Rights: The Secret Deliberation' (1972) 66 AJIL 509, 513–514, 517, 519, 522–524; M Cappelletti and JA Jolowicz, *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (Oceana, Dobbs Ferry NY 1975) 31 fn 54; SA Cohn, 'International Adjudication of Human Rights: A Survey of its Procedural and Some of its Substantive Holdings' (1977) 7 Ga J Int'l & Comp L 315, 377.

opponent and it was thus an inequality of arms for the accused not to have a right of response.[70] This procedural inequality was increased more so by the *avocat général's* participation in the deliberations which afforded him an additional opportunity to promote an opinion unfavourable to the accused.[71] An additional feature of the case was the importance attached to 'appearances'.[72] Recourse to appearances is associated predominantly with the requirement of an impartial tribunal and grounded in the maxim that '...justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[73] Objectively justified fears[74] could be generated as to the neutrality of a legal officer who makes submissions adverse to a party.[75] Whilst regard for appearances in this context has met both praise[76] and criticism,[77] the opponent status of the *avocat général* was certainly justified. Though he was objective, he was associated with the prosecuting authority and clearly expressed opposition to the defence whilst in a position to influence the court. He essentially assumed, or appeared to have assumed, a prosecutorial role. Also justified was the Court not exhibiting the reticence demonstrated in *Delcourt* to attach a status to the *avocat général* that conflicted with that afforded pursuant to long-established tradition. The Convention is, after all, a living instrument to be interpreted in the light of current conditions and domestically unquestioned traditions, however old, cannot justify non-compliance with the prevailing law.[78] Subsequent cases have also reinforced the fact that those assuming a quasi-judicial function are not necessarily immune from opponent status.[79]

One cannot but conclude, therefore, that an opponent of the accused in criminal proceedings may be defined as: one who is not judge, juror or witness[80] but is directly part of the prosecution

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[70] *Borgers* (n 66) [24], [26]–[27], [29].
[71] ibid [28].
[72] ibid [24], [29]. Subsequently, the Court has on several occasions mentioned that it will consider 'appearances' when assessing compliance with the concept of equality of arms: eg *Bulut* (n 1) [47]; *Josef Fischer* (n 1) [18]; *Lanz* (n 1) [57]; *Öcalan* (n 1) [140]; *Stadukhin v Russia* (App 6857/02) ECHR 18 October 2007 [28]; *Moiseyev v Russia* (App 62936/00) ECHR 9 October 2008 [203], [207]. It does not in practice, however, rely upon the mere appearance of an inequality but the presence of a substantive inequality to register an inequality of arms.
[73] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ). The maxim was first referred to in *Delcourt* (n 30) [31] and is linked to appearances and impartiality in several judgements: eg *De Cubber* (n 25) [26]; *Mežnarić v Croatia* (App 71615/01) ECHR 15 July 2005 [32]; *Olujić v Croatia* (App 22330/05) ECHR 5 February 2009 [63]; *Micallef v Malta* (App 17056/06) ECHR 15 October 2009 [98].
[74] For the purposes of the appearances doctrine, '[w]hat is decisive is whether the doubts raised by appearances can be held objectively justified.': *Brandstetter v Austria* (Apps 11170/84; 12876/87; 13468/87) (1991) Series A no 211 [44]; *Stoimenov v the former Yugoslav Republic of Macedonia* (App 17995/02) ECHR 5 April 2007 [40].
[75] *Kress v France* (App 39594/98) ECHR 2001-VI [81].
[76] eg Trechsel (n 37) 100; D Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 252.
[77] *Borgers* (n 66) Diss Ops Judges Cremona; Martens [3.3]–[3.9]; Storme [10]–[11]; *Kress* (n 75) Joint Partly Diss Op Judge Wildhaber and others [7]–[8], [13].
[78] *Kress* (n 75) [70].
[79] eg *Bulut* (n 1) [48]–[50]; *Reinhardt and Slimane-Kaïd v France* (Apps 23043/93; 22921/93) ECHR 1998-II [103], [105]; *Kress* (n 75) [81]–[83]; *Josef Fischer* (n 1) [21]–[22]; *Lanz* (n 1) [60], [64]; *APBP v France* (App 38436/97) ECHR 21 March 2002 [28]–[29].
[80] Judges and jurors are neutral decision-makers who are part of the court itself, and lay or expert witnesses are evidential sources called by opposing parties or court-appointed.

team or, like an *avocat général* or similar officer, is a party joined to the proceedings whose position or observations cannot be regarded as neutral.[81] Those falling within the latter category become allies of the prosecution if not already affiliated hierarchically with it.

2. Arms

The 'arms' aspect of the concept of equality of arms refers to the 'opportunity to present his case' component of the established definition.

Whereas the definition expressly mentions case presentation rather than preparation, the latter is implicit therein; trial advocacy and case preparation are natural and necessary bedfellows, hence its inclusion in this discussion. Effective preparation breeds an effective response to disputed facts and the delivery of convincing legal argument when facing an opponent at trial. This relationship is acknowledged by Article 6(3), the specific guarantees of which are intended to facilitate both case preparation and presentation.

'Opportunity', in the aforementioned extract from the definition, equates to procedural rights for it is the latter that generate the former. Procedural rights constitute the 'arms' that make available an 'opportunity' and medium for the parties to prepare their cases and participate proactively throughout the entire proceedings; law, facts and evidence provide the ammunition. Thus, '[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'[82] Incorporated within the term 'procedural rights' is access by the parties to the powers of the tribunal, including available remedies. Accordingly, for example, where the parties are permitted to apply for leave to appeal, this is to be regarded as a procedural right. The procedural rights awarded the defence enabling case preparation and presentation must, of course, comply with the

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The justices' clerk in the magistrates' court (England and Wales) also acts solely as part of the tribunal itself, hence is not an opponent: *Mort v UK* (App 44564/98) ECHR 2001-IX Pt B s 1(b) ('The Law'): 'There is no question of the justices' clerk enjoying any role in the proceedings independent of the justices, or in having any duty with regard to influencing a decision in any particular direction. In that respect, the clerk's position can be distinguished from officers such as the *procureur général*, *avocat général* or *commissaire du gouvernement*, who make submissions to the courts concerning their personal views on the outcome of particular cases.'

[81] A party may be joined to the proceedings without being a state representative. Amnesty International was granted leave to intervene fully in the proceedings concerning Pinochet before the former House of Lords, the latter dealing purely with points of law of general public importance. This intervener was thereby rendered an additional party to the proceedings, independent of the prosecuting authority. Its position, by virtue of its adverse interests to the merits of Pinochet's case, was that of an opponent: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* [2000] 1 AC 61 (HL); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL).

Intervention, nevertheless, is restricted. Affirming that the opposing parties in criminal proceedings are generally the prosecution and defence, the Divisional Court subsequently held that an overwhelming reason for intervention by an interested party would be required for leave to be granted in cases other than those which strictly concerned points of law, which might merit being handled differently: *Re Pinochet Ugarte (No 4)* [1999] All ER (D) 1371 (QB).

[82] *Williams v Twomey* 510 F2d 634, 640 (7th Cir 1975) (Wyzanski J).

standards of the Article 6 catalogue. The 'arms' element, therefore, harbours a simplistic significance. It indicates merely that the concept of equality of arms is applicable to procedural rights or opportunities designed for case preparation and presentation within a judicial decision-making scheme for opposing parties.

3. Equality

(a) Procedural Equality

The 'conditions that do not place him at a disadvantage vis-à-vis his opponent' feature of the definition of the concept of equality of arms introduces a comparative element questioning whether the procedural rights afforded a party to prepare and present his case were equal to those extended to his opponent. It is by virtue of this feature that the notion of 'equality' is fused with the abovementioned procedural 'arms' aspect of the definition, inferring equality of opportunity for case preparation and presentation. Implicit in equality is also the principle of reasonableness: the procedural scheme must be such that a reasonable man would adjudge the procedural rights to have been allocated to the parties in equal measure. Equality of arms, therefore, is a construct demanding that the procedural rights made available to parties to enable case preparation and presentation be preserved, as far as their respective roles permit, in a reasonably symmetrical balance to ensure equal treatment throughout the proceedings. To observe this balance de facto and de jure is to promote a relationship of reciprocity between the parties. In consequence of its manifestly procedural cast, the concept of equality of arms is concerned essentially with equality of procedural position before the court. It is a doctrine that attempts to redress the substantive inequality of the parties in view of the differences inherent in their roles and practical circumstances. The appellation 'equality of the parties' can thereupon be cited as a synonym for 'equality of arms'. The latter term, nevertheless, reflects more aptly the substance of the concept it designates, readily implying that the parties are to be equally armed to engage each other at trial, rather than equal per se, and should be favoured.

(b) Equality Distinguished

It is the condition of equality that distinguishes the concept of equality of arms from the principle from which it originally derives. It is an evolutionary development of the natural justice principle *audi alteram partem*, which calls for all parties to be given an opportunity to be heard before judgement is rendered. Fawcett, Nowak and Jackson predicate, unconvincingly, to equate

conceptually both principles.[83] Equality of arms, however, proves a wider and more sophisticated concept. It conveys that it is insufficient merely to hear the other side; the other side must be heard on equal terms.

Cheng, nonetheless, constructs a contrasting proposition, advancing that the rule *audi alteram partem* is a derivative of the requirement of equality of arms, the latter being a corollary of the right to an impartial tribunal.[84] It is difficult to discern any persuasive merit in his position. As aforementioned, the introduction of an 'equality' requirement in hearings represents a transition from the basic to the more sophisticated. To be heard on equal terms, one must first have the right to be heard. Accordingly, logic indicates that the principle to originate first was not equality of arms. The link presented between procedural equality and the impartiality of the tribunal is also defective. The former does not stem from the latter. The issue of impartiality is not a matter of 'process' but relates to improper influences upon the composition of the tribunal in the course of its establishment. A procedural inequality indicates that the process (preparatory, trial or appeal procedures), rather than the decision-maker, is biased unduly against the unequal party. The procedural relationship between the parties, rather than a party and decision-maker, is at issue.

Whereas also distinguishable is the concept of equality of arms from the adversarial procedure principle, a close relationship remains between them in criminal proceedings. It is thus useful first to be informed of this relationship. The right to adversarial argument is harboured implicitly in the Article 6(1) requirement of a fair hearing and entails that '…each party must in principle have the opportunity... to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.'[85] It is, essentially, a right of response and extends to submissions on points of procedure.[86] This does not, however, render it synonymous with the principle of *audi alteram partem*. It is a specific elaboration thereof because each party is also entitled to be cognizant of the information upon which the other relies in putting forward his case. It is, furthermore, a right that is feasibly reciprocal and, by nature, essential for case preparation and presentation. Accordingly, the adversarial principle is rightly oft-conceived as embraced within the umbrella concept of equality of arms.[87] Such was the case, for example, in

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[83] JES Fawcett, *The Application of the European Convention on Human Rights* (Clarendon, Oxford 1987) 154; Nowak (n 34) 246; JD Jackson, 'The Effect of Human Rights in Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 MLR 737, 751 fn 67.

[84] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, Cambridge 1993) 290–291.

[85] *Eskelinen and others v Finland* (App 43803/98) ECHR 8 August 2006 [31]. See also eg *Brandstetter* (n 74) [66]–[67]; *JJ v the Netherlands* (App 21351/93) ECHR 1998-II [43]; *Meftah and others v France* (Apps 32911/96; 35237/97; 34595/97) ECHR 2002-VII [51]; *Abbasov v Azerbaijan* (App 24271/05) ECHR 17 January 2008 [30].

[86] *Kamasinski v Austria* (App 9783/82) (1989) Series A no 168 [102]; *Edwards and Lewis v UK* (Apps 39647/98; 40461/98) ECHR 2004-X [46], [48].

[87] eg Fawcett (n 83) 154; P Plowden and K Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish, London 2002) 408; Doswald-Beck and Kolb (n 36) 144; E Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European

the Trial Chamber of the Special Court for Sierra Leone which considered that the 'effect' of the concept of equality of arms was to generate a right of the parties to respond.[88] Indeed, even in 1963, the Commission viewed the lack of an opportunity to respond to constitute an inequality of arms, though the term 'adversarial proceedings' or a similar characterisation ('adversarial trial'; 'adversarial argument') did not feature.[89] Such characterisation was first used by the Court in *Barberà, Messegué and Jabardo v Spain*[90] and the adversarial principle has been frequently accompanied thereafter by reference to the concept of equality of arms.[91] Indeed, the Court has observed that the adversarial principle is implied from the latter concept.[92] There is considerable overlap between them because a breach of the adversarial principle creates a detrimental imbalance or exacerbates an existing one between the parties. Amongst several cases illustrative to this effect is *Lanz v Austria*: '…a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent.'[93]

Despite this significant overlap, distinctions may be drawn between the adversarial and equality of arms principles. The former by definition offers greater specificity because it focuses solely on matters of disclosure and the opportunity to respond, whereas the applicability of the latter not only includes these aspects but also extends to a wider catalogue of procedural conditions in criminal proceedings. Whilst the adversarial principle is narrower in this sense, it is wider to the extent that, unlike the concept of equality of arms, its scope is not restricted to 'opponents' and the evidence they present. Its ambit encompasses any individual that presents evidence or files observations which may influence the outcome of the proceedings. This

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Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 HRQ 294, 296; Negri (n 39) 517; P van Dijk and M Viering, 'Right to a Fair and Public Hearing (Article 6)' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerpen 2006) 580–581.

[88] *Prosecutor v Norman et al* (CDF Case) (Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone) SCSL-04-14-PT (19 April 2004) text to fn 1.

See also eg *Delalic* (n 34) [47]: 'Very closely associated with the concept of equality of arms is the related concept of a judicial process, affectionately referred to as the right to have an adversarial trial.'; HRC (n 1) [13]: 'The principle of equality between parties... demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.'

[89] *Pataki and Dunshirn v Austria* (Apps 596/59; 789/60) (1963) 6 Yearbook 714 (EComHR) 732. Such characterisation eventually became the norm, eg *Belziuk v Poland* (App 23103/93) EComHR Report 26 February 1997 [39]: '...the principle of equality of arms... also includes the fundamental right that criminal proceedings should be adversarial.'

[90] (App 10590/83) (1988) Series A no 146 [78].

[91] eg *Jasper v UK* (App 27052/95) ECHR 16 February 2000 [51]; *Georgios Papageorgiou v Greece* (App 59506/00) ECHR 2003-VI [36]; *Laukkanen and Manninen v Finland* (App 50230/99) ECHR 3 February 2004 [34]; *Koval v Ukraine* (App 65550/01) ECHR 19 October 2006 [113]; *Sidorova (Adukevich) v Russia* (App 4537/04) ECHR 14 February 2008 [24].

[92] *Fretté v France* (App 36515/97) ECHR 2002-I [47]; *Zhuk v Ukraine* (App 45783/05) ECHR 21 October 2010 [25].

[93] (n 1) [62]. See also eg *Borgers* (n 66) [26]–[27]; *Bulut* (n 1) [49]–[50]; *Werner v Austria* (App 21835/93) ECHR 1997-VII [67] (civil); *Reinhardt and Slimane-Kaïd* (n 79) [103], [105]–[106]; *Kuopila v Finland* (App 27752/95) ECHR 27 April 2000 [38].

includes, for example, victims who are not witnesses[94] or a trial judge who authors a statement to a superior court disputing an accused's factual allegations.[95] In effect, therefore, the right to adversarial argument prevents non-adversaries from indirectly creating an undue imbalance which tilts proceedings in favour of the prosecution without fear of response from an accused. It is this distinguishing feature that renders the adversarial principle indispensable to Article 6(1).

(c) Degree of Equality

It is instructive to a greater understating of the degree of procedural equality insisted upon by the concept of equality of arms to outline and rebut criticism of the same in a US appeals case. *United States v Turkish*[96] explored the issue of equality of arms with respect to securing grants of 'use immunity' for defence witnesses, a procedural device providing that a reluctant witness asserting the privilege against self-incrimination can be compelled to respond but no use, direct or indirect, may be made of the compelled testimony or evidence derived therefrom in a subsequent prosecution against that individual.[97] Accordingly, an immunized witness remains adequately protected[98] in the absence of the self-incrimination privilege in exchange for the surrender of potentially incriminating but useful evidence which may be relied upon by the calling party. Use immunity could be conferred upon prospective prosecution witnesses who invoked their privilege against self-incrimination but was not accessible to the defence, thereby advantaging the prosecution in its ability to present its case and denying the accused an opportunity to possibly elicit truthful exculpatory evidence. The defence contended unsuccessfully that this unequal treatment of its witnesses was irreconcilable with the requirements of fair trial. The court maintained that a 'criminal prosecution… is in no sense a symmetrical proceeding.'[99] It reasoned

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[94] The accused should at the sentencing stage be entitled under the adversarial principle to respond to a victim statement (outlines physical, emotional and financial impact of crime) whether or not the victim appeared as a witness at trial.

[95] *Kamasinski* (n 86) [102]. See also *Nideröst-Huber v Switzerland* (App 18990/91) ECHR 1997-I [31] (civil) where the applicant was unable to inspect and comment on observations of a lower court which the Federal Court reproduced in its judgement.

Unlike in criminal cases, with some exceptions (*JJ* (n 85) [43]; *Meftah* (n 85) [51]–[52]; *Şahin Çağdaş v Turkey* (App 28137/02) ECHR 11 April 2006 [28]–[30]), the Court has not generally in civil cases pursued an approach based on equality of arms, by classifying an independent member of the national legal service as an opponent, but relied instead on the adversarial principle to find a breach of Article 6(1) when there was no opportunity to reply to his opinion: *Lobo Machado v Portugal* (App 15764/89) ECHR 1996-I [31]; *Vermeulen v Belgium* (App 19075/91) ECHR 1996-I [33]; *Van Orshoven v Belgium* (App 20122/92) ECHR 1997-III [41]–[42]; *KDB v the Netherlands* (App 21981/93) ECHR 1998-II [44]; *Göç v Turkey* (App 36590/97) ECHR 2002-V [55], [58]. An exception is *APEH Üldözötteinek Szövetsége and others v Hungary* (App 32367/96) ECHR 2000-X [42]–[44].

[96] 623 F2d 769 (2nd Cir 1980).

[97] 18 United States Code 2006 s 6002. Available at: Office of the Law Revision Counsel, US House of Representatives <http://uscode.house.gov/pdf/2004/2004usc18.pdf>.

[98] *Kastigar v United States* 406 US 441, 459 (1972) (Powell J): 'This protection coextensive with the privilege [against self-incrimination] is the degree of protection that the Constitution requires, and is all that the Constitution requires…'.

[99] *Turkish* (n 96) 774 (Newman J).

that the implementation of such a proceeding would involve the withdrawal of rights unique to the accused, thereby lowering the level of protection available to him, and imposing upon him the procedural burdens and restrictions assumed usually by the prosecution; an unfeasible proposition. Moreover, the court asserted that the public interest would not be served by extending to accused persons the powers of investigation and enforcement intrinsically at the disposal of the state.[100] It determined, therefore, that operating an asymmetrical procedure was the correct approach by which to secure a fair trial: '…in the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any particular procedural device.'[101]

This interpretation of the concept of equality of arms is certainly misguided. The true nature of the concept was not reflected accurately therein. The concept does not seek to equalize the material resources of the parties[102] or establish proceedings procedurally symmetrical *in toto* with equal procedural rights, obligations and constraints throughout. It is relative and proportionate rather than absolute equality that it seeks to achieve; '[e]quality of arms means equality "as far as possible".'[103] The realisation of fairness in criminal proceedings, by implication also an attempt to redress the natural advantages of the state, requires essentially a hybrid procedure involving the co-existence of degrees of symmetry and asymmetry. Indeed, the concept of equality of arms recognises that entirely procedurally symmetrical criminal proceedings would be inappropriate and impracticable in view of the naturally different roles of the parties and its scope of application is restricted accordingly.[104]

The consequence of the dissimilar positions of prosecution and defence is implicit acceptance within the Convention that a procedural scheme incorporating some asymmetric features, resulting in the different treatment of opposing parties, is necessary and remains consistent with the requirement of procedural fairness. Procedural asymmetry operates on the premise that non-reciprocal rights between prosecution and defence will counteract each other. The most significant advantage afforded the prosecution, acting in partnership with the police, is its exclusive access to the unrivalled investigative, evidence gathering and enforcement assets of the

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[100] ibid.

[101] ibid 774–775. Support for this analysis is provided by K Goldwasser, 'Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial' (1989) 102 Harv L Rev 808, 825–826: '…any argument that our criminal justice system equates fairness with symmetry would be… untenable. The system, adversary though it is, operates on the premise that fairness can be achieved only by recognizing the differences between prosecution and defence.'

[102] *Kayishema and Ruzindana* (n 47) [69]: '…equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources.'; *Prosecutor v Bagilishema* (Judgement) (Trial Chamber) ICTR-95-1A-T (7 June 2001) [14]: '…present human rights case law does not require that both parties in a case shall be granted the same level of material means and resources…'.

[103] *Korellis v Cyprus* (App 60804/00) ECHR 3 December 2002 ('The Law').

[104] Safferling (n 55) 265: 'Equality [of arms]… does not mean equity of powers and rights but rather the balancing of the powers and rights of each participant according to the specific differences in their procedural roles.'

state, which employs powers of, inter alia, interrogation, entry, search, surveillance and seizure. Consequently, it harbours a potent ability to assemble information adverse to the defence to substantiate a charge. Pragmatic considerations, nevertheless, tend against making these powers and resources available to accused persons. Conversely, certain shielding devices are the exclusive province of the accused, all of which are intended to mitigate the disparity of resources between the parties and/or are, by their very nature, unsuited to the role of the prosecution. Thus, for example, accused persons do not generally bear the burden of proof (presumption of innocence); are incompetent as witnesses for the prosecution; are not obliged to disclose inculpatory evidence, whereas the prosecution is bound ethically and legally to disclose exculpatory evidence; should have the benefit of an interpreter if unfamiliar with the language of the court; and are entitled to a trial within a reasonable time.

Consequently, the concept of equality of arms exists in conjunction with necessarily asymmetrical aspects of criminal proceedings and can thus be associated only with partial procedural symmetry. It has already been indicated that it is also associated only with procedural rights that are essential to the facilitation of the effective preparation and conduct of the case at hearing. Silver, accordingly, presses that the concept does not impact upon procedural rights that are naturally or necessarily non-reciprocal; only procedural rights that can feasibly and desirably be reciprocal and are a necessary means of enabling case preparation and/or presentation are situated within its remit.[105] This remit thereby extends to procedural possibilities including, for example and where jurisdictionally relevant, the right to: submit real evidence and written arguments; make oral representations to the judge regarding the admissibility of disputed evidence; present opening and closing speeches; challenge a juror on cause shown; and avail oneself of available judicial remedies. It would be unconvincing simply to contend that fairness does not require securing the enjoyment of these rights in equal measure for both parties. It is demonstrated in the following sub-section, however, that the remit is even broader than Silver suggests.

(d) Equality and Article 6(3) ECHR

The concept of equality of arms pervades and underlies the provisions of Article 6(3), *Jespers v Belgium* providing a vividly pertinent attestation thereto: 'It is, in order to establish equality, as far as possible, between the prosecution and the defence that... the "rights of the defence", of which Article 6, paragraph 3... gives a non-exhaustive list, have been instituted.'[106] The rights of Article

[105] JS Silver, 'Equality of Arms and the Adversarial Process: A New Constitutional Right' [1990] Wis L Rev 1007, 1039. He also advocates that the US Supreme Court should accord formal recognition to a new constitutional right to equality of arms: 1032, 1037, 1041.

[106] (App 8403/78) (1981) 27 DR 61 [55]. The overlap between the concept of equality of arms and Art 6(3) is also acknowledged widely in legal scholarship: eg B Byfield, 'The Right to a Fair Trial: Article 6 of the European Convention' in AD Byre and BY Byfield (eds), *International Human Rights Law in the Commonwealth*

6(3) are not merely those of the accused but also his representative.[107] The rights to adequate time and facilities, legal representation and to call and examine witnesses included therein certainly accord with Silver's proposition, they all being feasibly reciprocal and essential for case preparation and/or presentation. Yet, his proposition harbours a significant error: the remit he attributes to the concept of equality of arms is excessively restrictive and, in contrast to *Jespers*, results in the exclusion of the two remaining Article 6(3) rights to prompt notification of charge and an interpreter. To be informed of the accusation is necessary for preparation and presentation of effective and relevant arguments in response. The assistance of an interpreter capacitates the accused to communicate with the court and prosecuting authorities, and if necessary his own counsel, and understand the evidence and proceedings against him. Both rights are clearly essential to effective case preparation and presentation. Nonetheless, equivalent rights are not logically required by the prosecution, which is inherently familiar with the charge and language of the court. Therefore, the exclusion of these rights from Silver's proposition is grounded solely upon their non-reciprocal nature. The essence of procedural equality, however, does not merely represent qualified reciprocity. It seeks to remove disadvantage to secure equality of position and the rights to prompt notification of charge and an interpreter, for example, contribute to the realisation of this aim. Accordingly, and contrary to Silver's premise, it is possible for non-reciprocal rights necessary for case preparation and/or presentation to contribute to equality of standing before the court, thereby becoming encompassed within the equality of arms remit.

It is certainly a remit not exhausted by the rights of Article 6(3) for it encompasses all procedural rights throughout the proceedings that are conducive to its purpose. Also of importance is that the concept of equality of arms does not pose a restrictive influence over potential interpretations of Article 6(3) guarantees. Such an influence would merely serve to dilute the scope for dynamic, yet reasonable, interpretations which act as beacons for the evolution of domestic criminal justice systems to a higher standard of human rights protection. This appears to have been recognised by the Court and evidenced, for example, in its observation that the concept of equality of arms does not exhaust the content of Article 6(3)(d).[108] Thus, as with respect to the content of Article 6(1), the concept of equality of arms does not exhaust the content of any Article 6(3) guarantee. Nor does it always find itself referred to expressly in cases on Article 6(3); it is an underlying doctrine.

Caribbean (Martinus Nijhoff, Dordrecht 1991) 93; J Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (John Wiley & Sons, Chichester 1999) [9.38]; R Clayton and H Tomlinson, *Fair Trial Rights* (OUP, Oxford 2001) [11.208]; A Jennings, 'Fair Trial' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001) 154; JG Merrills and AH Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn Manchester UP, Manchester 2001) 119; Negri (n 62) 20; Harris and others (n 76) 251, 306.

[107] *Ofner v Austria* (App 524/59) (1960) 3 Yearbook 322 (EComHR) 352; *Ensslin, Baader and Raspe v Germany* (Apps 7572/76; 7586/76; 7587/76) (1978) 14 DR 91, 115.

[108] eg *Vidal* (n 28) [33]; *Solakov v the former Yugoslav Republic of Macedonia* (App 47023/99) ECHR 2001-X [57]; *Popov v Russia* (App 26853/04) ECHR 13 July 2006 [178].

4. Disadvantage

(a) Disadvantage Defined

The concept of equality of arms, as defined, requires the accused to have suffered a 'disadvantage' for an infringement to be registered. The inherent ambiguity in the term allows for two distinct and credible interpretations thereof. The first refers to unequivocal inequality: any procedural inequality is inherently disadvantageous, regardless of its actual or inevitable prejudicial effect. The second is discerned from Convention case-law as the interpretation actually applied in practice: 'disadvantage' equates predominantly to de facto prejudice but can, in some circumstances, also refer to inevitable prejudice. Accordingly, when proceedings are viewed in their entirety, a disadvantage is suffered if the procedural inequality actually or inevitably had an adverse and material effect on the defence case and thus influenced the reliability of the outcome. Yet, implicit in this prejudice proviso is that detriment occasioned by the inequality may be offset or overcome by other procedural safeguards,[109] thereby rendering the proceedings nevertheless fair. Thus, in essence, it is not the fact of undue asymmetrical treatment itself that will give rise to a violation but the actual or inevitable effect thereof within the context of the trial as a whole.

(b) Actual Prejudice

Treatment of 'disadvantage' as synonymous with actual prejudice predominates the approach of the Strasbourg organs to equality of arms. A requirement of prejudice has been applied also to Article 6 in general[110] and Trechsel seems to imply that it is the most natural interpretation of

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[109] *Matyjek v Poland* (App 38184/03) ECHR 24 April 2007 [55]: '…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…'. See also eg *Doorson v the Netherlands* (App 20524/92) ECHR 1996-II [72].

[110] eg Art 6(1): *Harper v UK* (App 11229/84) EComHR 10 November 1986 quoted in S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 44: 'Where the procedural flaw is not central to the notion of a fair hearing, as it would be in a situation where the defence was not allowed to put its case, a violation will only be registered if the shortcoming in question caused actual prejudice to the defence'; *Nielsen* (n 27) 550, 568: The applicant alleged that the court appointed expert witness made remarks at trial dealing in an inadmissible manner with his guilt. Although the EComHR considered the statements objectionable, it concluded that both the public prosecutor and the trial president significantly contributed to neutralising the influence of the remarks on the jury, resulting in a fair trial; *Campbell v UK* (App 12323/86) (1988) 57 DR 148, 155–156: EComHR considered that being handcuffed throughout an appeal hearing in which the accused represented himself did not hamper him from presenting adequately his submissions; *Stanford v UK* (App 16757/90) (1994) Series A no 282-A [24]–[25], [30], [32]: The applicant complained that the courtroom acoustics at trial were such that he was unable to hear evidence effectively therein. Admitting that he had encountered difficulties, the Court still maintained that the trial was fair on grounds, inter alia, that the applicant was represented ably and his representatives had the opportunity to discuss with him any evidential points arising.

'disadvantage'.[111] Application of the prejudice proviso in an equality of arms context was illustrated, for example, in *Kremzow v Austria*[112] where the Court confirmed that the applicant had encountered two instances of procedural inequality upon filing a plea of nullity before the Austrian Supreme Court. Whilst the applicant was required to introduce his submissions within

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Art 6(3)(b): *Köplinger v Austria* (App 1850/63) (1969) 12 Yearbook 438 (EComHR) 488: The applicant alleged that because of the seven changes in legal representation and their late appointment, they did not have the necessary time to prepare his defence effectively. The circumstances were not considered prejudicial and unlawful because the lawyer assisting the applicant at the decisive Regional Court stage was undisputedly provided adequate preparatory time and facilities, and the lawyer that prepared the appeal also represented him before the Supreme Court; *X v UK* (App 4042/69) (1970) 13 Yearbook 690 (EComHR) 696: '…whereas it is possibly true that the applicant met and instructed the lawyer who finally represented him only for ten minutes on the actual day of his trial… the applicant has failed to show that, as a result, he suffered any prejudice in his representation…'; *F v UK* (App 11058/84) (1986) 47 DR 230, 234–236: The applicant argued that he had been deprived of the right to privileged documents in the preparation of his defence as the documents had been seized and examined by police submitting evidence at trial. As use was not made of the documents at trial, the EComHR held that the hearing was fair, the applicant suffering no actual prejudice.

Art 6(3)(c): *Pobornikoff v Austria* (App 28501/95) ECHR 3 October 2000 [31], [33]: The applicant complained, inter alia, of his exclusion from an appeal against sentence in which the Supreme Court carried out an assessment of his personality and character. The ECtHR, taking into account that a possible reduction in sentence had been at stake, did not consider that the case could have been properly examined without gaining a personal impression of the applicant. Accordingly, the applicant's exclusion was prejudicial.

See further Harris and others (n 76) 204.

[111] Trechsel (n 37) 99: '…some sort of detrimental effect on the defence will have to be shown. This does not give cause for concern—after all, the very definition of the principle [of equality of arms] refers to the fact that the defence has suffered some type of "disadvantage".'

[112] (App 12350/86) (1993) Series A no 268-B. See also eg: *Kuopila* (n 93) [36]–[38]: The applicant complained that vital evidence had been submitted by the prosecution to the Court of Appeal without disclosure. This evidence was accompanied by a letter from the prosecutor communicating his view that it was not relevant for the outcome of the case. The Court considered that the prosecutor's opinion was intended to influence the Court and that the applicant should have been granted the opportunity to assess the relevance and weight of the evidence and submit comments. Consequently, the applicant was prejudiced in his ability to present his case and the principle of equality of arms breached; *Solakov* (n 108) [57], [59]–[62], [65]–[67]: The applicant first alleged that he had been unable to cross-examine witnesses in the US whose statements served as important grounds for his conviction. The Court observed that the applicant's lawyers had been summoned to the US but failed to take reasonable steps to attend the hearing and examine the witnesses, or request postponement to ensure their attendance. Moreover, at trial, the applicant did not register a complaint in this respect, request that the witnesses be summoned or contest the contents of their statements. The Court highlighted the fact that the domestic courts made a comprehensive and careful analysis of the witnesses' statements and examined corroborating evidence. In view of the circumstances of the trial as a whole, it was satisfied that the applicant was given an adequate and proper opportunity to present his defence unprejudiced. The applicant's second complaint related to his inability to obtain the attendance and examination of two defence witnesses. Having regard to the reasons cited by him for summoning these witnesses and the trial in its entirety, the Court found that the refusal to summon them did not restrict his defence rights to a prejudicial extent. Consequently, equality of arms was held to have been observed in respect of both complaints.

For the operation of the de facto prejudice proviso in the former EComHR, see also eg: *Ofner and Hopfinger* (n 30) 700–706: The EComHR, particularly Mr Castberg, in its assessment of whether there was an inequality of arms considered, inter alia, the position of the applicant at the outcome of the proceedings, specifically whether a *reformatio in peius* (to be placed in a worse position), a manifestation of actual prejudice, had occurred. There was held to be no such occurrence and equality of arms had been maintained; *U v Luxembourg* (App 10142/82) (1985) 42 DR 86, 96–97: The EComHR considered whether the fact that the prosecuting authorities had 30 days in which to enter an appeal whereas the applicant had only 10 days was contrary to the principle of equality of arms. The fundamental question, in its opinion, was whether, viewing the trial in its entirety, this inequality had a decisive influence on the proceedings. It declared the application inadmissible as the trial outcome could not be explained by the longer time granted to the prosecuting officer.

strict time-limits, no time-limit had been imposed on the submission of the Attorney-General's *croquis* (consultation document outlining his position), resulting in the former being given less time in advance of the hearing to formulate his counterarguments. Additionally, unlike the applicant, the Attorney-General's office was advised of the identity of the reporting judge, thereby divulging which chamber would deal eventually with the case. Holding that the time and facilities granted the applicant to prepare his response to the *croquis* were nevertheless adequate—three weeks and it was open to his lawyer to inspect it before its transmission—the Strasbourg Court did not consider the differences sufficient to prejudice the defence and overshadow the overall fairness of the proceedings, hence rejecting the applicant's complaint of inequality of arms.[113] The finding should not be construed as implying that all inequalities in themselves of inconsiderable import have no bearing on the fairness of the proceedings. Where more than one such example of inequality exists within a case, the firmly established trial as a whole approach ensures that it should be logical for the Court to consider not their individual effects but their cumulative effect.[114] This overall effect may be such as to effectively prevent the proper development of a party's case, rendering the inequalities, taken as a whole, prejudicial and accordingly upsetting procedural fairness.

An approach to equality of arms based upon a requirement of actual prejudice certainly meets the preference of states. They are more predisposed to accepting the unlawfulness of their conduct if it inflicts actual harm on the defence case and compromises the reliability of the outcome. Discerning actual harm naturally requires an examination of the entire proceedings, hence the application of the prejudice proviso is wholly consistent with the Court's ever present focus on the 'fairness of the trial as a whole'. This presents states with the opportunity, therefore, to offset the effect of inequalities with additional procedural safeguards before final judgement is reached and thus avoid registering an inequality of arms. The prejudice approach, accordingly, accepts that an affront to individual dignity occasioned by inequality can sometimes be compensated for. It is also an approach indicative of a balancing of interests between state and individual: where the material position of the defence is not affected by the inequality, the inequality is overlooked and the proceedings are still held fair but if a prejudicial effect is present, a finding is made in favour of the accused.

The prejudice proviso raises concerns from a defence perspective. It evidences tolerance of a degree of unequal treatment and the accompanying offense to the dignity of the individual. It can also in some cases present an especially challenging burden for the applicant to prove that such treatment had an adverse and material effect on the defence case and thus influenced the

[113] *Kremzow* (n 112) [48]–[50], [75].

[114] This proposition accords logically with the holistic approach adopted and aptly demonstrated in *Barberà, Messegué and Jabardo* (n 90) [68], [89], where the Court held that an array of procedural deficiencies, whilst individually not of decisive importance, could cumulatively render the trial, 'as a whole', violative of Art 6(1). Procedural shortcomings comprised: defendants being tried almost immediately after an overnight road transfer of over 600 km; a late and unexpected change in bench membership; the brevity of the trial; and crucial evidence not being adduced and discussed orally in the defendants' presence.

reliability of the outcome. This is particularly so if the state implemented remedial measures in an attempt to offset the inequality or the inequality is borderline prejudicial. The restricted competence of the Court heightens the challenge. It is not an appeal court of fourth instance; it is for domestic courts to establish the facts and apply and interpret their own substantive and procedural law.[115] Linking an inequality with prejudice requires inevitably some appraisal of the merits of both sides of the case as presented during the domestic proceedings. Such an appraisal by the Court would conflict with the fourth instance doctrine and, accordingly, it relies upon for guidance the pronouncements of higher domestic courts concerning the effect of the inequality in relation to the merits of the charge.[116] Consequently, the case for the state can become more forceful and any reasonable uncertainties are more likely to fall in its favour. A distribution of the burden of proof could mitigate the extent of the hurdle the applicant must overcome. If the Court reasonably speculates that, in the case circumstances, prejudice was likely, though not inevitable, the state should bear the burden of proving the absence thereof; alternatively, if the Court does not reasonably expect on the facts that the inequality could have prejudiced the applicant, the latter could be required to prove the link between the inequality and the alleged detriment to the defence case.[117]

(c) Inevitable Prejudice

A procedural inequality is in some circumstances such as to render prejudice arising therefrom manifestly inevitable. Only when it is not, such as is the situation in most cases, is proof of prejudice requisite. The Court has been willing to accept inevitable prejudice as synonymous with 'disadvantage', rather than requiring prejudice to be proven, in its treatment of certain inequalities relevant to the right to legal assistance in Article 6(3)(c).[118] Such was the case in *Artico v Italy*[119] where the Court considered it impracticable to prove indubitably that a lack of legally aided assistance before the Court of Cassation influenced the material position of the defence.[120] It consequently took the view that prejudice is intrinsic to the absence of legal aid when it appears plausible on the facts that the interests of justice demand counsel.[121] Prejudice has also been assumed where states have placed undue restrictions on counsel visits[122] or insisted unjustifiably that counsel-client consultations be conducted within the hearing of the authorities.[123] The same

[115] eg *GB v France* (App 44069/98) ECHR 2001-X [59]; *Gurepka v Ukraine* (App 61406/00) ECHR 6 September 2005 [45]; *FC Mretebi v Georgia* (App 38736/04) ECHR 31 July 2007 [31].
[116] Stavros (n 110) 45, 47.
[117] ibid 47–48, 186.
[118] Ch 5 Pts D s (1)(b), F–G.
[119] (App 6694/74) (1980) Series A no 37.
[120] ibid [35].
[121] ibid [35], [37].
[122] Ch 5 Pt F.
[123] ibid.

is further evident when an accused suffers ineffective legal assistance attributable to the state.[124] One cannot but conclude that certain undue interference with the right to legal assistance or the absence of effective legal assistance will engender a disadvantage vis-à-vis the prosecution impacting upon many or all aspects of the proceedings, and thus the outcome thereof. Such interference or ineffectiveness is inevitably prejudicial because it prevents an adequate representation of the defence case. Equality of arms is certainly a stronger concept when the applicant need not prove the inequality occasioned actual prejudice, particularly in instances where it is impracticable to do so. Given that the actual prejudice proviso dominates the approach of the Court to equality of arms, its acceptance of inevitable prejudice in some scenarios as tantamount to 'disadvantage' is progressive.

(d) Unequivocal Inequality

Even more progressive is to interpret 'disadvantage' as unequivocal inequality, which forgoes any consideration of either actual or inevitable prejudice. Under this interpretation, it is the fact of a procedural inequality in itself that is sufficient to cause an inequality of arms.

An approach based on unequivocal inequality is lent deceptive authority in a sentiment expressed in some cases: '…the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality.'[125] However, the illusory quality to the sentiment is evident in the link between the rationale of the judgements and the de facto prejudice proviso. The cases concerned the submission of written observations by the state authorities to the courts without communication to the applicants.[126] The sentiment is directed specifically to the contents of the observations, indicating that they are not a decisive factor in finding a violation of the concept of equality of arms; the contents are further to the actual inequality. The decisive element of inequality was that the authorities had the benefit of an additional opportunity to assert their position and influence the outcome without possibility of a response from the applicants that may have been material, the latter thereby suffering a prejudicial inequality.[127] The approach evidenced in practice in these cases is, therefore, consistent with the requirement of actual prejudice.

Despite this eventual reliance on the prejudice proviso, it remains valid textually to interpret 'disadvantage' as unqualified inequality. To do so is acutely dignitarian, whereby any inequality is an affront to the dignity of the affected party and thereby a violation. Minor inequalities clearly not impacting on the outcome would still register a breach. To reject an unequivocal equality based approach is to hold as acceptable some inequalities beyond that which are necessary by

[124] Ch 5 Pt G.
[125] *Bulut* (n 1) [49]; *APEH* (n 95) [42]; *Josef Fischer* (n 1) [19]; *Lanz* (n 1) [58].
[126] Ch 4 Pt D s 2(b)(ii).
[127] *Bulut* (n 1) [49]–[50]; *APEH* (n 95) [42]–[44]; *Josef Fischer* (n 1) [19], [21]–[22]; *Lanz* (n 1) [58], [60], [62]–[64].

virtue of the roles of the opposing parties. Such inequalities in the 'arms' available to the parties offends against an intuitive sense of fair contest between them, regardless of outcome. Accordingly, unequivocal equality bestows the accused with a degree of protection far surpassing that of the prejudice approach, the latter restricting inherently the potential applicability of the concept of equality of arms. Though he acknowledges the dominance of the prejudice proviso within Strasbourg case-law, the unequivocal inequality approach is favoured by Stavros.[128] If such an approach were applied, however, it would certainly not contribute to acquiring the continual consent of Member States to the Convention, upon which the instrument's sustainability relies. The Convention was devised as a base and subsidiary (to domestic legal systems) rather than idealist and inflexible standard to uphold. States would feel aggrieved if their conduct was highlighted adversely on the international stage and they were compelled to amend existing rules of procedure, even though the inequality at issue, particularly if minor, did not occasion an actual miscarriage of justice. Yet, the concept of equality of arms is more than about avoiding miscarriages of justice. If it is to realise its full intrinsic value and seriously safeguard the dignity of the individual, 'disadvantage' must equate to unequivocal inequality. Whilst this may appear idealistic, it is not an unrealistic standard of equality for states to uphold in most cases. This dignitarian interpretation of 'disadvantage', it is submitted, should be preferred in most instances to that applied by the Court in practice requiring actual or inevitable prejudice.

(e) Substantial Disadvantage

Several judgements incorporate the standard definition of the concept of equality of arms but with the exception that the reference to 'disadvantage' is immediately preceded by the term 'substantial'.[129] 'Substantial disadvantage' certainly suggests a requirement of prejudice to find an inequality of arms, as opposed to relying simply on any inequality in itself. The use of 'substantial' in some judgements, fortunately, does not expose the operation in practice of two severities of prejudice in criminal proceedings. The distinction has not attracted judicial comment and appears to be purely illusory and without practical ramifications.[130] If a requirement to demonstrate substantial prejudice in order to register a violation was applied in practice, it would imply simply that some procedural inequality affecting the outcome of a trial, albeit to a lesser extent than substantially, is excusable. Such a consequence would pose a complete affront to the spirit of

[128] Stavros (n 110) 53: 'It is suggested… that the principle of the equality of arms goes to the heart of the right to be heard and that prejudice should be normally seen as inherent in the breach of this principle…'.
[129] eg *Coëme and others v Belgium* (App 32492/96 et seq) ECHR 2000-VII [102]; *GB* (n 115) [58]; *MS v Finland* (App 46601/99) ECHR 22 March 2005 [30]; *Klimentyev v Russia* (App 46503/99) ECHR 16 November 2006 [95]; *Matyjek v Poland* (n 109) [55]. The definition was similarly specified by the EComHR in *Struppat v Germany* (App 2804/66) (1968) 27 CD 61, 73 and *Kaufman v Belgium* (App 10938/84) (1986) 50 DR 98, 115 (civil cases making reference also to criminal proceedings).
[130] Trechsel (n 37) 97 highlights *Lanz* (n 1) [57] in which the Court omitted 'substantial' from the definition of equality of arms but cited as authority *Dombo Beheer BV* (n 31), a case in which 'substantial' was used.

fairness inherent in the concept of equality of arms and the integrity of any conviction. Given that the Convention is a 'living instrument',[131] adapting to societal development, it is reasonable that definitions are subject to evolutionary modification. However, where a modification has no practical relevance, it should be avoided in favour of previous consistency. Accordingly, the omission of 'substantial' from the Strasbourg definition would constitute a welcome development in future jurisprudence.

(f) Shared Deprivation of a Procedural Right: No Disadvantage

Discerning a disadvantageous procedural position for the purposes of equality of arms is an inherently contrastive exercise; a disadvantage cannot exist in the absence of an undue contrast between the parties. Accordingly, if parties A and B are both denied the opportunity to exercise the same procedural right, they are in theory treated equally and their positions in this respect cannot be contrasted; a position of disadvantage is thereby absent. Strasbourg proceedings have often given rise to cases in which prosecution and defence were jointly deprived of a particular procedural right and a disadvantageous position was consequently found lacking, rendering, by definition, equality of arms a concept that cannot be relied upon by an applicant in such circumstances. Many of these cases concern the right to be represented at leave to appeal or appeal proceedings. Echoing the approach of the Commission,[132] the Court in *Monnell and Morris v UK*[133] and *Ekbatani v Sweden*,[134] for example, found that the concept of equality of arms was respected at appellate level because the presence of both prosecution and defence was not permitted. This approach has been applied also with respect to an evidential concern. Whereas the defence alleged it had been disadvantaged because the product of a telephone intercept had not been disclosed to it in *Jasper v UK*, the Court held procedural equality to have been realised as both prosecution and defence were prohibited from adducing the evidence in question.[135] The civil arena also provides a further illustrative window on the relative character of equality and its impact on detecting disadvantage. In *Nideröst-Huber v Switzerland*,[136] the applicant complained that the observations of a lower court calling for the dismissal of his case had been communicated to the Federal Court at appeal but not to him. The concept of equality of arms was not considered infringed because the observations were also not communicated to the respondent.[137] Similarly, in *Krčmář and others v the Czech Republic*, there was no disadvantage because the documentary

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[131] *Tyrer v UK* (App 5856/72) (1978) Series A no 26 [31].
[132] eg *X v Germany* (App 3139/67) (1968) 26 CD 77, 78–79; *X v UK* (App 5871/72) (1974) 1 DR 54, 54; *X v UK* (App 7413/76) (1977) 9 DR 100, 100–101; *Brown v UK* (App 11129/84) (1985) 42 DR 269, 271–272.
[133] (n 30) [62].
[134] (n 30) [30].
[135] (n 91) [57].
[136] (n 95).
[137] *Nideröst-Huber* (n 95) [23].

evidence in issue, gathered by the appeal court on its own initiative, was not sent to either of the litigating parties.[138]

Criticism has, however, been levelled at the approach taken in all aforementioned judgements. Denouncing this approach as 'erroneous' and 'procedural equality at the lowest level', Stavros rightly asserts that a 'right that might appear dispensable for the prosecution could be of fundamental importance to the defence.'[139] In such an event, the prosecution case can still find itself advantaged and this should be taken into account whenever the Court assesses whether the accused was placed on an equal footing. Nevertheless, if both parties are deprived of the same procedural right necessary for case preparation or presentation, possible relief resides within the Convention for the accused. The concept of equality of arms represents only a single component of the fair trial guarantee. Accordingly, observance of procedural equality does not preclude the finding of a breach of another fundamental fair trial privilege in the alternative. Such was evidenced, for instance, in *MS v Finland*[140] where the applicant had alleged an inequality of arms because an adverse letter was submitted to the appeal court without communication to him. As the prosecution was also not privy to it, the Court did not consider procedural equality to have been compromised.[141] Instead, acknowledging that the letter was capable of influencing the appellate decision, it held the fair trial guarantee to have been violated by relying on the accused's right to be aware of and comment on all evidence submitted with a view to influencing the decision-maker(s).[142]

(g) The Disadvantaged Prosecutor

A strictly notional view of equality of arms would seem to suggest that a 'disadvantage' within an adjudicatory scheme could relate not only to the position of the accused but applies also to inequalities incurred by the prosecution. Indeed, the very definition of the concept of equality of arms from Strasbourg refers to 'each party' being afforded a reasonable opportunity to present his case under non-disadvantageous conditions, relative to his opponent. Beyond this definition, the Court has oft-termed its evaluation of cases in such a way as to give the appearance that neither party should suffer disadvantage. In *Ekbatani*, for instance, it commented that: 'It is true that the Court of Appeal observed the principle of "equality of arms". In particular, neither Mr. Ekbatani nor the prosecutor was allowed to appear in person before it and both were given equal

[138] (App 35376/97) ECHR 3 March 2000 [39].
[139] Stavros (n 110) 53–54.
[140] (n 129).
[141] *MS* (n 129) [31].
[142] ibid [32]–[34], [36]–[37].

opportunities to present their cases in writing.'[143] In *Barberà, Messegué and Jabardo*, the Court observed that Article 6(3)(d) '…entails equal treatment of the prosecution and the defence…'.[144]

The inclusion of the prosecution as a potential object of an inequality has also been expressed by the ICTY. The Trial Chamber in *Prosecutor v Delalic* pronounced that: '…procedural equality means what it says, equality between the Prosecution and the Defence. …[A]n inclination in favour of the Defence is tantamount to a procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms.'[145] The Appeals Chamber reinforced this position in *Prosecutor v Aleksovski*, maintaining that equality of arms cannot be realised where the accused is favoured, beyond observance of his fundamental protections, to the disadvantage of the prosecution.[146] It found the same in *Tadić* relying on Convention jurisprudence: '…equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.'[147] This stance recognises that trials are arenas not only for an accused, but also for the interests of the community; as the community is represented by prosecutors, the latter are deserving of even-handed treatment in their case presentation,[148] insofar as their role permits. In *Delalic*, for example, the disadvantage was expressed as an unreasonable pre-trial failure to disclose to the prosecution the list of defence witnesses.[149] It makes conceptual sense, therefore, that procedural equality should not be solely the protective preserve of accused persons.

Whilst this may be accepted in theory by the European Court, an inherent restriction on its competence prevents it from applying in practice the principle of equality of arms to a disadvantaged prosecutor. The prosecution, as an instrument of state machinery, cannot claim to be the victim of a violation under Article 34.[150] In criminal proceedings, therefore, the Court is competent to redress a procedural imbalance only for accused persons. Interestingly, Judge Vohrah, relying on the actual practice of the European Court, expounded that the concept of equality of arms in the ICTY '…should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case… to preclude any injustice against the accused.'[151] He seems to apply the practical restriction imposed on the European Court to the ICTY but fails to acknowledge that the Tribunal was devised, in part, to assist both parties in the

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[143] (n 30) [30].
[144] (n 90) [78].
[145] (n 34) [49].
[146] (Decision on Prosecutor's Appeal on Admissibility of Evidence) ICTY-95-14/1 (16 February 1999) [25].
[147] (n 43) [48], [52]. See also eg *Milutinović* (n 44) [24]: 'The principle of equality of arms would be violated only if either party is put at a disadvantage when presenting its case.'; *Halilović* (n 44) [8]: '…the principle of "equality of arms" should be interpreted in favour of both parties and not only in favour of the accused…'.
[148] *Aleksovski* (n 146) [25]; *Halilović* (n 44) [8].
[149] (n 34) [49].
[150] 'The Court may receive applications from any person, *non-governmental organization* or group of individuals claiming to be the victim of a violation…' (emphasis added).
[151] *Prosecutor v Tadić* (Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements) (Trial Chamber) ICTY-94-1 (27 November 1996).

preparation of their cases,[152] the prosecution not being the organ of any state. Consequently, unlike the European Court, the ICTY is competent to ensure that the prosecution suffers no disadvantage. Therefore, despite the view of Judge Vohrah, it remains that the concept of equality of arms is applicable notionally in criminal proceedings to the position of the prosecution but is enforceable, in this particular respect, only in fair trial regimes not devised exclusively to uphold the rights of the accused.

E. CONCLUSION

This discussion set out to offer a thorough theoretical insight on the concept of equality of arms within a criminal context under Article 6.

The contribution of this concept to a fair adjudication stems predominantly from its instrumental and intrinsic value. Its instrumental value lies in rendering more likely a correct trial outcome. Its intrinsic value is manifested in its respect for the dignity of the accused, allowing him to feel like a meaningful participant in proceedings which will decide his fate. It is this value rather than the former that offers the most important justification for securing procedural equality. Jointly, these values generate a collateral value of equality of arms: procedural legitimacy.

A contemporary legal basis for the concept of equality of arms exists in Article 6 and wider international law. Despite the lack of an express reference to the concept in Article 6, it is a well-established implied element of the Article 6(1) 'fair hearing' requirement and can apply to all stages of the proceedings. The concept is further accepted as an element of procedural fairness in international law by other human rights tribunals, ad hoc criminal tribunals and the ICJ. Indeed, it may also be considered both a general principle of law and part of customary international law.

The well-established Strasbourg definition of equality of arms has four fundamental elements which were elaborated upon in the above discussion to elucidate the nature of the concept.

Equality of arms as defined is applicable only to opposing parties. The opponent of the accused is predominantly the conventional prosecutor. The Court in *Borgers*, however, justifiably opened the door to opponent status being distributed more widely to avert procedural disadvantage. Rather than succumb to the influence of old-established national traditions, the Court relied on both an appearance of and actual lack of neutrality to establish opponent status for an individual not directly part of the prosecution team. Accordingly, a party joined to the proceedings, such as an *avocat général* or similar quasi-judicial officer, whose position or

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[152] *Tadić* (n 43) [52]: '…the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.' See also ICTY Rules of Evidence and Procedure (adopted 11 February 1994, entered into force 14 March 1994, as amended 8 December 2010) UN Doc IT/32/Rev.45 (2010) Rule 54: 'At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.'

observations cannot be regarded as neutral can attract opponent status. It is thus that '[t]he principle of equality of arms has required civil law countries to make a sharper differentiation between those exercising judicial functions and those exercising "party" functions.'[153]

The 'arms' element of equality of arms relates to the 'opportunity to present his case' aspect of the established definition. It is implicit that this 'opportunity' refers also to case preparation, for it is a natural and necessary precursor to case presentation. 'Opportunity', whether in the context of case preparation or presentation, equates to procedural rights (arms). Equality of arms, therefore, concerns procedural rights formulated to afford parties an opportunity for case preparation and presentation in judicial proceedings.

The 'conditions that do not place him at a disadvantage vis-à-vis his opponent' component of the definition represents the requirement for 'equality' in the parties' procedural opportunities, as far as their respective roles permit, to prepare and present their cases. This requirement is an evolutionary development of the principle of *audi alteram partem* and not a corollary of the right to an impartial tribunal. It also embraces the adversarial principle, though the latter can be applied additionally to non-opponents. The degree of procedural equality called for does not involve criminal proceedings that are procedurally symmetrical *in toto*, for this would be inappropriate and impracticable given the naturally dissimilar roles of the parties; it calls only for partial procedural symmetry. The content of this partial symmetry is not restricted only to procedural rights that can feasibly and desirably be reciprocal. Non-reciprocal rights—those not logically required by the prosecution—necessary for case preparation and/or presentation, such as the rights to prompt notification of charge and an interpreter, can also be encompassed within the equality of arms remit since they are intended to remove disadvantage. Article 6(3) contains reciprocal and non-reciprocal rights intended to establish procedural equality between prosecution and defence. The concept of equality of arms thus underlies these rights, albeit the nexus is not referred to expressly in every Article 6(3) case.

The fourth fundamental element of the definition of equality of arms is the requirement that the the accused have suffered 'disadvantage' for a violation to be registered. In some cases, the term is prefixed with the word 'substantial' but this has no practical relevance and should be omitted in future jurisprudence. Strictly notionally, 'disadvantage' can refer to an inequality of arms also suffered by the prosecution but this is not enforceable under the competence of the Court. Two possible interpretations of 'disadvantage' exist.

The interpretation actually applied in practice is that the term equates predominantly to de facto prejudice but can, in some circumstances, also refer to inevitable prejudice. Thus, a disadvantage occurs if the procedural inequality actually or inevitably had an adverse and material effect on the defence case and, in turn, influenced the reliability of the outcome. This interpretation is consistent with the Strasbourg emphasis on considering the proceedings as a

[153] Jackson (n 83) 757.

whole and accords states the opportunity to offset, through additional procedural safeguards, the effect of inequalities to prevent them becoming prejudicial and registering an inequality of arms. A requirement of actual prejudice not only evidences tolerance of some undue inequality, but also presents applicants with a sometimes especially challenging burden of proving causation. Moreover, reasonable uncertainties over causation are more likely to fall in favour of states given the restraints on the Court from the fourth instance doctrine. It is submitted that applicants should only be required to bear the burden of proof in cases where the Court does not reasonably expect on the facts that the inequality could have been prejudicial. In respect of certain inequalities concerning Article 6(3)(c), however, the Court has taken a progressive approach and accepted that prejudice was manifestly inevitable and not required proof of causation.

The second interpretation of 'disadvantage' is that any procedural inequality is in itself disadvantageous, regardless of prejudicial effect. This is acutely dignitarian and offers the accused a much greater level of protection than the above interpretation without being an unfeasible standard to uphold in most cases and should be preferred.

Irrespective of the aforementioned interpretations, a 'disadvantage' is not registered at Strasbourg if prosecution and defence are jointly deprived of the procedural right at issue. However, this can still advantage the prosecution if the right is more important to the defence, a consequence the Court should take into account. Nevertheless, a practicable solution for applicants is to pray in aid that the deprivation is inconsistent with another fair trial right.

The insight into the concept of equality of arms offered herein should be kept in mind throughout Chapters 3–5. These chapters rely on Article 6(3) as the context in which to illustrate and assess the Court's approach to the concept in practice. This approach is predominated by the application of a requirement to demonstrate actual or inevitable prejudice. Although all of Article 6(3) is intended to secure procedural equality, only the rights in sub-paragraphs (b)–(d) are presented in subsequent chapters. They are prioritised because the range and depth of issues arising therefrom cut right to the heart of the Strasbourg approach to the equality of arms doctrine under Article 6, thus are the most opportune for an interesting, well-informed and accurate discussion. Of these rights, Article 6(3)(d) is the first discussed hereafter.

3

EQUALITY OF ARMS AND THE RIGHT TO CHALLENGE AND CALL WITNESS EVIDENCE

A. INTRODUCTION

A failure to challenge adverse witness evidence is tantamount to tacit acceptance of such evidence as truth. It is imperative, therefore, that opportunity exists for such evidence to be tested and favourable witness evidence admitted. To this effect, Article 6(3)(d) grants the accused in criminal proceedings the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

This chapter considers the Court's approach to equality of arms in the light of Article 6(3)(d). The requirement in the latter of equal conditions is one of several aspects evidencing a strong nexus with the concept of equality of arms and this relationship is explained in Part B. Identified in Parts C and D are those who fall into the category of witness or examiner respectively as Article 6(3)(d) provides no express definition thereof. With such terms defined, analysis of the right to question adverse witnesses predominates the remainder of the chapter for this component of Article 6(3)(d) engages the foremost attention of the Court. This analysis begins in Part E by outlining an examination model that is a benchmark of compliance with Article 6(3)(d) and serves as a point of reference for the subsequent discussion on derogations therefrom. The Court accepts that this model may be legitimately derogated from in exceptional cases without occasioning a violation. It has done so principally out of concern for the safety and well-being of victims and witnesses and their ability to testify freely,[1] an interest now acknowledged widely as one of those to be accommodated in criminal proceedings.[2] The Court must, therefore, balance a

[1] Derogation can be legitimate also on purely practical grounds, eg where the witness is deceased or untraceable at the time of trial but has provided a statement beforehand.

[2] eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 Art 13: 'Each State Party shall ensure that... the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.'

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted 29 November 1985) UNGA Res 40/34 Annex 40 GAOR Supp (No 53) 214 UN Doc A/40/53 (1985) Principle 6(d): 'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation'.

'triangulation of interests' between the accused, the prosecution (representing the societal interest in the administration of justice), and victims and witnesses.[3] Whereas victims and adverse witnesses are not opponents as defined in the concept of equality of arms,[4] the accommodation of their interests can place the prosecution, which relies upon their testimony, in a position of procedural advantage over the accused. Part F, accordingly, discusses the Court's approach to the concept of equality of arms within the context of derogations from the benchmark examination model. Therein, witnesses for whom derogations have been made are separated into three categories: absent, anonymous and vulnerable (child victims in sexual offence prosecutions). Having considered the first component of Article 6(3)(d), Part G focuses thereafter on the accompanying but less jurisprudentially prominent right to call witness evidence under the same conditions as the prosecution.

Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993, as amended 7 July 2009) <http://www.icty.org/sid/135> Arts 20(1) ('The Trial Chambers shall ensure that... proceedings are conducted... with... due regard for the protection of victims and witnesses.'), 22.

International Criminal Tribunal for Rwanda Rules of Procedure and Evidence (adopted 29 June 1995, as amended 1 October 2009) <http://www.unictr.org/tabid/95/default.aspx> Rule 69(A): '...either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk...'.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 Art 68; Rules of Procedure and Evidence of the International Criminal Court (adopted and entered into force 9 September 2002) <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm> Rules 86 ('A Chamber in making any direction or order... shall take into account the needs of all victims and witnesses...'), 87–88.

R v DJX (1990) 91 Cr App R 36 (CA) 40 (Lord Lane CJ): 'The learned judge has the duty... to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses.'; *Prosecutor v Tadić* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) (Trial Chamber) (ICTY-94-1) 10 August 1995 [55]: 'A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses.'

Recommendation No R (85) 11: The Position of the Victim in the Framework of Criminal Law and Procedure (adopted by Committee of Ministers 28 June 1985) (Council of Europe, Strasbourg 1985) [8] ('At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity.'), [16] ('...especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender'); Recommendation No R (97) 13: Intimidation of Witnesses and the Rights of the Defence (adopted by Committee of Ministers 10 September 1997) (Council of Europe, Strasbourg 1998) Explanatory Memorandum [49]: '...State's duty to provide effective measures to protect the witness, with a view to ensuring that he can testify in security.'

L Ellison, *The Adversarial Process and the Vulnerable Witness* (OUP, Oxford 2001) 65: 'Traditionally, the interests of witnesses have not been balanced against the rights of defendants to a fair trial but have been marginalized, the relationship between the state and the offender dominating all aspects of the criminal process. The proposition that the scope of fair trial rights can be assessed without reference to the rights and legitimate expectations of those who testify as witnesses... is, however, no longer tenable.'; J Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 Legal Stud 1, 2–3, 6–10.

[3] *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 [38] (Lord Steyn).

[4] Ch 2 text to n 80.

B. THE NEXUS BETWEEN EQUALITY OF ARMS AND ARTICLE 6(3)(D)

Article 6(3)(d) is a specific manifestation of the concept of equality of arms. Amongst the individual guarantees of Article 6(3), it is the language of sub-paragraph (d), granting the accused a right to summon and examine witnesses 'under the same conditions' as the prosecution, which bears the closest resemblance to the Court's definition of equality of arms. Aside from this particular resemblance, the nexus can be discerned at a legal and conceptual level.

1. Legal Nexus

Authoritative statements establish that the link between Article 6(3)(d) and the concept of equality of arms is accepted in law. The article was first linked to procedural equality by the architects of the Convention in its drafting stages: 'The purpose of this paragraph is to place the accused on a footing of equality with the public prosecutor, as regards the hearing of witnesses.'[5] This connection was reaffirmed by the former Commission[6] and has been consistently reflected in the Court's jurisprudence: 'Its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter.'[7] Similarly, the Human Rights Committee has advanced that the concept of equality of arms lies at the heart of the equivalent Article 14(3)(e) in the International Covenant on Civil and Political Rights: 'As an application of the principle of equality of arms, this guarantee… guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.'[8]

The nexus between Article 6(3)(d) and procedural equality is made possible in the law of the Convention because both are aspects of the Article 6(1) fair hearing requirement. Accordingly, in

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[5] 'Text of the Report Submitted by the Conference to the Committee of Ministers' (16 March 1950) Doc CM/WP 4 (50) 19; CM/WP 4 (50) 16 rev; A 1431 reprinted in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff, The Hague 1977) vol 4, 242, 262.

[6] eg *Austria v Italy* (App 788/60) (1961) 4 Yearbook 116 (EComHR) 172; *X v Belgium* (App 1134/61) (1961) 4 Yearbook 378 (EComHR) 382; *Wiechert v Germany* (App 1404/62) (1964) 7 Yearbook 104 (EComHR) 110, 112; *X v Austria* (App 4428/70) (1972) 40 CD 1, 8.

[7] *Engel and others v the Netherlands* (App 5100/71 et seq) (1976) Series A no 22 [91]. See also eg *Bönisch v Austria* (App 8658/79) (1985) Series A no 92 [32]: '...principle of equality of arms… exemplified in paragraph (3)(d) of Article 6…'; *Vidal v Belgium* (App 12351/86) (1992) Series A no 235-B [33]; *Solakov v the former Yugoslav Republic of Macedonia* (App 47023/99) ECHR 2001-X [57]; *Popov v Russia* (App 26853/04) ECHR 13 July 2006 [176]; *Pello v Estonia* (App 11423/03) ECHR 12 April 2007 [26]; *Dorokhov v Russia* (App 66802/01) ECHR 14 February 2008 [65].

With the exception of *Bönisch*, it is interesting to note that the word 'full' attached to the 'equality of arms' reference in *Engel* also finds itself repeated in the other cited judgements. Its inclusion, when compared to judgements in which it is absent, is superfluous and appears not to have impacted upon the Strasbourg interpretation of the concept of equality of arms.

[8] Human Rights Committee (HRC), 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial' (2007) UN Doc CCPR/C/GC/32 [39].

its assessment of cases concerning Article 6(3)(d), the Court conjointly considers Article 6(1).[9] However, despite the close nature of the relationship between the concept of equality of arms and Article 6(3)(d), it does not necessarily follow that the former is expressly referred to by the Court in its every application of the latter. Such is sometimes the case both because the presence of the equality of arms principle is readily implied and it does not exhaust the content of Article 6(3)(d).[10]

2. Conceptual Nexus

Further demonstrative of the nexus is that the exercise of Article 6(3)(d) serves the values reflected in the concept of equality of arms. It should be recalled that Chapter 2 established two principal values—instrumental (accurate outcome) and intrinsic (dignitarian)—and the collateral value of procedural legitimacy arising thereof.[11]

The Article 6(3)(d) right of the defence to call witnesses on equal terms with the prosecution contributes to the realisation of an accurate outcome. The purpose of calling a witness is to elicit evidence establishing the defence case or a relevant part thereof. Doing so under the same procedural conditions as the prosecution ensures that prosecution witnesses cannot exert a one-sided influence on the court to the detriment of an accurate outcome.

Also reflecting the instrumental value of the concept of equality of arms is the right to challenge witnesses under the same conditions as the prosecution. The aim of examining or having examined an adverse witness is to elicit favourable testimony and compromise the prosecution case. The latter requires exposing the factual limitations of the evidence and/or its unreliability, and/or impeaching witness credibility. Testing prosecution witnesses in this manner, under conditions of equality, ensures that the impact of their testimony on case outcome is proportionate to its actual evidential value, rather than that purported by the prosecution, hence more conducive to an accurate outcome. Also contributive to this aim is that the prosecution is restricted to the same opportunities to challenge witnesses as the defence. Were this not the case, an undue impression would be created for the court misrepresenting the strength and quality of evidence favourable to the accused.

Within trial hearings of the accusatorial mould, of course, challenging witness evidence through cross-examination by the parties is the preferred means of contributing to an accurate outcome. It is a practice that has been lauded as highly effective for testing the veracity and

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[9] eg *Lüdi v Switzerland* (App 12433/86) (1992) Series A no 238 [43]; *Lucà v Italy* (App 33354/96) ECHR 2001-II [37]; *SN v Sweden* (App 34209/96) ECHR 2002-V [43]; *Bocos-Cuesta v the Netherlands* (App 54789/00) ECHR 10 November 2005 [64]; *Kovač v Croatia* (App 503/05) ECHR 12 July 2007 [23]; *Balčiūnas v Lithuania* (App 17095/02) ECHR 20 July 2010 [101]. *Engel* (n 7) [91] is an exception.
[10] *Vidal* (n 7) [33]; *Solakov* (n 7) [57]; *Popov* (n 7) [178].
[11] Ch 2 Pt B.

accuracy of witness evidence,[12] and observed famously by Wigmore as '…beyond any doubt the greatest legal engine ever invented for the discovery of truth.'[13] Accepting that cross-examination is a component of the Sixth Amendment Confrontation Clause of the US Constitution,[14] the underlying purpose of the provision being '…to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence…',[15] the US Supreme Court has oft-recited Wigmore's description in agreement.[16] It is submitted, however, that the contribution of cross-examination towards an accurate outcome is certainly less than Wigmore suggests: '…because cross-examination allows so much latitude for bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony.'[17] Indeed, research indicates that the consequence of direct and leading questions in cross-examination is answers that are less accurate than when witnesses are encouraged to give '…a free narrative',[18] the latter being a more prominent feature of inquisitorial judge-led examinations. Nevertheless, the value of cross-examination to accuracy of outcome is still significant, thus it justifiably continues to remain the primary means of challenging witness evidence in accusatorial style trials.

Accompanying its instrumental value is the contribution Article 6(3)(d) also makes to the intrinsic dignitarian concern of the concept of equality of arms. Not only does it afford the accused an opportunity to put his own witness evidence before the court, but also ensures that prosecution witness evidence is not merely accepted against him without an opportunity for

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[12] eg *Mechanical & General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Company* [1935] AC 346 (HL) 359; A Denning, *Freedom Under the Law* (Stevens & Sons, London 1949) 62.

[13] JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn Little, Brown & Co, Boston 1940) vol 5, 29.

Compare RC Park, 'Adversarial Influences on the Interrogation of Trial Witnesses' in PJ van Koppen and SD Penrod (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/Plenum, New York 2003) 166 who extensively evaluates Wigmore's assertion and concludes that: 'It seems likely that the greatest legal engine for discovering the truth is discovery and investigation, not trial cross-examination.'

[14] 'In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…'. Available at: US Government Printing Office (16 September 2009) <http://www.gpoaccess.gov/constitution/index.html>.

See eg *Mattox v United States* 156 US 237, 242–243 (1895); *Pointer v Texas* 380 US 400, 406–407 (1965); *Douglas v Alabama* 380 US 415, 418 (1965); *Barber v Page* 390 US 719, 725 (1968); *Coy v Iowa* 487 US 1012, 1019–1020 (1988).

[15] *Ohio v Roberts* 448 US 56, 65 (1980). See also *Kentucky v Stincer* 482 US 730, 736–737 (1987); *Maryland v Craig* 497 US 836, 845 (1990).

[16] eg *California v Green* 399 US 149, 158 (1970); *White v Illinois* 502 US 346, 356 (1992); *Lilly v Virginia* 527 US 116, 124 (1999).

[17] JH Langbein, 'The German Advantage in Civil Procedure' (1985) 52 U Chi L Rev 823, 833. See also eg R Vouin, 'The Protection of the Accused in French Criminal Procedure' (1956) 5 ICLQ 157, 168: '…it does not ensure free and frank testimony from the witness.'; Australian Law Reform Commission, 'Manner of Giving Evidence' Research Paper No 8 (Sydney 1982) Ch 10 [5]: 'So far as obtaining accurate testimony is concerned, it is arguably the poorest of the techniques employed at present in the common law courts.'; DJ Birch, 'The Criminal Justice Act 1988—Part 2: Documentary Evidence' [1989] Crim LR 15, 17: Cross-examination demonstrates '…the power of a skilful cross-examiner to make an honest witness appear at best confused and at worst a liar.'

[18] Law Commission, 'Evidence in Criminal Proceedings: Hearsay and Related Topics' Consultation Paper No 138 (HMSO, London 1995) [6.45].

challenge. He can thus engage the court in a participatory capacity whereupon his dignity is recognised.[19] In doing so, he can meaningfully influence the outcome of the case against him and thereby his own fate. Further preserving his dignity is that Article 6(3)(d) entails that his participation in matters of witness evidence is under conditions of equality with the prosecution.

It is the combined effect of this intrinsic and the abovementioned instrumental value that gives rise to the societal perception of procedural legitimacy, a collateral value of equality of arms. Adherence to Article 6(3)(d) demonstrates to the public that the court will take account of the witness evidence of both parties and such evidence will be adequately tested, hence bolstering its confidence that a correct verdict was reached. Additionally, as this evidence is to be treated under the same conditions as afforded the prosecution, society is reassured that the dignity of its members will be respected when opposed by the state in criminal proceedings.

Nevertheless, the conceptual nexus between Article 6(3)(d) and the principle of equality of arms is not founded solely on shared values. Article 6(3)(d) is procedural right that is feasibly reciprocal and essential to case preparation and presentation, all of which are features identified in Chapter 2 that bring the provision within the remit of the equality of arms concept.[20] Also adduced in that chapter was that this remit encompasses the adversarial principle.[21] The Court invariably associates Article 6(3)(d) with the requirement upon states to ensure that evidence in criminal proceedings is produced '...with a view to adversarial argument.'[22] This association, accordingly, serves to strengthen the connection between this article and the overarching concept of equality of arms.

C. WITNESS DEFINED

Given that 'witnesses' fall within the scope of Article 6(3)(d) but are without express definition therein, it is a term necessitating elaboration.

1. Witness

In its most basic formulation, a witness is one who renders testimony. To bear testimony is to attest to a personal observation which can be taken into account by a court in order to establish or prove a relevant fact. The most readily recognizable testimony is that delivered orally by a witness present in court under questioning. One must also recognize, however, that testimony can take the form of a solemn pre-trial written statement, such as a verbatim transcription of police interrogation, witness statement, deposition, affidavit or transcript record of oral testimony

[19] TM Massaro, 'The Dignity Value of Face-to-Face Confrontations' (1988) 40 U Fla L Rev 863, 902–907.
[20] Ch 2 Pt D ss 2–3(a), (c)–(d).
[21] ibid s 3(b).
[22] eg *Barberà, Messegué and Jabardo v Spain* (App 10590/83) (1988) Series A no 146 [78]; *AM v Italy* (App 37019/97) ECHR 1999-IX [25]; *SN* (n 9) [44]; *WS v Poland* (App 21508/02) ECHR 19 June 2007 [55].

tendered at a previous hearing.[23] It is to such formal statements made to state investigative, prosecutorial and judicial bodies that the attention of the Court is principally directed.[24]

For the purposes of Article 6(3)(d), the Court has opted to give the term 'witnesses' an autonomous meaning.[25] This ensures that its interpretation is not restricted to the narrow definitions implemented in some domestic legal systems, which may unduly circumvent Convention applicability, and that a universal approach is forged to secure parity of treatment between states. Such autonomy is, however, limited to the extent that it does not involve reclassifying those that have already been deemed witnesses in domestic laws.[26] By adopting this autonomous approach, the Court has not restricted the applicability of the term 'witnesses' to those simply bearing oral testimony at a hearing in person. The crucial criterion for bestowing witness status upon an individual appears to be whether he authored at any time a statement that was taken into account by the national court in its appraisal of the case.[27] Whether or not this statement was read out at trial has no bearing on the determination of the issue.[28] Neither is it a bar to witness status that the statement was made by a co-accused. Under the autonomous approach, '...where a statement may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the [Article 6(1) and 6(3)(d)] guarantees… apply.'[29] Accordingly, a co-accused can occupy the position of both party to proceedings and witness.

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[23] Whilst the US Supreme Court did not conclusively define a 'testimonial statement' in *Crawford v Washington* 541 US 36, 51–52 (2004), it did provide some guidance therein, referring, inter alia, to "'…pretrial statements that declarants would reasonably expect to be used prosecutorially'" (fn omitted). It also gave examples of statements which are not testimonial in character: '….a casual remark to an acquaintance…'; '[a]n off-hand, overheard remark…'; '…business records or statements in furtherance of a conspiracy.'

[24] *R v Owen (Martin James)* [2001] EWCA Crim 1018 [18] (Keene LJ): '…there is no case where the European Court found a breach [of Article 6(3)(d)] in situations where the court had not been concerned with what might be called in English terms a "witness statement" i.e. a statement made by a potential witness to the police or the prosecuting authorities.'

[25] eg *Windisch v Austria* (App 12489/86) (1990) Series A no 186 [23]; *Delta v France* (App 11444/85) (1990) Series A no 191-A [34]; *Solakov* (n 7) [57]; *Mild and Virtanen v Finland* (Apps 39481/98; 40227/98) ECHR 26 July 2005 [43].

[26] S Maffe, *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses* (Europa Law, Groningen 2006) 73: '…the autonomy of the interpretation is a one-way autonomy…'.

[27] eg *Isgrò v Italy* (App 11339/85) (1991) Series A no 194-A [33]; *Asch v Austria* (App 12398/86) (1991) Series A no 203 [25]; *Artner v Austria* (App 13161/87) (1992) Series A no 242-A [19]; *Pullar v UK* (App 22399/93) ECHR 1996-III [45]; *Andandonskiy v Russia* (App 24015/02) ECHR 28 September 2006 [50].

[28] *Kostovski v the Netherlands* (App 11454/85) (1989) Series A no 166 [40].

[29] *Gossa v Poland* (App 47986/99) ECHR 9 January 2007 [56]. See also eg *Lucà* (n 9) [41]; *Kaste and Mathisen v Norway* (Apps 18885/04; 21166/04) ECHR 9 November 2006 [53]; *Melnikov v Russia* (App 23610/03) ECHR 14 January 2010 [66].

2. Status of Experts

Remaining to be addressed herein is the issue of whether witness status can also be extended to include experts. Experts can be court-appointed or engaged by the parties to provide admissible opinion evidence by report and/or in person on matters calling for, inter alia, technical, scientific and medical expertise. The function of this expertise is to assist decision-makers presumed to be without the requisite special knowledge, skill and experience to comprehend the nature and significance of the evidence presented before them.[30] In providing this assistance, the expert is obliged to be objective and impartial, his paramount duty being to the court rather than to the instructing party. Whereas the weight attached to expert opinion evidence in each case will vary, there is ever present potential for an expert to have a significant bearing on the trial outcome. It is, therefore, crucial that the rights of the defence are respected in the presence of evidence of this type.

Amongst the rights of the defence, it was equality of arms in particular and the status of the court-appointed expert that were in issue before the Court in *Bönisch v Austria*.[31] The applicant had been convicted on two occasions because his business employed a meat smoking technique that contravened food regulations. The Director of the Food Control Institute had been responsible for drafting the adverse reports that initiated both proceedings. He was also the sole court-appointed expert in both prosecutions, whereas the expert instructed by the applicant in the first proceeding was heard as a mere witness. The Court was of the view that, read literally, Article 6(3)(d) applies to witnesses, not experts.[32] On this basis, it may be conceded that an independent court-appointed expert is not intrinsically a witness.

This is not, however, to be construed as excluding him from acquiring witness status in all circumstances. The Court found that any doubts as to the neutrality of this expert were understandable given that the prosecutions against the applicant were consequent upon the reports he drafted. It thereby accepted that, on 'appearances', the expert '…was more like a witness against the accused.'[33] Recourse to appearances was, of course, also an approach highlighted in the previous chapter as used to identify opponents for the purposes of equality of arms.[34] It seems, therefore, that a court-appointed expert should not be regarded as an 'expert'

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[30] See further *Davie v Magistrates of Edinburgh* 1953 SC 34, 40 (Lord President Cooper): The duty of experts '...is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'

[31] (n 7).

[32] *Bönisch* (n 7) [29]. See also eg *Brandstetter v Austria* (Apps 11170/84; 12876/87; 13468/87) (1991) Series A no 211 [42]; *Eskelinen and others v Finland* (App 43803/98) ECHR 8 August 2006 [30]. Contrast the equivalent provision in the American Convention on Human Rights Art 8(2)(f) (emphasis added): '…right of the defense to examine witnesses present in the court and to obtain the appearance, *as witnesses*, *of experts* or other persons who may throw light on the facts'.

[33] *Bönisch* (n 7) [32].

[34] Ch 2 Pt D s 1(b).

but as an 'expert witness' if he appears to align himself with a party, such as the prosecution in this case, albeit informally. It was, accordingly, appropriate for the Court to refer to the defence expert as an 'expert witness'.[35]

In these circumstances, it is essential under the concept of equality of arms that opposing expert witnesses be treated on an equal footing. The absence of equal treatment in this case was 'particularly striking': the Director had been heard unduly as an official expert, '…formally invested with the function of neutral and impartial auxiliary of the court', thereby naturally giving his statements greater weight than those of the defence expert witness; and, unlike the latter, the Director was permitted to attend the hearings in full, examine the accused and witnesses, and comment upon their testimony.[36] These prejudicial inequalities placed the defence at a disadvantage vis-à-vis the prosecution, the Court consequently holding that Article 6(1) had been violated.[37]

The status of experts with regard to the concept of equality of arms again came to the fore in *Brandstetter v Austria*.[38] Of the two relevant proceedings against the applicant, the first concerned the quality of wine that he sold. He complained of an inequality of arms because the court appointed as official expert an employee of the institute which had set in motion his prosecution and refused to hear any other experts. Building on *Bönisch*, the European Court also took into account doubts raised by 'appearances' but made it express that such doubts must be 'objectively justified.'[39] It observed that the expert could not be regarded as a prosecution witness because his employment with the institute was not of itself sufficient to objectively justify fears that he would act without proper neutrality.[40] This is understandable given that, unlike the official expert in *Bönisch*, he was not involved in the initiation of the prosecution and to '…hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice.'[41] As prosecution witness status was not afforded the official expert, the rejection of the defence request to appoint other experts could not constitute a procedural inequality, thus avoiding a violation of Article 6(1) and 6(3)(d).[42]

The second proceeding centred on the applicant's conviction for tampering with evidence in relation to the first proceeding. The applicant complained that the official court expert was an employee of the institute and that the initial criminal suspicion emanated from him, whilst the defence expert was heard under the less privileged status of witness. The Court observed that doubts as to the official expert's neutrality could be held justified, in effect assimilating him to a witness for the prosecution, hence the defence witness should also have been examined under

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[35] *Bönisch* (n 7) [33].
[36] ibid.
[37] ibid [35]. It forwent a separate ruling on Article 6(3)(d).
[38] (n 32).
[39] *Brandstetter* (n 32) [44].
[40] ibid [44]–[45].
[41] ibid [44].
[42] ibid [45], [47].

the same conditions.[43] Yet, it did not find an inequality of arms.[44] It distinguished the official expert from the Director in *Bönisch* because he did not pose questions or comment on the evidence of the defence witness and thereby assume a dominant position.[45] It also considered that the results of the defence witness's analysis were relevant only if it could be proved that the evidence could not have been tampered with. As the domestic court established that tampering could not be excluded, the ground for the request to appoint the defence witness as a second official expert became obsolete.[46] It appears, therefore, that the Court relied upon as decisive the absence of actual prejudice to override its recognition of the unequal treatment of prosecution and defence.

D. EXAMINER DEFINED

Having defined the term 'witness', it falls logically to also identify briefly those that can occupy the position of examiner in the conduct of witness examinations.

In allowing the accused the opportunity 'to examine or have examined' witnesses, the language of Article 6(3)(d) is indicative of a deliberate sensitivity towards accommodating the differences in the accusatorial and inquisitorial trial models adopted by Contracting States. In the tradition of the latter model, the examination of witnesses is conducted predominantly by the presiding judge on behalf of the parties ('to have examined'), though supplementary questions may be put by the parties to witnesses either directly or through the intermediary of the judge.[47] The accusatorial tradition, on the other hand, relies on the direct examination of witnesses by the parties ('to examine'), whereupon the judge is tasked with ensuring that it is carried out in a fair manner. Although this is not such as to preclude the judge from questioning a witness altogether,[48] any intervention must be temperate,[49] such as that exercised merely for clarification of a particular point.

Where leave is granted for a party to question a witness, it is conventional practice in both trial models that the examination is undertaken by a qualified lawyer. An accused is to be identified with his legal representative for the purposes of Article 6(3)(d).[50] It is thus consistent with this provision for counsel to conduct an examination in the absence of his client in

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[43] ibid [61].
[44] ibid [62]–[63].
[45] ibid [62].
[46] ibid.
[47] eg in France: Code of Criminal Procedure 1958 (as amended) Arts 312, 332. Available at: Legifrance and JR Spencer (trs) (1 January 2006) <http://195.83.177.9/code/liste.phtml?lang=uk&c=34>.
[48] eg *R v Remnant* (1807) Russ & Ry 136, 137–138; *R v Wilson* (1924) 18 Cr App Rep 108 (CCA) 109.
[49] eg *R v Hulusi (Kolliari Mehmet)* (1974) 58 Cr App R 378 (CA) 382, 385; *R v Marsh* The Times 6 July 1993 (CA).
[50] *Kamasinski v Austria* (App 9783/82) (1989) Series A no 168 [91].

exceptional circumstances,[51] though it is from a dignitarian standpoint always preferable for the latter to be present to observe testimony influential to his fate. A competent counsel harbours the training and experience necessary for a forensic examination designed to test witness evidence effectively and put his client's case to the witness, whilst remaining tactically astute and compliant with rules of criminal procedure. The accused as a layperson cannot be expected to have such qualities, the likely consequence of which is that his position will suffer detrimentally without professional representation.[52]

In this light, the Court in *Isgrò v Italy*[53] seems to have reached an unfortunate conclusion. During the investigation phase, the applicant was confronted with a crucial witness without the assistance of counsel. The Court concluded that Article 6(3)(d) had been satisfied sufficiently as '...the purpose of the confrontation did not render the presence of Mr Isgrò's lawyer indispensable; since it was open to the applicant to put questions and to make comments himself...'.[54] It had not considered the absence of representation to have caused actual prejudice. This view appears misguided. It dismisses the significant disparity of competence and experience between lawyer and client in challenging and questioning a witness.[55] Though counsel was present at trial, a further opportunity to examine the witness was not available. Furthermore, the pre-trial investigation phase carries a particularly decisive weight in the inquisitorial tradition and, in fact, the witness's statements were relied upon in convicting the accused. It is submitted, therefore, that one cannot but describe the circumstances herein as prejudicial.

Nevertheless, the situation may arise in which an accused waives his right to representation and wishes to examine a witness in person. Whilst representation in the material confrontation in *Isgrò* was not permitted in law rather than waived, the judgement confirms that an unrepresented accused may conduct the examination himself. If, however, representation is available, domestic restrictions on examinations by a pro se accused in certain situations will be compatible with

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[51] eg to prevent possible witness intimidation: *X v Denmark* (App 8395/78) (1981) 27 DR 50, 54–55; *Kurup v Denmark* (App 11219/84) (1985) 42 DR 287, 291–293.

[52] eg *Artico v Italy* (App 6694/74) (1980) Series A no 37 [34], [36]; New South Wales Law Reform Commission, 'Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials' Report 101 (Sydney 2003) [5.8]: '…an experienced criminal advocate is in the best position to protect the interests of the accused as well as the public interest in ensuring that the evidence is appropriately tested. If cross-examination was to be conducted by someone other than a legal practitioner, the complainant's evidence is unlikely to be tested effectively.'

[53] (n 27).

[54] *Isgrò* (n 27) [36].

[55] See further SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart, Oxford 2007) 151 who remarks that the argument of the Court '...seems completely to ignore the reason for the existence of lawyers in the criminal process and casts doubt on the need for a lawyer at trial, if it is sufficient that the judge or the prosecutor can ask the questions for the accused or that he or she can ask them for him- or herself. This is a spurious argument at odds with the Court's own definition of fairness and its arguments justifying the right to counsel.'

Article 6(3)(d). Such situations may include examinations of vulnerable witnesses such as sexual offence complainants and children[56] because of the risk of intimidation or further distress.

E. A BENCHMARK MODEL FOR THE CONDUCT OF EXAMINATIONS

It is useful to outline the benchmark examination model reflected in Article 6(3)(d)[57] to serve as a point of reference against which legitimate and illegitimate derogations therefrom can be discerned and measured. A benchmark model is, of course, intended to uphold the highest standard of protection for the dignity of the accused. Given that it is the trial hearing at which all admissible evidence is presented in its final form and the verdict is reached, as well as Article 6 being designed predominantly to apply to the trial *stricto sensu*, it is natural that the benchmark model focuses on this stage of the proceedings. In its regard for Article 6(3)(d), the Court makes known consistently that '...evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument.'[58] The Commission also opined '...that the requirements of a fair trial and equality of arms generally make it necessary for all prosecution witnesses to be heard before the trial courts and during adversarial proceedings.'[59] On this basis and the language of Article 6(3)(d) itself, a model may be derived wherein live oral testimony[60] is elicited from a witness in a court accessible to public scrutiny, and the witness is physically confronted[61] by an accused exercising his right to question him, either pro se or vicariously through counsel or judge, under a condition of equality of arms. This model may be extended to include two further elements identified by Maffe in his 'confrontational paradigm': the requirement that evidence be sworn and that the real identity of the witness be disclosed to the defence.[62] Evidence that is sworn invites criminal penalties if it is knowingly false, thereby rendering more likely the appearance of procedural legitimacy. The realisation of adversarial argument requires, inter alia, the defence to have knowledge of all evidence adduced intended to influence the decision-maker. As disclosure of witness identity has an evidential value when

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[56] See further Youth Justice and Criminal Evidence Act 1999 (UK) (YJCEA) ss 34–35. In cases not covered by these sections, s 36 allows the court to prevent an examination by an accused in person if the quality of evidence provided by any witness is likely to be diminished and it is not contrary to the interests of justice.

[57] See further the 'model of full compliance with the guarantee' in S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 299.

[58] eg *Van Mechelen and others v the Netherlands* (App 21363/93 et seq) ECHR 1997-III [51]; *Sadak and others v Turkey (No 1)* (App 29900/96 et seq) ECHR 2001-VIII [64]; *B v Finland* (App 17122/02) ECHR 24 April 2007 [41]; *Zhoglo v Ukraine* (App 17988/02) ECHR 24 April 2008 [38].

[59] *Cardot v France* (App 11069/84) EComHR Report 3 April 1990 [50].

[60] In contrast to the heavy reliance upon written evidence in inquisitorial style trial hearings, the accusatorial trial model champions the superiority of live oral testimony: JR Spencer, 'Orality and the Evidence of Absent Witnesses' [1994] Crim LR 628, 628; L Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 Int'l J Evidence & Proof 29, 34, 38–39.

[61] See also *X* (n 51) 54: '...in principle... it is essential and indeed often indispensable that an accused be present when witnesses are being heard in a case against him.'; *Kurup* (n 51) 292.

[62] (n 26) 23, 26–28.

assessing credibility, it is a feature that certainly accords with ensuring adversarialism. Article 6(3)(d) cases before the Court, however, concern by their very nature testimonial evidence obtained in derogation of this benchmark examination model.

F. DEROGATIONS FROM THE BENCHMARK MODEL

It is accepted in Convention jurisprudence that the aforementioned benchmark model is open to legitimate derogation without violating Article 6(3)(d). Derogation in this context refers to the absence of one or more features of the model in the conduct of the trial hearing. The replacement of live oral testimony at trial with a previously given written statement is the most prominent example to this effect. Acceptance of derogation measures demonstrates an acknowledgement by the Court that there exist exceptional cases in which a concessionary and practicable solution is required to reconcile the competing triangulation of interests between the defence, prosecution and witnesses. The interest of the witness is to protect his life or well-being, especially if he is a victim of serious crime and/or vulnerable. If, however, the witness is deceased or untraceable at the time of trial, only the prosecution and defence interests remain relevant. The prosecution interest lies in putting all relevant testimonial evidence before the court, even if it is not live and oral but merely in the form of written statements, with a view to influencing the trial outcome. Favourable to this interest is that rules governing the conduct of examinations be flexible, for the stricter the rules, the greater the likelihood that prosecutions are stifled and criminals remain at large. The interest of the accused, however, is in challenging the adverse testimonial evidence in accordance with the benchmark model, thereby exposing the witness to the best possible scrutiny.

It is possible to render derogation measures legitimate because the Court evaluates procedural fairness on the basis of the trial in its entirety rather than considering Article 6(3)(d) in isolation. This provision and Article 6(1) are thus conjointly assessed. The trial as a whole approach is a procedural appraisal and not an evidential one. The Court has firmly adopted the general rule that the admissibility and assessment of evidence are primarily matters for the competence of domestic courts.[63] It is not, therefore, in principle the nature of the evidence itself but the use made of it that is the concern of the Court.[64] Engaging in an overall assessment of the trial also ensures that the Court will take account of state measures employed to offset the effect of derogations involving a procedural inequality. This offsetting can be such as to avoid a joint violation of Articles 6(1) and 6(3)(d).

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[63] eg *Edwards v UK* (App 13071/87) (1992) Series A no 247-B [34]: '…it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts…'; *Doorson v the Netherlands* (App 20524/92) ECHR 1996-II [67]; *PS v Germany* (App 33900/96) ECHR 20 December 2001 [19]; *Borisova v Bulgaria* (App 56891/00) ECHR 21 December 2006 [46]; *Muttilainen v Finland* (App 18358/02) ECHR 22 May 2007 [21].

[64] *Unterpertinger v Austria* (App 9120/80) (1986) Series A no 110 [31].

The subsequent discussion considers the approach of the Court to the concept of equality of arms when derogations from the benchmark model have occurred. It is instructive to group judgements into separate categories of witness because the corresponding extent and rationale of the derogations differ.

1. Absent Witnesses

(a) Introduction

On several occasions, the Court has been called upon to determine the legitimacy of derogations from the benchmark model when the prosecution has failed to secure for examination the attendance of the witness at trial. Its jurisprudence in this area appears to turn on the impact of pre-trial written witness testimony on the outcome of the case. More specifically, the following analysis demonstrates that a conviction based solely or predominantly on the statement of an absent witness (actual prejudice), never at any previous stage examined by the defence, will generally be found incompatible with Article 6. Were it not so, the prosecution would be unduly advantaged vis-à-vis the defence from an opportunity to admit highly prejudicial witness evidence that could not be challenged effectively. Witness absence may be explained by reason of failure to comply with a summons, alleged untraceability, illness, death or the exercise of a right of exemption by the witness himself.

(b) Case-Law

A right of exemption was indeed exercised in *Unterpertinger v Austria*.[65] The applicant had been convicted of causing criminal injury to his ex-wife and stepdaughter, both of whom had made statements to the police but refused to give evidence at trial by virtue of their entitlement as close relatives. The statements were read out at the hearing. The applicant complained that he had been convicted exclusively on the basis of these statements without being offered an opportunity to examine the witnesses at any stage of the proceedings. The Court ruled that neither the witness exemption, legitimately designed to avoid a moral dilemma, nor the reading out of the statements were in themselves incompatible with Articles 6(1) and 6(3)(d).[66] Nevertheless, what was incompatible with these articles was that, whilst other evidence was put before the courts, the conviction had been based 'mainly' on statements authored by witnesses the applicant had never been able to examine.[67] The extent of the prejudicial effect of these untested statements was, therefore, crucial in the Court's assessment.

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[65] ibid [30].
[66] ibid [30]–[31].
[67] ibid [30]–[33].

Whereas the Court did not refer expressly to the concept of equality of arms in its reasoning, the finding of a violation was an implicit acknowledgement that the applicant had suffered disadvantage, despite the prosecution also having been prevented from orally examining the witnesses at trial. Given that the police are part of the wider prosecution team,[68] their questioning of a witness constitutes an out-of-court examination conducted on behalf of prosecutors in court. It was in this case procedurally advantageous for the prosecutor to be allowed to admit adverse testimony already examined on his behalf and incapable of being adequately tested by the defence at any stage. Indeed, the testimony was treated '…as proof of the truth of the accusations…'.[69] Though the finding of a violation was in itself correct, the absence of equality of arms was a procedural defect deserving of express rather than implied prominence in the judgement.

Inequality of this nature also underlies the *Delta v France*[70] judgement in which two material witnesses failed to attend trial despite being summoned. Their statements provided in the police investigation were put before the trial court, which made no effort to compel attendance, and resulted in the applicant's conviction. The Court considered this incompatible with Articles 6(1) and 6(3)(d) because at no stage in the proceedings had the defence an adequate and proper opportunity to examine these witnesses and the conviction was based decisively on their statements.[71]

This conclusion and rationale was reciprocated in *Lucà v Italy* where the sole basis of conviction was a pre-trial statement made by the co-accused witness to the public prosecutor.[72] The statement was read out at trial because of the co-accused's refusal under his statutory right to remain silent to be present for examination. The applicant had clearly been placed in a position of procedural disadvantage. Given the decisively prejudicial nature of the statement, it was appropriate that the conflict between the co-accused's privilege against self-incrimination and the applicant's right to procedural equality was resolved in favour of the latter.

It was not statutory privilege but the death of a witness before trial that prevented the accused in *Ferrantelli and Santangelo v Italy*[73] from conducting an examination. The witness's previous incriminatory written evidence was presented at trial. The Court found the written evidence admissible because the death was not attributable to the state,[74] hence there was no state induced disadvantage to the defence. Whilst this is understandable, it is also particularly relevant that the

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[68] eg the Crown Prosecution Service (CPS) lists 'working with the police from the outset of a case to its disposal' as part of its role: CPS, 'Annual Report 2004–2005' (12 July 2005) <http://www.cps.gov.uk/publications/docs/annualreport05.pdf> 5. See also *Van Mechelen* (n 58) [56]: '…the police... usually have links with the prosecution…'.
[69] *Unterpertinger* (n 64) [33].
[70] (n 25).
[71] *Delta* (n 25) [37].
[72] (n 9) [43]–[45].
[73] (App 19874/92) ECHR 1996-III.
[74] ibid [52]–[53].

Court also based its decision on a lack of actual prejudice: the testimony was corroborated and did not constitute the sole or main item of incriminatory evidence.[75]

In circumstances where the witness is absent through illness, *Bricmont v Belgium*[76] provides relevant guidance. The criminal proceedings brought against the applicants were based on the accusations of a witness unable to testify in person at trial because of poor health. A comprehensive confrontation with the witness had not taken place at any stage of the proceedings. In respect of Mr Bricmont, the Court found that the domestic court relied heavily upon the evidence of the witness to justify conviction.[77] It added that an examination should have been conducted at the home of the witness.[78] Consequently, it is clear that where a conventional examination is not possible due to illness, the Court requires that a suitable alternative arrangement for examination be made.[79] This serves to restrict the extent of the departure from the benchmark model. It is only if alternative arrangements are not feasible that written statements may replace oral testimony. In view of these circumstances, Mr Bricmont was placed in a disadvantageous position wherein actual prejudice occurred, the consequence of which was a violation of Article 6.[80] On the other hand, the Court did not consider the witness's evidence to have caused actual prejudice to Mrs Bricmont because the domestic court did not refer to such evidence in convicting her, hence avoiding a violation in her case.[81]

The suggestion by the Court that the examination could have been conducted at the home of the witness is a particularly apt example of the diligence demanded of states in the realisation of Article 6(3)(d). Where the statement of an absent witness is integral to the conviction, the Court has consistently demonstrated that a violation will occur if the state did not initially make a genuinely sincere and sustained effort to ensure that an examination would take place.[82] It may be submitted that it is only through taking such positive steps that the state can be viewed as not exploiting the opportunity offered by the absent witness to create an undue procedural advantage for the prosecution. If a material witness remains untraceable through no fault of the accused and despite positive efforts by the state, only a postponement of proceedings consistent with the fair trial 'within a reasonable time' requirement of Article 6(1) or an acquittal seems proper. Unfortunately, however, the state is not alone in bearing a burden. If the accused seeks to summon a prosecution witness for examination at trial, a failure to explain what he intends to

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[75] ibid [30], [52].
[76] (App 10857/84) (1989) Series A no 158.
[77] ibid [83]–[84].
[78] ibid [81].
[79] See further M Strange, 'Evidence' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001) [16.5.1.3]: 'Where witnesses are ill… the case law needs to be considered in the light of advances in technology, which may allow for cross-examination via live video links, if necessary in the witnesses' home or in hospital.'
[80] *Bricmont* (n 76) [85].
[81] ibid [86].
[82] eg *Sadak* (n 58) [66]–[67]; *Hulki Güneş v Turkey* (App 28490/95) ECHR 2003-VII [93], [95]; *Mild and Virtanen* (n 25) [45]–[47].

prove through the witness evidence and its value for the outcome of the case will allow the witness to remain absent and his written testimony to be relied upon by the court.[83] The situation arises, therefore, that in order to prevent a prosecution advantage, the onus is on the accused to ensure that the opponent's witness appears before the court.[84] It is a circumstance that seems counter-intuitive to achieving procedural fairness. Accordingly, Stavros is correct in asserting that '…the accused should not be routinely made to assume responsibility for the failure of the national authorities to ensure respect for his procedural rights.'[85]

Further criticism may also be directed towards the judgement in *Asch v Austria*,[86] the facts of which are similar to *Unterpertinger*. The applicant had been convicted of causing actual bodily harm to a witness whose statements were read out at trial because she had availed herself of her right to refuse to give live testimony. The applicant did not have an opportunity to examine her at any stage. In finding that a violation did not occur, the Court reasoned that the statements did not constitute the only item of evidence on which the conviction was based as corroboration was provided by medical evidence and the personal assessment of the police officer who had interviewed the witness.[87] The implication is, of course, that a violation will occur if the statement forms the sole basis of the conviction, a stricter test than that merely requiring that the statement be the main reason for the conviction. Despite the corroborative evidence, the value of which was insufficient in itself to raise guilt beyond reasonable doubt, it was the witness evidence that formed the main item of proof for the conviction, a fact recognised only in the associated dissenting judgement which viewed the case as essentially the same as *Unterpertinger*.[88] The Court failed to give due regard to the actual weight attached by the domestic court to the effectively untested statements of the witness.[89] Moreover, the corroborative evidence and the applicant's opportunity to comment on the witness's statements constitute a poor counterbalance to the actual prejudice arising from the prosecution advantage of putting forward evidence of a witness never examined by the defence. Thus, in accordance with the reasoning in *Unterpertinger*, a violation should have been found.[90]

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[83] *Laukkanen and Manninen v Finland* (App 50230/99) ECHR 3 February 2004 [36], [38].

[84] See also *Cardot v France* (App 11069/84) (1991) Series A no 200 [35]–[36]: The applicant complained that he had not been afforded an opportunity to examine his former co-defendants whose evidence incriminated him. The prosecution had not called them. The Court held that the applicant had failed to exhaust domestic remedies because he had not applied, either at first instance or on appeal, for the witnesses to be called.

[85] S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 235.

[86] (n 27).

[87] *Asch* (n 27) [30]–[31].

[88] ibid Diss Op Judges Vincent Evans and Bernhardt [1], [5]. See also C Osborne, 'Hearsay and the European Court of Human Rights' [1993] Crim LR 255, 265: 'There is no logical or consistent basis for a distinction between the *Asch* case and the *Unterpertinger* case…'.

[89] Stavros (n 85) 235.

[90] Trechsel (n 57) 295 marks the case as '…an exceptionally weak point in the Court's jurisprudence…' to '…be regarded as an unfortunate mistake.'

The approach in *Asch* was, unfortunately, followed in *Artner v Austria*[91] where the pre-trial statements of the untraceable main witness were read out at trial. Despite the applicant not having an opportunity to examine the witness, the Court considered that a violation did not occur because the conviction had also been based on corroboratory evidence.[92] As with *Asch*, the testimony of the witness was the fundamental basis for the conviction, thereby occasioning severe and actual prejudice. This was an improper restriction of the rights of the applicant which was acknowledged by the four dissenting judges.[93] It appears, therefore, that the Court in *Asch* and *Artner* considered the use of corroboratory evidence to be a means of counterbalancing a procedural defect that had given rise to a prosecutorial advantage. However, the defect and prejudice arising therefrom was simply too great to be cured in this manner. Put simply, the applicant in both cases would not have been convicted had it not been for the untested statements. Fortunately, the strictness of the approach taken in *Asch* and *Artner* is not generally repeated in other relevant jurisprudence.[94] As indicated in the analysis preceding *Asch* and *Artner*, the conventional approach adopted by the Court is that Article 6 is breached when a 'conviction is based solely or to a decisive degree' on statements of a witness the defence has not had an opportunity to examine or have examined.[95] In other words, to consider the prosecution unduly advantaged in this manner, the clear occurrence of actual prejudice is requisite.

2. Anonymous Witnesses

(a) Introduction

Another species of derogation from the benchmark model has presented itself in a series of cases involving serious crime whereupon use at trial is made of the testimony of prosecution witnesses whose identities and addresses are withheld intentionally from the defence. Special measures preserving anonymity can also involve use of screens,[96] disguise and voice distortion. Prosecutors tend to seek anonymity for their witnesses in two particular scenarios. The first of these involves the desire to avoid a state asset being compromised so that the asset may continue to provide valuable covert information in the future. Such assets include security service operatives, undercover police and customs officers, and informants. The second scenario concerns the witness whose life or safety is, or is reasonably expected to be, at serious threat from the accused or his affiliates (witness intimidation). This is especially the case where the accused is involved in

[91] (n 27).
[92] *Artner* (n 27) [22]–[24].
[93] ibid Diss Op Judge Thór Vilhjálmsson; Diss Op Judges Walsh, Macdonald and Palm [1]–[2].
[94] Strange (n 79) [16.4].
[95] See also eg *Hulki Güneş* (n 82) [86], [89], [96]; *Bonev v Bulgaria* (App 60018/00) ECHR 8 June 2006 [43]–[45]; *Zhoglo* (n 58) [39], [41], [43].
[96] eg Criminal Code of Canada RSC 1985 c C-46 s 486.2(1)–(2), (4)(b). Available at: Department of Justice Canada (24 August 2010) <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>; YJCEA s 23(1).

organised crime or domestic violence. The Court has certainly acknowledged the valuable contribution made by anonymous witnesses to the investigation of crime.[97] Indeed, it has often professed that the use of anonymous evidence '…is not under all circumstances incompatible with the Convention.'[98] The justification for this has been expressed as follows:

> It is true that Article 6… does not explicitly require the interests of witnesses… called upon to testify… to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8... of the Convention. Such interests… are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses… called upon to testify.[99]

The legitimacy of using anonymous evidence is, therefore, dependent upon a fair balance being struck between the competing rights of witnesses and the accused. Neither conflicting right is to be forfeited for the preservation of the other. Instead, and in the same manner as Hesse's constitutional law concept of *praktische Konkordanz* (practical concordance), both rights are limited by proportionate concessions so that each can be preserved to the optimal extent possible.[100] This case-specific balancing exercise does not detract from the absolute nature of the overall right to a fair trial.

The realisation of a fair balance is, however, particularly difficult to attain in view of the inherent risk associated with the use of anonymous testimony. The ability of the accused to test effectively the accuracy and credibility of a witness account is severely restricted when he is oblivious to the identifying particulars of the latter.[101] The accused is simply denied the

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[97] *Windisch* (n 25) [30]: 'The collaboration of the public is undoubtedly of great importance for the police in their struggle against crime. In this connection the Court notes that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants.' See also eg *Kostovski* (n 28) [44]; *Doorson* (n 63) [69]; *Ramanauskas v Lithuania* (App 74420/01) ECHR 5 February 2008 [53].

[98] eg *Doorson* (n 63) [69]; *Van Mechelen* (n 58) [52]; *Birutis and others v Lithuania* (Apps 47698/99; 48115/99) ECHR 28 March 2002 [29]; *Taal v Estonia* (App 13249/02) ECHR 22 November 2005 [31]; *Krasniki v the Czech Republic* (App 51277/99) ECHR 28 February 2006 [76].

[99] *Doorson* (n 63) [70]; *Van Mechelen* (n 58) [53]; *Marcello Viola v Italy* (App 45106/04) ECHR 2006-XI [51].

[100] K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (16th edn CF Müller, Heidelberg 1988) 27 cited in DP Kommers, 'German Constitutionalism: A Prolegomenon' (1991) 40 Emory LJ 837, 851; E Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 HRQ 294, 303, 317. Contrast the now outdated view of Stavros (n 85) 248: '…Art.6… does not allow for limitations to protect conflicting interests.'

[101] See further *Smith v Illinois* 390 US 129, 131–132 (1968) (Stewart J) (fns omitted): '…when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through

opportunity to exploit the evidential value attached to the identity of the author of an incriminating statement. It appears an affront to the pursuit of adversarialism. Such impediments on the defence have been acknowledged by the Court:

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.[102]

Accordingly, the use of incriminatory anonymous evidence at trial is a highly prejudicial handicap, which by the Court's own admission is for the accused '…almost insurmountable…',[103] that can serve to place the prosecution in a position of undue advantage.

Whereas sufficient counterbalancing measures ensuring that the rights of the defence are restricted to the least extent possible are prescribed by the Court as an essential remedial instrument of the state in this regard, such measures are not in themselves enough to prevent an Article 6 violation. The jurisprudence below reveals that the Court will also consider two other crucial factors: the extent to which the evidence in issue influenced the conviction (sole or decisive basis: prejudice), a factor transplanted from its rulings on absent witnesses; and, since *Doorson v the Netherlands*,[104] whether anonymity was reasonably justified in the first place. Whilst it is clear that these two factors in combination can generate a finding of violation irrespective of

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cross-examination must necessarily be to ask the witness who he is and where he lives. …To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. "…Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test…".'

S v Leepile and others (5) (1986) (4) SA 187 (W) 189 (Ackerman J): The consequences of anonymous testimony are: '(a) No investigation could be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general. (b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him. (c) It would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate.'

Recommendation No R (97) 13 (n 2) Explanatory Memorandum [37]: '…allowing a witness to give evidence anonymously always entails a risk…: i. the anonymous witness could be unreliable for subjective reasons associated with his personal history, for instance former mental disorders, hallucinations, or simply former episodes of regular lying, which could not be brought to light without the defence knowing his identity and verifying his personal history; ii. the anonymous witness might have had in the past some undisclosed relationship or contact or indirect connection with the defendant which, on the contrary, ought to be known and taken into consideration in order to verify whether it might be the source of a prejudiced attitude towards the defendant; iii. the anonymous witness could be plotting against the defendant.'

[102] *Kostovski* (n 28) [42]. See also *Van Mechelen* (n 58) [54]: '…if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve.'; *Doorson* (n 63) [72]; *Krasniki* (n 98) [76].

[103] *Windisch* (n 25) [28].

[104] (n 63) [71].

countermeasures, it remains uncertain whether the first factor is sufficient in itself to occasion a violation in practice.

(b) Case-Law

Kostovski v the Netherlands[105] provides the earliest example of the Court's treatment of anonymous evidence. The applicant's conviction for armed robbery involved the use of statements of two anonymous witnesses, neither of whom were present at trial. Both had been interviewed by the police and one had also been heard by examining magistrates who were not aware of the individual's identity, the defence being absent in each case.

Included in the general principles applied by the Court and reverberated identically or similarly in all subsequent judgements on Article 6(3)(d) was the following:

> …to use as evidence… statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and 1 of Article 6… provided the rights of the defence have been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.[106]

Accordingly, a defence examination of live oral testimony at trial is not essential to the realisation of Article 6. Pre-trial statements are admissible in the alternative and the requirement to provide an opportunity for examination is satisfied if an adequate and proper defence examination occurs at any point in the proceedings,[107] thus including the judicial investigation and police inquiry stages. This approach is unfortunate given that it does not encourage compliance with the benchmark model where, significantly, witness evidence is tested before the eyes of those actually reaching the verdict.

Nevertheless, at no stage in the instant case was an opportunity afforded the defence to directly question the witnesses. Instead, the defence were able to submit written questions to one of the witnesses indirectly through the second examining magistrate. The nature and scope of these questions was considerably restricted so as not to compromise anonymity. The defence

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[105] (n 28).

[106] *Kostovski* (n 28) [41]. See also eg *Saïdi v France* (App 14647/89) (1993) Series A no 261-C [43]; *Birutis* (n 98) [28]; *Bocos-Cuesta* (n 9) [68]; *Vladimir Romanov v Russia* (App 41461/02) ECHR 24 July 2008 [100].

[107] An adequate and proper opportunity for examination does not include questioning a witness solely during the pre-trial investigation stage if his material evidence subsequently is significantly amended and is of decisive importance to the conviction: *Vladimir Romanov* (n 106) [105]–[106].

were also able to examine both magistrates and, in regard to the other witness, an interviewing police officer but the same questioning restrictions applied.

In view of the almost ineffectual measures adopted by the judicial authorities, it is appropriate that the Court did not consider the constraints on the defence to have been counterbalanced.[108] Without direct defence examinations, the anonymous evidence effectively remained untested throughout the proceedings. The Court also criticised the absence of the anonymous witnesses as precluding the trial judges from observing their demeanour (unconscious and conscious behavioural attributes exhibited) under examination in order to gain a direct impression of their reliability.[109] Whereas the reliability of demeanour evidence as a significant gauge of credibility has been denied by the Law Commission[110] and consistently in psychological studies,[111] the Court herein and in subsequent jurisprudence clearly regards it as a valuable aspect of procedural fairness.[112] Furthermore, the Court found it irreconcilable with Article 6 that the conviction had been based to a decisive extent on the anonymous evidence.[113] In these circumstances, the prosecution had been placed in an unduly advantageous position leading to actual prejudice for the applicant, hence a breach of Articles 6(1) and 6(3)(d).[114]

Whilst *Kostovski* concerned civilian witnesses, *Lüdi v Switzerland*[115] provides guidance on the use of anonymous evidence from those serving the state in a covert capacity. The written statements of an undercover policeman played a part in securing the conviction of the applicant for drug trafficking. On the ground of preserving anonymity, the operative was absent at trial and, significantly, at no stage in the proceedings had the defence the opportunity to question him. Though the untested evidence of the operative was influential in the conviction, it did not constitute the sole or decisive basis for it.[116] The Court, therefore, focussed upon the extent of the restriction on the defence. Unlike *Kostovski* where the witnesses were anonymous *stricto sensu*,

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[108] *Kostovski* (n 28) [43]. *Windisch* (n 25) [28] followed suit in reaffirming that putting restricted questions to third parties in relation to anonymous statements is not a counterbalance capable of replacing direct examination of material prosecution witnesses at trial.

[109] *Kostovski* (n 28) [43].

[110] Law Commission (n 18) [6.21]–[6.30].

[111] eg OG Wellborn, 'Demeanor' (1991) 76 Cornell L Rev 1075, 1075: It '…diminishes rather than enhances the accuracy of credibility judgements.'; M Stone, 'Instant Lie Detection? Demeanour and Credibility in Criminal Trials' [1991] Crim LR 821, 829: 'There is no sound basis for assessing credibility from demeanour.'; JA Blumenthal, 'A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility' (1993) 72 Neb L Rev 1157, 1189: It '…promotes faulty judgements and greatly disserves the truth-seeking process.'

[112] eg *Windisch* (n 25) [29]; *Van Mechelen* (n 58) [59], [62]; *Hulki Güneş* (n 82) [95]; *Bocos-Cuesta* (n 9) [71]; *Kovač* (n 9) [30]; *Vladimir Romanov* (n 106) [105].

See further *R v Collins* (1938) 26 Cr App R 177 (CA) 182 (Humphreys J): The opportunity to observe demeanour is an 'inestimable advantage'; *Government of the Virgin Islands v Aquino* 378 F2d 540, 548 (3rd Cir 1967) (Judge Freedman): 'Demeanor is of the utmost importance in the determination of the credibility of a witness'; Osborne (n 88) 266–267: Demeanour is '…a useful, if not infallible guide to credibility…'.

[113] *Kostovski* (n 28) [44].

[114] ibid [45]. This outcome was mirrored in *Windisch* (n 25) [31]–[32] where anonymous statements were of decisive importance to the conviction and *Saïdi* (n 106) [44] where the 'sole basis' for the conviction was anonymous evidence.

[115] (n 9).

[116] *Lüdi* (n 9) [46]–[47].

the operative in the present case was known to the accused, albeit not by real identity but by physical appearance because of their several meetings. In this light, the Court considered that it would have been possible for the operative to be examined by the defence in a manner that did not disclose his identifying particulars.[117] Thus, the prosecution had essentially placed itself in an unduly advantaged position when a less restrictive measure would have sufficed for its purposes; strict necessity had not been observed. Indeed, there was a complete absence of any effective attempt to counterbalance the handicap arising from the anonymity. Accordingly, a finding of violation was appropriate.[118] Clearly, the decision demonstrates that a violation is possible even if anonymous evidence is neither the sole nor decisive basis for the conviction.[119]

In contrast to the above cases, the judicial authorities in *Doorson* avoided a breach of Articles 6(1) and 6(3)(d) despite the handicap presented to the defence by the use of anonymous testimony.[120] The applicant had been convicted for drug trafficking in part on the evidence of two anonymous witnesses whom he had not been able to confront.

The Court for the first time devoted more than just cursory attention to whether or not anonymity was justified. It referred to two grounds upon which regard must be had: it was an established fact that drug dealers often used intimidation measures against prosecution witnesses; previously, one of the witnesses had been injured by a drug dealer after testifying against him and the other had been threatened by dealers to deter him from testifying. The Court viewed these grounds as reasonably justifying the witnesses' fears of possible reprisals by the applicant, thus anonymity.[121] This appears to be an unsound rationale. The applicant had neither threatened the witnesses nor was he known to have ever resorted to violence or threats, or to have illegally carried or handled weapons. Anonymity should only have been justified had this not been the case. The Court instead relied unreasonably on a generalisation as a justification for the restriction of defence rights.

The Court also determined that sufficient measures had been implemented to counterbalance the disadvantage to the accused: the anonymous witnesses were questioned during the appeal stage by an investigating judge who was aware of their identities; the judge submitted a record of her findings regarding the witnesses' reliability; defence counsel was present at the examination and able to put questions to the witnesses, except those designed to reveal identity, and all were

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[117] ibid [49].
[118] ibid [50].
[119] See *Birutis* (n 98) [30]–[35] for evidence of the same. The case is unique to the extent that the decision concerning two of the applicants turned on the failure of the courts to conduct an inquiry into the *manner in which the anonymous evidence was obtained* (obtained allegedly under conditions of improper pressure and incentives) and the absence of an opportunity for the defence to question the witnesses. Accordingly, the handicaps faced by the applicants were not counterbalanced. A violation was also found in respect of the third applicant because, although anonymity was justified, his conviction rested solely upon anonymous evidence.
[120] *Doorson* (n 63) [83].
[121] ibid [71].

answered.[122] These measures are certainly superior to those applied in *Kostovski* and this is the only instance in which the Court found counterbalancing measures that offered satisfactory compensation. It would, however, have been more satisfactory had the additional measure of screening been implemented so as to allow the accused to at least be present at the examination whilst still preserving anonymity.

Nevertheless, the Court declared that '…even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements.'[123] Accordingly, counterbalancing practices are a subordinate consideration to the extent of the actual prejudice arising from the anonymous evidence. When such evidence constitutes the sole or decisive basis of the conviction, the degree of prejudice is too great and likely to be sufficient in itself to justify a violation. The Court did not consider this to have been the case in the applicant's conviction in view of other available evidence.[124]

This conclusion is, however, highly questionable. The national court based its conviction principally on the evidence of the anonymous witnesses and two identified witnesses, N and R.[125] N had made a statement to the police incriminating the accused but retracted it when questioned in open court both at first instance and on appeal. R's evidence was effectively untested as he had only been heard by the police. Given the fundamental flaws in N and R's evidence, it is particularly unconvincing not to assert that the conviction was based to a decisive extent on the anonymous evidence. It is thus, in addition to the aforementioned unsound basis for anonymity, another ground upon which a violation should have been found. The impact of the anonymous testimony unduly tilted the balance between defence and prosecution in favour of the latter.

It is also notable that the Court observed without meaningful elaboration that witness evidence obtained under conditions in which the rights of the defence are not '…secured to the extent normally required by the Convention should be treated with extreme care.'[126] The Dutch authorities had apparently adhered to this requirement.[127] The Court seems to be suggesting that a cautionary approach to the assessment of evidence is a special measure. However, evidence in any context carries an implicit condition that it be treated with caution and circumspection. Accordingly, treatment of evidence in this manner by a state should not be included in the evaluation of any catalogue of positive measures applied by it to mitigate a handicap to the accused.

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[122] ibid [72]–[73], [75].
[123] ibid [76].
[124] ibid.
[125] ibid [34].
[126] ibid [76]. See also *Visser v the Netherlands* (App 26668/95) ECHR 14 February 2002 [44]; *SN* (n 9) [53]; *Krasniki* (n 98) [77]; *Gossa* (n 29) [55]; *Zhoglo* (n 58) [40].
[127] *Doorson* (n 63) [76].

Doorson was subsequently distinguished in *Van Mechelen and others v the Netherlands* where the Court did find the rights of the defence unacceptably restricted.[128] The applicants were convicted for attempted murder and robbery in circumstances wherein the only positive identification evidence was provided by police officers who wished to remain anonymous principally for the protection of their families from reprisals.

The Court distinguished the position of police officers from that of the ordinary witness as found in *Doorson*. It specified that the role of a policeman inherently involves testifying in open court, thus anonymity should only be implemented in exceptional circumstances.[129] It is also right that police officers be treated differently from civilian witnesses for the reason mentioned in the above analysis of *Unterpertinger*: the police are part of the wider prosecution team. The danger of this relationship is that anonymity could be used for prosecution self-interest rather than for actual witness protection. Unlike *Doorson*, the Court was not convinced that the national authorities had made sufficient inquiry into whether or not there was an actual threat of reprisals justifying anonymity. Indeed, a named civilian witness had made statements identifying one of the applicants and was never threatened.[130]

A further distinction is apparent between the two cases in respect of the counterbalancing measures adopted by the judicial authorities. In *Doorson*, the anonymous witnesses were questioned crucially in the presence of defence counsel. By contrast, in *Van Mechelen*, the officers were questioned by an investigating judge, who was aware of their identity and provided an opinion as to their reliability in his official report, whilst the defence and prosecution were listening and could ask questions from a separate room by sound-link. Thus, not only were the identities withheld from the defence but this separation ensured that, unlike in *Doorson*, demeanour could not be observed by it either which, according to the Court, resulted in untested testimony.[131] The measures did not satisfactorily offset the disadvantage to the accused.[132] The Court, therefore, requires anonymous witnesses to be present before the defence during questioning.

Expressly applying a test of strict necessity,[133] the Court also held that the national authorities had failed to justify the necessity for the measures adopted or explain why less restrictive measures, such as disguise or prevention of eye contact, were not considered.[134] Trechsel suggests that the use of disguise is not realistically conducive to reliable observation of demeanour and risks creating a carnivalesque atmosphere.[135] Whilst this may be the case, there is

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[128] (n 58) [66].
[129] *Van Mechelen* (n 58) [56].
[130] ibid [61], [64].
[131] ibid [59], [64].
[132] ibid [62].
[133] ibid [58]: '…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.'
[134] ibid [60].
[135] (n 57) 319.

a feasible alternative measure. Providing that the accused and public were present at hearing and could listen to the live testimony, the witnesses could be screened off to ensure that only the decision-makers and prosecution and defence counsels could observe their demeanour during questioning. In such circumstances, the in-court identification of the accused by the witnesses could be conducted by live video feed (the screened witness can view the accused on his monitor) or by a clear photograph taken at the beginning of the hearing.

The final feature distinguishing the present case from *Doorson* is the actual prejudicial impact of the anonymous evidence as perceived by the Court. The convictions in *Van Mechelen* were based to a decisive extent on the identification evidence provided by anonymous witnesses.[136] Consequently, the domestic procedure allowing this occurrence placed the prosecution at an advantage vis-à-vis the defence.

The same conclusion was reached in *Visser v the Netherlands* which is of particular interest because the Court in finding a violation did not consider it necessary to examine the adequacy of the counterbalancing measures adopted therein.[137] It simply bypassed this aspect and grounded the violation on two superior concerns, the first of which was the justification for witness anonymity. Anonymity had been sought for fear of reprisals since the applicant's co-accused carried a violent reputation and the offence for which the applicant was tried was revenge kidnapping. The Court, however, ruled anonymity unjustified because the judicial authorities had not demonstrated adequately that they had at any stage carried out a proper assessment of whether the fear of reprisals was well-founded.[138] In refusing to accept at face value the grounds for anonymity, the Court again exhibited a reassuring stance so as to ensure the prosecution could not use non-essential anonymity to the detriment of the defence. The second vital concern was the prejudicial effect of the anonymous testimony. The Court viewed the conviction as having been based to a decisive extent on this evidence.[139]

It is evident from the approach taken by the Court that whilst it regards counterbalancing measures as important, they are clearly a subordinate concern to both the adequacy of the grounds for anonymity and, as already indicated in the *Doorson* analysis, the impact of the associated evidence on the accused. If the judicial authorities fail to adequately substantiate their rationale for anonymity, there is no legitimate ground upon which to derogate from the benchmark model and it is a logical consequence that measures designed to counterbalance the anonymity are rendered irrelevant. Furthermore, if actual prejudice arises from the evidence of the witness inappropriately awarded anonymity, the Court will find a violation.[140]

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[136] *Van Mechelen* (n 58) [63]–[64].
[137] (n 126) [51]–[52].
[138] *Visser* (n 126) [47]–[48].
[139] ibid [50].
[140] The approach and outcome herein was subsequently mirrored in *Krasniki* (n 98) [80]–[86].

Also meriting discussion in the present analysis is the admissibility decision in *Kok v the Netherlands*[141] because it is inconsistent with the majority of Strasbourg judgements concerning derogations from the benchmark model.

This inconsistency stems from a principle therein which was also recited subsequently in two judgements on the merits, *Visser* and *Krasniki v the Czech Republic*:

> …in assessing whether the procedures involved in the questioning of the anonymous witness were sufficient to counterbalance the difficulties caused to the defence due weight must be given to the above conclusion that the anonymous testimony was not in any respect decisive for the conviction of the applicant. The defence was thus handicapped to a much lesser degree.[142]

The relationship between the two variables—counterbalancing measures and the impact of the anonymous evidence—presented in this proposition is one of correlation. It seems to indicate that even where anonymous evidence forms to a decisive extent the basis of a conviction, this is a disadvantage capable of being offset by sufficient procedural countermeasures. In other words, the Court did not view it as an absolute condition of procedural fairness that the conviction not be based to a decisive extent on such evidence. Also providing authority to this effect is *SN v Sweden*,[143] though it concerned a vulnerable rather than anonymous witness. Despite observing that the statements of a child witness who never testified in court were virtually the sole evidence upon which the accused's conviction was based, the Court concluded, nevertheless, that the counterbalancing measures applied were sufficient to avoid a violation.[144]

This approach appears inconsistent with the opinion held by the Court in most other judgements not only in respect of anonymous witnesses but also those within the absent and vulnerable categories. The following principle in *AM v Italy* reflects this majority view:

> …the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[145]

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[141] (App 43149/98) ECHR 2000-VI.
[142] ibid [1] ('The Law'); *Visser* (n 126) [46]; *Krasniki* (n 98) [79].
[143] (n 9).
[144] *SN* (n 9) [46]–[47], [49]–[54].
[145] (n 22) [25] (vulnerable). See also eg *Doorson* (n 63) [76] (anonymous); *Van Mechelen* (n 58) [55] (anonymous); *Lucà* (n 9) [40] (absent); *PS* (n 63) [24] (vulnerable); *Vladimir Romanov* (n 106) [100] (absent).

On this contrary view, therefore, it is in principle an absolute condition that a conviction should not be founded solely or to a decisive degree on anonymous testimony. *Visser* and *Krasniki* also made reference to this absolute requirement to accompany their citation of the *Kok* principle.[146] Neither case is, however, particularly useful authority for *Kok* outside of reciting the relevant principle in the latter. The convictions in these cases were based solely or to a decisive extent on anonymous testimony and violations were found without any examination of counterbalancing measures.[147]

The contradiction between the *Kok* and *AM* principles demonstrates a failure by the Court to create necessary legal certainty. A natural repercussion of this was uncertainty in the former House of Lords in *R v Davis*:

> It is considerably less certain… that there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance in the scales. I doubt whether the Strasbourg court has said the last word about this.[148]

A possible means of resolving this uncertainty is to dismiss the *Kok* principle and rely on as authoritative the *AM* principle simply because it is consistently cited in most judgements. However, authoritative status for a principle should not be assumed without regard to the actual practice of the Court. All the cases cited concerning anonymous evidence reveal that the Court does not seem inclined to settle at finding a violation with regard exclusively to the fact that the conviction was based solely or to a decisive extent on anonymous evidence. It also reflects on the justification for anonymity and, with the exception of *Visser* and *Krasniki*, the applied counterbalancing measures. Counterbalancing procedures are the subordinate concern. Regard for factors in addition to the importance of the evidence to the conviction evidences an attempt to comply with the examination of the trial as a whole approach. In these circumstances, therefore, one cannot assert with absolute certainty that, in practice, the *AM* principle is in itself sufficient to occasion a violation. Nevertheless, it is undeniable that it is for the Court a particularly useful indicator of actual prejudice. Accordingly, it can at the very least be concluded confidently that if a conviction is based solely or to a decisive degree on anonymous evidence, the Court is unlikely to hold the trial fair, the same conclusion being reached in *Davis*.[149]

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[146] *Visser* (n 126) [45]; *Krasniki* (n 98) [78].
[147] ibid respectively [50]–[52]; [84]–[86].
[148] [2008] UKHL 36; [2008] 3 WLR 125 [89] (Lord Mance). See also [95]: '…the Strasbourg case law may itself prove to have a greater flexibility than some of the dicta used in them would suggest.'
[149] ibid [59].

(c) Alternative Approach

In contrast the aforementioned uncertainty, the analysis of the jurisprudence on anonymous witnesses illustrates incontrovertibly that the Court has engaged deliberately in a balancing exercise between the rights of the witness and accused. It has already been stated with reference to the concept of *praktische Konkordanz* that this balancing exercise involves restricting the rights of both actors through proportionate concessions. In *Doorson*, for example, the identities of the witnesses were disclosed to the investigating judge, defence counsel was present at the examination and could pose questions (protection afforded the witnesses limited); questions potentially revealing identity, however, could not be asked and the accused could not attend the examination (limitation on the accused). A balancing of interests is undertaken because the Court accepts that use of anonymous testimony from the public and covert state agents is necessary in exceptional circumstances. It is submitted, however, that the extent of this acceptance is misguided. Lusty's observation is pertinent: 'There is now emerging a general consensus amongst the international community that witness anonymity is a cure worse than the disease.'[150]

There are numerous measures available to states that offer a feasible alternative to anonymity. These measures are capable of providing effective protection for lay and expert witnesses without restricting the rights of the defence, hence derogation from the benchmark model and the accompanying inequality between the parties is avoidable. The following measures are proposed as examples:[151]

(a) The creation and strict enforcement of a specific offence of intimidation of witnesses to deter acts not already addressed under other legislation.
(b) Withholding bail and remanding the accused in custody.
(c) Revealing the identity of the witness at the latest possible stage in the proceedings but in such time as is reasonable to allow the defence to sufficiently prepare its examination.
(d) Exclusion of the public and media but only during the live testimony of the witness in issue (requires limited derogation from the benchmark model but is permissible under Article 6(1)). If the press are to be present during the testimony, reporting restrictions may be implemented.
(e) The provision of overt or covert protective surveillance and/or alternative accommodation for the witness and relatives under threat until the conclusion of trial.

[150] D Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 Sydney L Rev 361, 424.
[151] Recommendation No R (97) 13 (n 2) Appendix [3], [9], [15] and Explanatory Memorandum [65], [80]–[81], [83]–[89]; Lusty (n 150) 424 fn 377.

(f) The use of a short or long-term protection scheme for the witness and relatives under threat after trial involving one or more of the following steps: domestic or international relocation (including employment assistance), identity change and protective surveillance.

It is unfortunate that the Court provides criteria to be satisfied if anonymous evidence is to be admitted rather than using the opportunity afforded it to reject witness anonymity and encourage states to pursue innovate and effective alternative measures where procedural equality is not endangered.

Though the above measures may also be deployed where the life or safety of a covert state agent is under specific threat, agents are faced with a unique obstacle as compared to the lay and expert witness. A possible consequence of the identification of an agent at trial is that his ability to ever continue in an undercover operational capacity is irreparably compromised. It is submitted that the realisation of this possibility is unlikely in most scenarios and anonymity is thereby unwarranted. These scenarios involve for the most part short-term undercover assignments that are highly localised and involve suspects linked to either a closely or loosely associated group or small network. It is not unreasonable to consider that the agent could continue to operate undercover effectively in either the same or surrounding areas and target those outside the aforementioned network. Delaying the agent's next assignment is a further strategy that may lessen the likelihood of recognition when undercover status is re-established. It cannot be ignored, however, that there will be operations conducted on occasion against the most serious of organisations within the criminal fraternity which retain particularly extensive network coverage. It may be possible for agents who have subsequently testified without anonymity to undertake undercover investigations of individuals or groups unaffiliated with the prior target organisation. The onus must be on the state to prove on a case-by-case basis that this is not possible.

If the same is proved, this will constitute an exceptional circumstance in which practical realities ensure that anonymity cannot be ruled out as a solution of last resort. It is likely in such exceptional circumstances that effective anonymity would require the additional use of screening. If anonymity is sought, strict conditions must be attached to the proceedings. The Committee of Ministers of the Council of Europe have recommended 'the establishment of an independent verification mechanism capable of providing an effective substitutive form for the defendant and his counsel in the research of any doubtful circumstance that might seriously affect the reliability... of the anonymous witness.'[152] This pre-trial counterbalancing mechanism should include: a investigation concerning the personal history of the witness carried out by an independent magistrate to ensure that the witness is not plotting against the accused; a

[152] Recommendation No R (97) 13 (n 2) Explanatory Memorandum [38]. See also [66], [75] and Appendix [10].

subsequent report by the magistrate detailing the reliability and genuineness of the witness; an opportunity for the defence to comment and ask questions on the personal history of the witness; and a right of the defence to object to the application for anonymity.[153] Anonymity must, of course, be justified and the evidence of the witness need be significant.[154] In regard to trial, the Committee also asserted as an absolute condition that a conviction should not solely or to a decisive extent be based on anonymous evidence.[155] It is additionally paramount that the defence be able to examine or have examined the witness. If screening measures are employed, defence counsel should be in a position to observe demeanour. The application of such conditions in the above exceptional circumstances must be accompanied by caution so as not to encourage the remit of 'exceptional circumstances' from becoming unduly inclusive. It is the absence of caution that breeds the normalisation of witness anonymity,[156] the natural consequence of which is to place the accused in a disadvantaged position.

3. Vulnerable Witnesses: Child Victims in Sexual Offence Prosecutions

(a) Introduction

The final category of witness in which states harbour a tendency to derogate from the benchmark model encompasses those considered vulnerable. Though a condition of vulnerability is also suffered by mentally disabled victims and rape complainants,[157] the few cases considered thus far by the Court in this category relate specifically to children.

Accordingly, those vulnerable for present purposes are child victims of sexual offences whose traumatic experiences '…present the prosecuting authorities and the courts with serious evidential difficulties in the course of the proceedings.'[158] Children are often acutely susceptible to serious emotional distress occasioned by face-to-face confrontation with the alleged perpetrator of the traumatic event.[159] Recounting the intimate particulars of the event before the

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[153] ibid Explanatory Memorandum [76].
[154] ibid [77].
[155] ibid Appendix [13] and Explanatory Memorandum [38], [79].
[156] R Costigan and PA Thomas, 'Anonymous Witnesses' (2000) 51 NILQ 326, 343–348; Lusty (n 150) 425.
[157] See further *A* (n 3) especially [34]–[35], [38]–[40], [43], [45] (Lord Steyn) concerning the interpretation of YJCEA s 41 which prevented the accused from examining a rape complainant on her previous sexual behaviour, including with the former, except in particularly narrow circumstances. The House of Lords held the provision to be, on ordinary principles of statutory construction, a '…prima facie excessive inroad on the right to a fair trial' as it denied the accused the opportunity of putting forward relevant evidence for '…a full and complete defence…', hence was incompatible with Art 6. It is, however, questionable whether the same would be found in Strasbourg given that rules on the admissibility of evidence are primarily a matter within the broad margin of appreciation afforded to states.
[158] *Mattoccia v Italy* (App 23969/94) ECHR 2000-IX [71].
[159] JR Spencer, 'Children's Evidence in Legal Proceedings in England' in JR Spencer and others (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge University Law Faculty, Cambridge 1990) 117; GS Goodman and others, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57 Monogr Soc Res Child Dev 1, 100–101, 120–121; J McEwan, *Evidence*

accused is liable, potentially, to include within the distress negative and revived feelings of helplessness, hurt, shame, guilt and, if the abuser was in a position of trust, betrayal.[160] Such a response may jeopardise the quality of the evidence elicited or prove to be an insurmountable obstacle. These possible negative effects assume even greater significance because the nature of sexual offences is such that the testimony of the child is often the foremost basis for the prosecution. Though an adverse emotional impact is particularly prominent in cases involving children, sexual offence prosecutions are, of course, also capable of becoming a painful ordeal for adult victims facing their perceived offenders.

It is in view of these circumstances that the Court recognises the welfare of the victim-witness in sexual offence proceedings as a legitimate interest in the application of Article 6:

> In the assessment of… whether or not... an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that 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 an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.[161]

Lawful derogation from the benchmark model to accommodate a vulnerable witness is, therefore, possible but contingent once again on a fair balancing of interests. The threat underlying derogation in the present context is, of course, that the vulnerable witness may be protected to the extent that the defence is unable to properly test important evidence and is thereby unduly disadvantaged vis-à-vis the prosecution.

In its analysis of whether or not a fair balance was achieved, the jurisprudence below indicates that the Court adopts the key factors to be taken into account that were given prominence in cases concerning absent and anonymous witnesses. Thus, as indicated in the above quotation, the Court will consider whether measures implemented by the judicial authorities were sufficient to counterbalance the unconventional burden on the defence. It will also assess the reasonableness

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and the Adversarial Process: *The Modern Law* (Blackwell, Oxford 1992) 112; LC Brannon, 'The Trauma of Testifying in Court for Child Victims of Sexual Assault v The Accused's Right to Confrontation' (1994) 18 Law & Psychol Rev 439, 440, 442, 459.

See further M Wąsek-Wiaderek, *The Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View* (Leuven UP, Leuven 2000) 33 who suggests that such distress is tantamount to secondary victimization.

[160] Goodman and others (n 159) 120; Brannon (n 159) 442–443.

[161] *SN* (n 9) [47]. See also *PS* (n 63) [22]–[23]; *Bocos-Cuesta* (n 9) [69]; *WS* (n 22) [47], [57]; *Kovač* (n 9) [27].

of the justification for the derogation and whether the conviction was based to a sole or decisive extent (prejudice) on the evidence of the vulnerable witness.

(b) Case-Law

These factors featured in *PS v Germany*,[162] a case where the applicant was convicted of sexually abusing an eight-year-old girl. The trial court relied on statements made by the girl, her mother and the police officer who questioned her after the offence.

The girl was never heard before the courts because she had repressed her recollection of the event and reminding her thereof would be detrimental to her personal development. The Court opined, however, that such a rationale was irrelevant for it was '…rather vague and speculative…'.[163] Quite rightly, therefore, the Court is not prepared to accept as given a condition of vulnerability in all child sexual abuse prosecutions. Accordingly, in the subsequent case of *Bocos-Cuesta v the Netherlands*, it criticised the failure of the judicial authorities to base the derogation on '…concrete evidence…' and it also highlighted in *Kovač v Croatia* the '…absence of any explanation…' for refusing the applicant the opportunity to question the child victim-witness.[164] In light of the consequences for the accused, it is essential that derogation from the benchmark model grounded on the vulnerability of the witness is, like anonymity, adequately justified.

The Court also noted in the case that at no stage in the proceedings had the girl been questioned by a judge and the applicant been able to observe her demeanour as an indicator of reliability.[165] Though the appeal court had at its disposal an expert opinion on the girl's credibility, the European Court considered its value as a countermeasure highly compromised since it had been prepared 18 months after the alleged offence.[166] This is understandable because a significantly delayed opinion does not necessarily reflect accurately the actual credibility of a witness at the time the incriminating statements were made. Additionally, the countermeasure was certainly outweighed by the fact that the conviction was based to a decisive extent on the girl's evidence.[167]

In these circumstances, the prosecution gained a prejudicial advantage from the opportunity to use evidence that the defence could not effectively test. It was determined, accordingly, that the rights of the defence had been restricted to an unacceptable extent in breach of Articles 6(1) and 6(3)(d).[168]

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[162] (n 63).
[163] *PS* (n 63) [28].
[164] *Bocos-Cuesta* (n 9) [72]; *Kovač* (n 9) [31]. Breach of Arts 6(1) and 6(3)(d) found in both cases: [74], [33] respectively.
[165] *PS* (n 63) [26].
[166] ibid [29]. Contrast Trechsel (n 57) 321 who finds this view unconvincing.
[167] *PS* (n 63) [30].
[168] ibid [31]–[32].

No such breach was found in *SN* where the conviction of the accused was for the sexual abuse of a child of 10 who did not appear before the courts.[169]

The Court did not, unfortunately, require the same standard of evidential substantiation for the derogation from the benchmark model as that apparent in *PS*, *Bocos-Cuesta* and *Kovač*. It seemed to accept the derogation as justified merely on the status of the witness as a child victim of sexual abuse.[170] Such a stance risks an unnecessary restriction of defence rights given that it is not inevitable that a confrontation with the accused in all such cases will be to the severe emotional short and/or long-term detriment of the child.

It has already been referred to in the above analysis on anonymous witnesses that the Court acted against the trend set in the majority jurisprudence by not finding a violation despite observing that the child's evidence constituted virtually the sole basis for the conviction. The fundamental basis for its decision was that the applied counterbalancing measures were sufficient to have enabled the defence to challenge the child's statements and credibility.[171] The videotape of the first police interview with the child was shown at trial and on appeal. The transcript of the second interview was read out at trial and the defence listened to the audiotape of the same at the appeal stage. This evidence was disclosed to the defence pre-trial. Defence counsel had consented to not being present at the second interview and failed to request that it be videotaped, though he was able to have his questions put to the child by the interviewer. Accordingly, he had not availed himself of the opportunities to view directly or indirectly both the child's response under questioning, which may have provided evidence to undermine the child's credibility, and the conduct of the interview. Despite this failure on the part of the defence, the procedure applied remains subject to criticism: it did not allow for anyone independent of the prosecution to question directly the child at any stage.[172] A possible remedy to this defect is the suggestion of Judges Türmen and Maruste that an expert in child forensic psychology could have been engaged to assess the child's evidence.[173] It was in view of the defect that these judges considered in their dissenting opinion that the judicial authorities had failed in their duty to implement all feasible counterbalancing measures.[174]

When this criticism is combined with the highly prejudicial impact of the child's evidence, which significantly was not corroborated by an independent witness, and the absence of adequate substantiation for the derogation, the accused was placed in an unduly disadvantaged position irrespective of the failings of his counsel. Accordingly, contrary to the Court's actual decision, a finding of violation was a warranted response.

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[169] (n 9) [54].
[170] *SN* (n 9) [47].
[171] ibid [52].
[172] ibid Concurring Op Judges Thomassen and Casadevall.
[173] ibid Diss Op Judges Türmen and Maruste.
[174] ibid.

A violation was found to have occurred subsequently in *WS v Poland*, a case concerning the conviction of the applicant for the repeated sexual abuse of his daughter between the ages of two and four.[175] The child was never at any stage questioned by the defence, prosecutor, police or courts.

An expert, however, twice conducted a psychological examination of the child, the findings of which were of decisive importance to the conviction.[176] Accordingly, the information gleaned from the girl was particularly prejudicial to the accused. Having noted that the soundness of the methodology used by the expert psychologist was confirmed, the Court declared that her opinion that it would be harmful to the well-being and development of the child to be heard (rationale for the derogation) was sufficiently motivated and not disproved.[177] However, the Court did highlight that the absence of video recordings of the examinations denied the parties and courts a necessary opportunity to observe the child's demeanour under questioning.[178] A video record is also a particularly prudent safeguard in view of the suggestibility of children and the ever-present threat of distortions by the adult interviewer.[179] Additionally, the Court observed that the judicial authorities failed to make any attempts during the proceedings to enable the defence to test the reliability of the child in a manner alternative to direct questioning.[180] It suggested, as examples, an interview in the presence of a psychologist with written questions from the defence or an interview in a studio wherein the accused or his counsel could be present indirectly through the use of a one-way mirror or video-link.[181] In these circumstances, the Court concluded that the restrictions on the defence right of examination were not counterbalanced.[182] Furthermore, the Government could not rely on as a defence the fact that the prosecutor had also not questioned the child, for the Court held that it was '…not sufficient for a finding that the applicant was not put in a disadvantageous position *vis-à-vis* the other party.'[183]

Such a finding is a correct application of the concept of equality of arms. The procedure implemented by the judicial authorities, the most notable aspect of which was the interviews by the psychologist, proved to be particularly advantageous to the prosecution. Whereas the formal opinion of the psychologist was susceptible admittedly to challenge, the defence could only mount an 'effective' challenge thereto if a proper and adequate opportunity to test its evidential source—the child—had been provided. Given that such an opportunity was not granted and the

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[175] (n 22) [64]. The child was aged four at the initiation of the investigation and seven at the time of trial.
[176] *WS* (n 22) [58].
[177] ibid [58]–[59].
[178] ibid [59], [63]. This was also a ground of criticism expressed, mutatis mutandis, in *Bocos-Cuesta* (n 9) [71] and *Kovač* (n 9) [30].
[179] LS McGough, 'Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims' (2002) 65 Law & Contemp Probs 179, 184.
[180] *WS* (n 22) [61].
[181] ibid. Video-links are also encompassed within the suggested example by the Court in *Bocos-Cuesta* (n 9) [71] and *Kovač* (n 9) [30] that the accused be able to observe children under questioning from '…another room via technical devices'.
[182] *WS* (n 22) [63].
[183] ibid [49], [63].

evidence of the child occasioned actual prejudice, the prosecutor was unduly advantaged by the process despite not questioning the child himself.

(c) Acceptable Level of Derogation from Benchmark Model

Vulnerability sufficiently justified merits protection. Court preparation programmes customised to the needs of each child are propounded as a means of enhancing communication skills to deal with examinations and empowering the child with stress management techniques and essential information on court procedure to reduce anxiety and fear.[184] Though such preparation is not without value, it is insufficient to overcome for the vulnerable child the trauma arising from an actual face-to-face confrontation with his perceived abuser. It is accepted, therefore, that where the state has, through expert opinion, adequately substantiated that a severe adverse impact on the well-being and development of the child is highly likely if a confrontation with the accused were to occur, derogation from the benchmark model will be necessary.

In order to restrict the extent of this derogation and the possible disadvantage to the accused, whilst accommodating simultaneously the interests of the vulnerable witness, the Court has in the above jurisprudence formulated feasible measures that are worth expanding upon. An audio-visual record of the initial interview of the child should be made as evidence-in-chief and subsequently disclosed to the defence to enable preparation of its lines of inquiry. Thereafter, in accusatorial style systems, defence counsel could question with delicacy the child at trial through the medium of video-link, the latter giving evidence from a separate child-friendly room. Alternatively, in inquisitorial style systems, a further and final pre-trial interview should be conducted in a child-friendly location by an investigating judge and/or an expert in child psychology. From a separate room, audio and video devices will allow the accused and his representative to observe the propriety of the interview and feed the interviewer questions to be put to the child. As in the case of the initial interview, this interview should also be recorded for transmission at trial. It is, of course, an option for procedures of the inquisitorial tradition to make use of audio-visual techniques for an examination of the child at the trial hearing in lieu of or in addition to this second pre-trial interview. It is through the adoption of such solutions that the child is both adequately protected but subject still to effective challenge by the defence.

[184] Recommendation No R (97) 13 (n 2) Explanatory Memorandum [107]; IM Cordon, GS Goodman and SJ Anderson, 'Children in Court' in van Koppen and Penrod (n 13) 182–183.

G. THE RIGHT TO CALL WITNESSES

Whereas the predominant focus of the analysis hitherto has been the examination of adverse witnesses, the accompanying right of the accused to call fact and expert witnesses on an equal footing with the prosecution remains to be considered.

Contrary to the conclusion drawn by Maffe,[185] the right of the accused to call a witness 'on his behalf' as articulated in Article 6(3)(d) is not restricted merely to those considered favourable to the defence. This was exemplified in *Cardot v France* where the onus was placed by the Court on the defence to call the prosecution witnesses it wished to examine, the prosecutor having deemed their attendance at trial unnecessary.[186] A prosecution witness is, accordingly, capable of incorporation into the category of witness on behalf of the defence. The remit of this category has been defined most accurately by Trechsel as including any witness '…called upon the initiative of the defence', hence extending its reach to even the neutral witness.[187] In the adversarial tradition, it is on the initiative of the parties that witnesses are called. On the other hand, courts of the inquisitorial tradition assume primary responsibility for selecting witnesses to be summoned, though the accused may make a request for additional witnesses. There is an expectation that he employ all lawful means at his disposal (reasonable effort) to communicate that request to the court.[188] The same is applicable in adversarial systems if the accused seeks to rely on a court issued summons when the witness indicates that he is unwilling to appear voluntarily. Whenever a court is relied upon to secure the attendance of a witness, it must make every reasonable effort to do so.[189]

The exercise of the right to call witnesses is, however, subject to a particularly potent discretion on the part of the domestic courts, it having been settled as a general rule that Article 6(3)(d) entrusts them with the assessment of whether the calling of a particular witness is appropriate.[190] It is in light of this vested discretion that the courts are not required to facilitate the attendance and examination of every witness demanded by the accused.[191] Indeed, the Court has stipulated that only in exceptional circumstances will it conclude that a refusal to hear such a witness is incompatible with Article 6.[192] The provision of this discretion and the reticence of the Court to intervene are consistent with the broader principle that the admissibility and assessment of evidence is primarily the responsibility of national courts. It is a reaffirmation of the Court's

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[185] (n 26) 75.
[186] (n 84) [35]–[36].
[187] (n 57) 323.
[188] *Dorokhov* (n 7) [67], [70]–[71].
[189] *Pello* (n 7) [34]–[35].
[190] eg *Vidal* (n 7) [33]; *Perna v Italy* (App 48898/99) ECHR 6 May 2003 [29]; *Dorokhov* (n 7) [65]; *Rumyana Ivanova v Bulgaria* (App 36207/03) ECHR 14 February 2008 [42].
[191] eg *Engel* (n 7) [91]; *Vidal* (n 7) [33]; *Popov* (n 7) [176]; *Polufakin and Chernyshev v Russia* (App 30997/02) ECHR 25 September 2008 [205]. See also 'Text of the Report...' (n 5) 262: 'It is obviously not a question of giving the accused the right to summon witnesses without any restriction.'
[192] *Bricmont* (n 76) [89]; *Popov* (n 7) [179]; *Pello* (n 7) [27].

position as a subsidiary body of oversight rather than fourth instance competence. In this capacity, the Court will seek to ensure that state discretion is exercised in a manner compatible with the concept of equality of arms: the conditions for calling witnesses must be equal between the parties.

Complaints grounded on the second limb of Article 6(3)(d) arise because the competent authorities are alleged to have exercised their discretion to an unfair extent in refusing to admit the evidence of a witness the defence sought to adduce. It is a condition of substantiating this allegation that the accused prove that he was unable, upon his request, to call the proposed witness and that he establish that the evidence anticipated therefrom was relevant:

> 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.[193]

The qualification of relevance is an appropriate obstruction to proposals for witnesses that are from the outset without merit.[194] It is not a standard that presents an affront to the reasonable level of protection an accused should expect. The judicial authorities bear a corresponding duty of giving adequate consideration to whether the accused's assertion of the relevance of the proposed witness is sound. If a court is not convinced sufficiently of the accused's argument towards relevance, adequate consideration entails that its decision must be expressly reasoned, particularly in light of *Vidal v Belgium*.[195] It is only right that the court explain itself if arbitrary decisions are to be avoided. The fact that a rejection is reasoned, however, should not of itself satisfy the requirement of adequate consideration for the reasons given in some cases will be especially unreasonable. The European Court should, accordingly, define the scope of adequate consideration to include a condition that the grounds for rejection not be manifestly unreasonable. To do so would be another means of reaffirming to national courts that their discretion is not unlimited.

Only through adequate consideration of relevance can a court's refusal to admit a proposed witness constitute a responsible and reliable exercise of its discretion and avert a violation. Such consideration was acknowledged as absent in *Popov v Russia*: '…the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in

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[193] *Perna* (n 190) [29], [32]. See also *Bocos-Cuesta* (n 9) [67]; *Koval v Ukraine* (App 65550/01) ECHR 19 October 2006 [116]; *Borisova* (n 63) [46]; *Pello* (n 7) [26]; *Muttilainen* (n 63) [21].

[194] See further Osborne (n 88) 260: '…attempts to prolong trials or abuse the process of the court, e.g. by summoning Government Ministers or foreign nationals, would certainly fail.'

[195] (n 7) [34]–[35]: It was especially the absence of reasons for the appellate court's refusal to admit a proposed witness that gave rise to an Art 6 violation.

Article 6.'[196] To deny the admission of a proposed witness without first confirming irrelevance through adequate consideration amounts, essentially, to limiting the opportunity of the accused to put relevant evidence before the court. Meanwhile, the prosecution will be entitled to admit all its relevant evidence for the charge relies upon it. The accused, accordingly, will be subject to a prejudicial inequality in the opportunity to admit relevant witnesses, hence contravening the concept of equality of arms.

It is in light of this analysis that *Dorokhov v Russia*[197] should be viewed as an out of place decision not to be followed. The Court considered 'regrettable' the failure of the domestic courts to duly examine the defence request to call two witnesses who were, in its view, 'clearly relevant'.[198] The prosecution had secured the attendance of its witnesses. Unexpectedly, however, the Court maintained that Articles 6(1) and 6(3)(d) had not been violated.[199] The rationale was that there was a solid evidentiary basis for the conviction and the probative value of the anticipated witness evidence was sufficiently low so as to render an acquittal unlikely.[200] The Court certainly exceeded its competence. The probative value of evidence is an issue confined primarily to the competence of national courts but was used unduly by the Court to effectively offset a prejudicial procedural inequality. Whilst it is acceptable for the Court to consider the relevance rather than probative value of witness evidence, it must retain a principally procedural focus if it is to avoid assuming a fourth instance role. A violation should, therefore, have been found on the basis of the inequality associated with the failure to give adequate consideration to the accused's request.[201]

The courts must not, however, focus their efforts exclusively on duly examining a witness request if they are to successfully avert procedural inequalities. Even in cases where a request to call witnesses is granted, a procedural inequality ensues if the court fails to take effective measures to secure their presence because relevant witnesses are in practice still being excluded to the advantage of the prosecution whose witnesses are in attendance.[202]

Also impacting on the effective exercise of the right to call witnesses under conditions of equality from the outset may be circumstances where the accused is denied adequate time and facilities to prepare a defence. The provision of an adequate opportunity for case preparation is necessary to effectively enable the accused to be in a position to propose witnesses. In *Borisova v Bulgaria*,[203] the accused was party to an expedited procedure without prior notice in which she

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[196] (n 7) [188]. See also eg *Pello* (n 7) [35]: A failure to 'examine adequately' a witness admission request was held to contravene Arts 6(1) and 6(3)(d); *Jorgic v Germany* (App 74613/01) ECHR 12 July 2007 [86], [88]: The refusal to call certain proposed witnesses on grounds of irrelevance was held legitimate given that the applicant's request had been duly examined and detailed reasons for the refusal were provided.
[197] (n 7).
[198] *Dorokhov* (n 7) [72]–[74].
[199] ibid [75].
[200] ibid [74].
[201] See also ibid Partly Diss Op Judges Lorenzen and Tsatsa-Nikolovska.
[202] *Polufakin and Chernyshev* (n 191) [207].
[203] (n 63).

was unable to call defence witnesses and convicted within three hours of being detained. The Court considered it reasonable that she failed to provide the trial court with the names of witnesses she wished to call as she lacked the time and facilities to prepare an effective defence.[204] As prosecution witnesses had been secured, the Court concluded correctly that the prosecution was advantaged unfairly in its opportunity to prepare its case and find supporting witnesses, thereby infringing, inter alia, Articles 6(1) and 6(3)(d).[205] The case illustrates an instance in which a violation was easily avoidable. The burden imposed by the Court of placing the accused in a position to propose witnesses was certainly not an onerous one. Indeed, neither is it particularly onerous for national courts to adequately examine a witness request, given their broad discretion, and make reasonable efforts to obtain the attendance of a witness upon approval of that request. Whereas the realisation of procedural equality in the opportunity to call witnesses is, therefore, an undemanding endeavour for judicial authorities, the demands that are imposed generally protect the accused to an acceptable degree.

H. CONCLUSION

The object of this discussion was to consider the Court's approach to equality of arms within the context of the Article 6(3)(d) right to challenge and call witness evidence

A strong nexus exists between equality of arms and this provision. This is authoritatively recognised in law by the Court, Commission and Human Rights Committee, and made possible in the ECHR because both are components of 'fair hearing' in Article 6(1). At a conceptual level, the nexus it evident in the contribution of Article 6(3)(d) to the instrumental, intrinsic and collateral value of procedural equality. The provision is also feasibly reciprocal, essential to case preparation and presentation, and associated with the adversarial principle, all of which are features linked to equality of arms.

The discussion identified those who can assume witness or examiner status. The Court has rightly adopted an autonomous interpretation of 'witness' to prevent states unduly avoiding Article 6(3)(d) applicability through formal labels. A witness is one who authored at any time a statement taken into account by the domestic court. This can include co-defendants and experts engaged by the parties. An independent court-appointed expert is not intrinsically a witness. He can, however, assume witness status if doubts as to his neutrality, raised by appearances, are objectively justified (expert witness). Recourse to appearances, as done when identifying an 'opponent', is a manifestation of the autonomous interpretation approach. Examiner status can apply to a judge, legal representative and pro se accused, though in the latter case it is not

[204] *Borisova* (n 63) [47].
[205] ibid [48]–[50].

unreasonable for him to be restricted from examining a demonstrably vulnerable witness when representation is available.

A benchmark model, reflected in Article 6(3)(d), for the conduct of examinations was presented in the chapter to serve as a reference point by which to discern and measure legitimate and illegitimate derogations therefrom. The model features live oral testimony before an open trial court; face-to-face contact between witness and accused; and questioning conducted under a condition of procedural equality. A requirement that evidence is sworn and the real identity of the witness is revealed is a worthwhile addition.

In exceptional cases, the Court accepts that this model can be legitimately derogated from without violating Article 6(3)(d). This is grounded on a need to reconcile the competing interests of the accused, prosecution and adverse witnesses. The danger in accommodating the interests of adverse witnesses is that prosecutors, who rely on their evidence, can find themselves procedurally advantaged over a defence which is unable to properly test this evidence. Derogations are considered in the light of the trial as a whole, a procedural rather than evidential assessment. They are implemented in relation to three categories of witness and the response of the Court thereto reveals its approach to equality of arms.

This approach was first discussed regarding absent witnesses. The Court will generally find Article 6 infringed if a conviction is based solely or to a decisive degree on the statement of an absent witness the defence has not had an opportunity to examine or have examined. Thus, it is only considered that a procedural advantage will result to the prosecution if actual prejudice occurs. The benchmark model allows the defence to challenge all evidence in open court because any evidence the prosecution relies upon is important. Under the Court's approach, important evidence that is not the sole or decisive basis of the conviction need not be tested at the trial hearing. This advantages the prosecution, albeit not always to a prejudicial extent. The preferred approach should be that it is an inequality of arms for statements of absent witnesses to be admitted, regardless of prejudice (unequivocal inequality). The state must provide sufficient other evidence to maintain the prosecution.

Anonymous witnesses were the second category of witness discussed. The Court again only considers the accused procedurally disadvantaged upon the occurrence of actual prejudice. It thus takes account of state measures intended to counterbalance the handicap of anonymous evidence, an indicator also of whether the rights of the defence were restricted to the least extent possible. Even if these measures are sufficient in themselves, they are a subordinate concern. A more pressing indicator of prejudice is that the anonymous evidence is the sole or decisive basis for the conviction. Whereas in principle this factor is sufficient in itself to cause a violation, the Court is inclined in practice to only find a violation once counterbalancing measures and the justification for anonymity have also been assessed. It is submitted, however, that an alternative approach is necessary. The Court should generally reject witness anonymity and thus avoid the

accused being disadvantaged altogether. The discussion provided several examples of measures capable of protecting witnesses without derogation from the benchmark model. Only in exceptional cases of where a state can adequately demonstrate that the capacity of its agent to ever carry out another undercover operation would be irreparably compromised should anonymity be possible. The strict conditions suggested in the discussion to accompany this anonymity should be implemented as a safeguard. An actual prejudice approach would be necessary in this instance.

The third category of witness discussed concerned those considered vulnerable: child victims in sexual offence prosecutions. The extent of the counterbalancing measures implemented and the impact of the evidence on the conviction are considerations also applied to these witnesses to identify actual prejudice and thereby establish an inequality of arms. Also assessed is the reasonableness of the justification for derogating from the benchmark model. Whereas in the absent and anonymous witness categories an actual prejudice approach should be avoided, it is submitted that it is called for when vulnerability is adequately substantiated as a certain level of derogation will be necessary. The extent of this derogation should be restricted in line with suggestions in the discussion, which will still allow effective defence challenge of evidence, to prevent prejudicial disadvantage.

Cases on all three categories of witnesses are consistent in equating procedural disadvantage with actual prejudice, albeit certain cases were wrongly decided in not registering an inequality of arms. Only in the case of vulnerable witnesses, and perhaps a minority of covert agents, is this approach warranted; otherwise, departures from the benchmark model should not be permitted and thus equality maintained as far as the parties' roles permit.

The final part of the discussion considered the right to call witnesses. The defence is entitled to request the calling of any witness, favourable or otherwise. Adopting a non-interventionist stance consistent with the fourth instance doctrine, the Court has allowed states a broad discretion to assess the appropriateness of acceding to each request. The accused must demonstrate the relevance of witnesses requested and national courts must give adequate consideration thereto, though the European Court should make express that grounds for rejecting a request not be manifestly unreasonable. These burdens on the parties are intended to unearth actual prejudice: rejection of proposed witnesses without first confirming irrelevance through adequate consideration renders unequal the defence with the prosecution who can call all their witnesses; this inequality gives rise to actual prejudice because relevant evidence is not put before the court. This approach to procedural equality is acceptable because the qualification of relevance is an appropriate bar to abuse of process without offending the dignity of the accused.

The link between equality of arms and actual prejudice is not exclusive to the context of examining and calling witnesses. It also features strongly in cases on adequacy of time and facilities for case preparation, which are next discussed.

4

EQUALITY OF ARMS AND THE RIGHT TO ADEQUATE TIME AND FACILITIES

A. INTRODUCTION

An opportunity for adequate defence preparation is essential if an effective response to the charge is to be mounted at hearing. The realisation of such an opportunity requires crucially that the accused be afforded 'adequate time and facilities' as guaranteed in Article 6(3)(b). One may infer from the standard of 'adequate' an acknowledgement that the time and facilities reasonably required in each particular case are variable by context. The degree of time and facilities provided in one case will not be enough necessarily to mount an effective defence in another which differs in seriousness of offence, complexity and difficulty. The inherent nature of time and facilities is such that Article 6(3)(b) is the most far-reaching and flexible provision of the Article 6(3) catalogue. Its non-observance is capable of placing the accused in a position of procedural disadvantage vis-à-vis the prosecution which has access to considerable state resources to aid its preparation.

Article 6(3)(b) is, accordingly, a facet of concern for the concept of equality of arms, Part B defining the nexus between them. The concern of the discussion thereafter is the Strasbourg approach to this concept in determinations on adequacy of time and facilities. It begins in Part C by examining the right to adequate time with a particular emphasis on the key matters taken into account when it is applied at Strasbourg. It is not, however, complaints of inadequate time that predominate Article 6(3)(b) jurisprudence. Attracting greater regard is the right to adequate facilities which is dealt with in Part D. Though it briefly provides examples of several facilities considered necessary for securing equality of arms, the facility of disclosure is the most prominent in the case-law and thus predominates the discussion in the section. The character of disclosure is outlined which addresses questions of what must be disclosed, the timing of disclosure and who disclosure must be made to. This serves as a useful prelude to discussing the Court's approach to the concept of equality of arms as applied to issues of disclosure. Its approach is explained with reference to cases of non-disclosure of evidence on grounds of public interest immunity and of written observations of legal officers joined to the proceedings.

B. THE NEXUS BETWEEN EQUALITY OF ARMS AND ARTICLE 6(3)(B)

Article 6(3)(b) issues from the concept of equality of arms. The nexus between them can be identified from both a legal and conceptual perspective.

1. Legal Nexus

Authoritative weight has been given to the existence of a nexus in law. The former Commission expressed that Article 6(3)(b) '…was designed, in particular, to help establish between the prosecuting authority and the defendant the equality necessary for a fair trial…'.[1] The Court has also affirmed that a failure to respect this guarantee undermines the requirement of procedural equality.[2] Similarly, the Human Rights Committee has in the equivalent Article 14(3)(b) of the International Covenant on Civil and Political Rights oft-professed that the provision is a feature of the equality of arms principle.[3] The legal foundation for the nexus at Strasbourg lies in the right to fair hearing in Article 6(1) of which the concept of equality of arms and Article 6(3)(b) are constituent parts. It is for such reason that Articles 6(1) and 6(3)(b) are sometimes expressly assessed in conjunction when determining whether the latter has been violated.[4] In cases where Article 6(3)(b) is applied without express reference to Article 6(1), the concept of equality of arms remains present as an underlying doctrine.

2. Conceptual Nexus

The existence of the nexus is also discernible at a conceptual level. Chapter 2 maintained that procedural rights characterised as feasibly reciprocal and essential for case preparation and/or presentation fell within the equality of arms remit.[5] Article 6(3)(b) is self-evidently of this nature. That chapter also identified the adversarial principle as encompassed within the scope of the concept of equality of arms.[6] Disclosure, a facility within the meaning of Article 6(3)(b), is an application of the adversarial principle for it enables the accused to inform himself of the

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[1] *Jespers v Belgium* (App 8403/78) (1981) 27 DR 61 [70].
[2] *Moiseyev v Russia* (App 62936/00) ECHR 9 October 2008 [223].
[3] eg *Paul Kelly v Jamaica* (Comm 253/1987) UN Doc CCPR/C/41/D/253/1987 60 (1991) [5.9]; *Michael Sawyers, Michael and Desmond McLean v Jamaica* (Comm 256/1987) UN Doc CCPR/C/41/D/256/1987 (1991) [13.6]; *Little v Jamaica* (Comm 283/1988) UN Doc CCPR/C/43/D/283/1988 (1991) [8.3]; *Smith v Jamaica* (Comm 282/1988) UN Doc CCPR/C/47/D/282/1988 (1993) [10.4]; Human Rights Committee, 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial' (2007) UN Doc CCPR/C/GC/32 [32].
[4] eg *Hadjianastassiou v Greece* (App 12945/87) (1992) Series A no 252 [37]; *Kremzow v Austria* (App 12350/86) (1993) Series A no 268-B [50]; *GB v France* (App 44069/98) ECHR 2001-X [57], [63], [70]; *Galstyan v Armenia* (App 26986/03) ECHR 15 November 2007 [84], [88]; *Ashughyan v Armenia* (App 33268/03) ECHR 17 July 2008 [66]–[67].
[5] Ch 2 Pt D ss 2–3(a), (c)–(d).
[6] ibid s 3(b).

observations and evidence of the other side. This relationship thus reinforces the nexus between Article 6(3)(b) and the principle of equality of arms.

This nexus is even closer because the instrumental, intrinsic and collateral values of the latter, also established in Chapter 2,[7] are served by the realisation of Article 6(3)(b) in practice.

The provision of adequate time and facilities for case preparation encourages an accurate outcome (instrumental). The prosecution is acknowledged as having considerable state resources at its disposal to prepare its case.[8] The facilitation of case preparation gives the defence a real opportunity at hearing to counter effectively the prosecution position and deliver its best case possible in the circumstances to influence the court. Essentially, therefore, preparation potentially influences the strength of the case presented at trial and its consequential impact upon those determining the outcome.[9] The Court, accordingly, recognises that Article 6(3)(b) affords the accused '…the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings.'[10] It is thus partially through preparation that the opportunity to influence the court becomes equal between the parties and a correct verdict more likely to be reached.

This instrumental value sits alongside the contribution Article 6(3)(b) makes towards preserving the dignity of the accused (intrinsic). Article 6(3)(b) expresses to the accused that the state considers him deserving of a meaningful opportunity to prepare for the hearing that will decide his fate. This opportunity is also conducive to the accused feeling that he is a participant of the trial process equal to the prosecution, as far his role inherently permits, and his defence will be a considered and effective one.

A perception of procedural legitimacy (collateral) is achieved as a consequence of the aforementioned instrumental and intrinsic values. Observance of Article 6(3)(b) makes apparent to the public that the accused was not placed at a disadvantage vis-à-vis the prosecution in his ability to prepare his case effectively. Not only does this suggest to the public that his dignity was being safeguarded but greater confidence can be had in the safety of an outcome influenced by a meaningfully prepared defence.

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[7] ibid Pt B.

[8] *Jespers* (n 1) [55]: '…the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion.'

[9] See further T Bakken, 'International Law and Human Rights for Defendants in Criminal Trials' (1985) 25 Indian J Int'l L 411, 414: 'A trial… without adequate planning and strategy is a sterile procedure devoid of probing inquiry…'.

[10] *Mayzit v Russia* (App 63378/00) ECHR 20 January 2005 [78]; *Galstyan* (n 4) [84]; *Moiseyev* (n 2) [220]. See further *McLean and another v Buchanan and another* [2001] UKPC D3; [2001] 1 WLR 2425 [56] (Lord Clyde): Art 6(3)(b) '…is principally directed to the securing for an accused person the opportunity and the services necessary for the preparation of his defence. It strikes at the imposition of restraints on his freedom to organise the preparation of his defence.'

C. ADEQUATE TIME

Unduly precipitated proceedings present an affront to Article 6(3)(b).[11] To preclude for the accused the availability of adequate time for effective case preparation is to place him in a position of disadvantage vis-à-vis the prosecution which is presumed to have such time. Given that the latter is responsible for prosecuting criminal cases, its case preparation will begin naturally at an earlier stage than that of the defence. The concept of equality of arms does not imply that adequate time is synonymous with time equal to that of the prosecution; it merely refers to the condition that both parties be afforded preparatory time adequate to their respective needs. If, however, the inequality in the time available to prosecution and defence is overwhelmingly unreasonable, it is unlikely that the time will be conceived as adequate for defence purposes.[12] The defence, nevertheless, is only entitled to reasonably expect such preparatory time as would be adequate for counsel of average competence[13] to deal with the issues raised in the case. The right to adequate time is applicable even if the accused opts to defend himself in person.[14] This time is not restricted to one fixed allocation as criminal proceedings comprise a series of stages which all necessitate a defence response, hence periods of preparation time. Accordingly, the Commission asserted that: 'The time necessary to prepare a defence must… be estimated on a different basis at the various stages of the proceedings.'[15]

1. Assessing Adequate Time

In determining whether the period of time in issue is adequate, hence does not disadvantage the accused vis-à-vis the prosecution, one must consider the circumstances of the case rather than the period in isolation.[16]

Amongst the relevant circumstances is whether the available preparation time is proportionate to both the complexity of the case[17] and the importance of the unrealised preparatory act. The application of these factors is evident, for example, with respect to case documentation. The volume of documentation is a contributor to complexity and perusal thereof is important for the identification of relevant defence arguments. The Court has held that 21 days for an applicant to examine and formulate his response to a 49 page Attorney-General's position paper was

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[11] *Bonzi v Switzerland* (App 7854/77) (1978) 12 DR 188, 190; *Kröcher and Möller v Switzerland* (App 8463/78) (1981) 26 DR 24, 53.
[12] *U v Luxembourg* (App 10142/82) (1985) 42 DR 86, 96.
[13] S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 216.
[14] *Galstyan* (n 4) [86].
[15] *Herbert Huber v Austria* (App 5523/72) (1974) 46 CD 99, 107.
[16] *X and Y v Austria* (App 7909/74) (1978) 15 DR 160, 162.
[17] *Albert and Le Compte v Belgium* (Apps 7299/75; 7496/76) (1983) Series A no 58 [41]; *S v UK* (App 11821/85) EComHR 12 December 1987 [1] ('The Law').

proportionate, thus adequate.[18] In contrast, 20 days in which to peruse a case-file of some 17,000 pages was not.[19]

The situation of defence counsel must also be taken into account. He cannot be expected to devote all his time exclusively to a particular case, given the usual workload commitments of practitioners, though there is an expectation that he make special provision for cases requiring urgent action.[20] It is important to compare the date of his actual appointment with the date of the hearing requiring preparation.[21] A late appointment attributable to the accused cannot substantiate a complaint of inadequate time.[22] Cases where a change of counsel is necessary require that the initial time available to the defence be extended to reflect the preparatory needs of new counsel.[23]

Also to be reflected in the amount of available time is the extent to which the defence is expected to be already familiar with the case material required to formulate the response at the next procedural stage. Thus, for example, it is legitimate for the preparatory time available for lodging an appeal or plea of nullity to reflect the fact that, following the trial, the defence will be familiar with the case-file, supporting evidence and nature of the charges.[24] Accordingly, in most cases, the appellate stage will justify a shorter preparatory period. It is also at this stage that a deficiency in the amount of preparation time at first instance may be capable of remedy, though the accused should endeavour to alert the appeal court of such a shortcoming.[25]

Of further relevance is whether any attempt was made by the defence to remedy its position at the time it perceived its preparatory period inadequate. It is not unreasonable that remedial action be required of it to the extent that it request a postponement (before the hearing) or adjournment (during the hearing) of proceedings for an adequate period of time. Not to do so is to fail to comply with the Article 35(1) requirement to exhaust all available and effective domestic remedies, for the state must have an opportunity to correct its wrongdoing within the domestic fora.[26] It is necessary for the state, however, to demonstrate that the accused unequivocally enjoyed, both in law and practice, a right of adjournment and that an adjournment may have been granted upon request.[27] If it is impracticable for the accused to request a postponement or adjournment, the domestic court should consider suspending the proceedings on its own

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[18] *Kremzow* (n 4) [48], [50].
[19] *Öcalan v Turkey* (App 46221/99) ECHR 2005-IV [142]–[144], [148].
[20] *X and Y* (n 16) 163.
[21] ibid 162; *Perez Mahia v Spain* (App 11022/84) (1985) 9 EHRR 145, 146.
[22] *X v Austria* (App 8251/78) (1979) 17 DR 168, 169–170.
[23] *Goddi v Italy* (App 8966/80) (1984) Series A no 76 [31].
[24] *Herbert Huber* (n 15) 107; *Hilden v Finland* (App 32523/96) ECHR 14 September 1999 [3] ('The Law').
[25] *Twalib v Greece* (App 24294/94) ECHR 1998-IV [40]–[43]. The reasoning of the Court leaves much to be desired: Partly Diss Op of Judges van Dijk, Makarczyk and Jambrek.
[26] *Murphy v UK* (App 4681/70) (1972) 43 CD 1, 12–13 where a complaint that official counsel had been appointed only 10 minutes before the hearing was declared inadmissible because the accused failed to request an adjournment.
[27] *Galstyan* (n 4) [85].

initiative for a time sufficient to compensate the manifest inadequacy.[28] Diligence is thus also demanded of states in such circumstances to avert a disadvantage accruing to the accused.

Further to all the factors mentioned hitherto, limited additional guidance may be found from preparatory periods of time assessed in the case-law. The following periods are examples of those found adequate: four days to examine witness statements, the substance of which was already known;[29] five days for a prison disciplinary hearing;[30] over fifteen days for a medical disciplinary hearing;[31] 10[32] and 17[33] days for trial; five weeks pre-trial and an interval (over two months) between trial sessions;[34] over a year pre-trial;[35] 14 days to formulate and submit a plea of nullity;[36] and 30 days to prepare an appeal, 10 of which were to examine the first instance judgement.[37] Given that the adequacy of these periods was determined heavily by the surrounding circumstances of the cases, it is difficult to conceive of them as a particularly reliable indicator of preparatory time an accused is entitled to expect.

Each period was accepted at Strasbourg because it did not occasion a prejudicial disadvantage for the accused as compared to the prosecution. The role of prejudice is, therefore, decisive in assessing an alleged inequality of arms. Accordingly, in a case where counsel was appointed shortly before the hearing, the preparatory period was still considered adequate because the applicant '…failed to show that as a result of inadequate time to instruct his lawyer on a particular point, he suffered a prejudice in the proceedings...'.[38] If this approach is to be used, it is submitted that when time permitted appears prima facie inadequate, the state should bear a burden of proving prejudice did not occur, thus lowering the extent of the challenge of proof the

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[28] *Goddi* (n 23) [31]. Neither the applicant (in custody for another matter) nor his counsel (not notified of hearing) were present at the appeal sitting. The court appointed on the day of the hearing a new lawyer who was not acquainted with the case and rendered a conviction.

[29] *S* (n 17) [1] ('The Law').

[30] *Campbell and Fell v UK* (Apps 7819/77; 7878/77) (1984) Series A no 80 [98].

[31] *Albert and Le Compte* (n 17) [41]–[42].

[32] *Perez Mahia* (n 21) 146.

[33] *X and Y* (n 16) 162–163.

[34] *Svinarenkov v Estonia* (App 42551/98) ECHR 15 February 2000 [3(d)] ('The Law').

[35] *Harward v Norway* (App 14170/88) EComHR 12 March 1990 [1] ('The Law').

[36] *Herbert Huber* (n 15) 107.

[37] *Hilden* (n 24) [3] ('The Law'). See also eg *Erdem v Germany* (App 38321/97) ECHR 9 December 1999 [3(d)] ('The Law'): One month for submitting statement of appeal.

[38] *X v Austria* (App 2370/64) (1967) 22 CD 96, 100. See also eg *X v UK* (App 4042/69) (1970) 13 Yearbook 690 (EComHR) 696: Despite meeting counsel for only 10 minutes on the actual day of trial, the applicant '…failed to show that, as a result, he suffered any prejudice in his representation during the proceedings.'; *Kremzow* (n 4) [50]: '…although the applicant may have been to some extent disadvantaged in the preparation of his defence, he nevertheless had "adequate time…" to formulate his response to the croquis.'

See further D Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 310 who submit that the Court should not apply an actual prejudice requirement.

applicant must overcome for a successful claim.[39] Applicants should only bear the reverse burden when the time appears prima facie adequate for purpose.

The presence of prejudice resulting from inadequate time vis-à-vis the prosecution has been acknowledged predominantly in two scenarios.

The first concerns accelerated procedures reserved for the efficient prosecution of minor offences. The existence of such procedures is recognised as legitimate provided the guarantees of Article 6 remain observed.[40] The applicant was the subject of an accelerated proceeding in *Borisova v Bulgaria*[41] where the preparation period for trial was no more than two hours, during which time she was either being transferred to court or was being held in police custody and unable to consult counsel. The right to adequate preparation time could clearly not be exercised effectively. This was such as to place the applicant at a considerable procedural disadvantage, hence effecting an infringement of Articles 6(1) and 6(3)(b).[42] Similarly, in *Galstyan v Armenia*,[43] the applicant was also either in transit to court or in police custody without outside contact during the pre-trial period of only a few hours. A prejudicial disadvantage was suffered because he had not been afforded adequate time to familiarise himself properly with the charge, assess prosecution evidence and formulate a defence strategy.[44]

The second scenario in which the accused is particularly susceptible to suffering procedural inequality is upon significant and late alteration of the characterisation of the charge with inadequate time to respond effectively thereto. Such was the case in *Pélissier and Sassi v France*,[45] for example, where the appeal court decided during deliberations to convict the applicants not of the offence charged of criminal bankruptcy, to which all arguments had been confined, but of aiding and abetting criminal bankruptcy. Where the defence is aware of or should have foreseen a change in a material aspect of a case, it is expected to adapt its position if time permits or request an adjournment. In this case, however, the Court considered that it had not been established that the applicants were either aware or ought to have been aware of the possibility that the alternative verdict may be returned.[46] It was noted as plausible that the applicants would have relied on different arguments had the alternative charge been known beforehand, particularly as aiding and abetting was not an element intrinsic to the initial accusation.[47] Notification of the new charge was clearly too late as it denied the applicants any time to prepare an alternative

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[39] S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 176–177. See also Ch 2 text to n 117.
[40] *Borisova v Bulgaria* (App 56891/00) ECHR 21 December 2006 [40]; *Galstyan* (n 4) [85].
[41] (n 40).
[42] *Borisova* (n 40) [45], [50].
[43] (n 4).
[44] *Galstyan* (n 4) [87]–[88]. See *Ashughyan* (n 4) [66]–[67] for a further example of the same.
[45] (App 25444/94) ECHR 1999-II.
[46] ibid [56]–[60].
[47] ibid [60]–[61].

defence.[48] In such circumstances, the defence suffered a prejudicial disadvantage, hence breaching Articles 6(1) and 6(3)(b).[49] It is possible to cure such a defect with a procedural and substantive review of the case at an oral hearing in the superior courts where the accused, having been given adequate opportunity to prepare, can present his defence to the reformulated charge.[50] Preparatory time, therefore, must be adequate to the extent that it allows the accused the opportunity at some stage in the proceedings to adapt its case in response to alteration of the charge.[51] Indeed, preparation time must adequately reflect any fundamental change in circumstance requiring defence reply.

D. ADEQUATE FACILITIES

'Facilities' are those procedural privileges that assist or may assist a party in the adequate performance of its case preparation.[52] Given this inherently broad scope, it is not extraordinary that neither a precise definition nor exhaustive catalogue of facilities exists. The facilities available to the prosecution are presumed adequate for preparation and capable of placing the accused at a distinct disadvantage. Accordingly, the accused must also be afforded facilities for case preparation if procedural equality is to be preserved. In the same vain as 'adequate time', however, it is not equal facilities that are required but facilities that accommodate adequately the needs of the defence. Such needs vary between defendants and adequacy of facility can be determined only within the context of the particular case in issue. States must cater to these needs in two respects: the provision of adequate facilities (positive obligation) and non-interference with available facilities (negative obligation). A failure to realise these obligations can effect undue prejudice upon the accused as compared to the prosecution. The presence of prejudice is a decisive determinant of adequacy of facility.[53] It is for the applicant to prove the

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[48] ibid [62].

[49] ibid [63]. For a finding of the same, see eg *Sadak and others v Turkey (No 1)* (App 29900/96 et seq) ECHR 2001-VIII [51]–[59]; *Abramyan v Russia* (App 10709/02) ECHR 9 October 2008 [36], [38]–[40].

[50] eg *Dallos v Hungary* (App 29082/95) ECHR 2001-II [48]–[53]; *Sipavičius v Lithuania* (App 49093/99) ECHR 21 February 2002 [29]–[34].

[51] See further *Mattoccia v Italy* (App 23969/94) ECHR 2000-IX [61].

[52] *Jespers* (n 1) [57]; *Ross v UK* (App 11396/85) (1986) 50 DR 179, 183; *Mayzit* (n 10) [79]; *Mironov v Russia* (App 22625/02) ECHR 5 October 2006 [5(d)(2)] ('The Law').

[53] Contrast prima facie *Korellis v Cyprus* (App 54528/00) ECHR 7 January 2003 [35]–[36], a case decided under Art 6(1) though still pertinent to Art 6(3)(b). The defence were denied an opportunity to conduct their own expert tests on a piece of evidence and the Court noted that prejudice need not be demonstrated.

However, its subsequent rationale for finding that Art 6(1) was not infringed appears inconsistent with this and does take account of whether prejudice occurred. Factors relevant thereto were that: an examination by a defence expert would have been manifestly ineffective in the circumstances; the defence were supplied a forensic expert report on the evidence; the defence cross-examined this expert; the defence failed to produce any evidence to contradict or create doubt about the key part of the expert's adverse opinion; the defence did not complain at trial of unfairness arising from the non-discovery; the applicant's conviction was mainly based on the testimony of a 'completely credible' complainant which was further corroborated by two credible witnesses. The Court concluded that the evidence the defence sought to examine '…did not in fact play a decisive role…' in the case outcome. In other words, the denial of this examination did not irretrievably prejudice the defence.

existence of actual prejudice,[54] though Stavros's suggestion that the state should be required to prove the absence thereof when a particular facility seems, prima facie on the facts, necessary in the interests of procedural fairness[55] warrants approval for strengthening the position of applicants. Consistent with the above suggestion on the burden of proof for claims of inadequate time, it is submitted that applicants should only be required to prove prejudice if the facility appears prima facie dispensable.

1. Examples of Facilities

It is useful at this stage to briefly highlight examples of particular facilities deemed necessary for placing accused persons on an equal footing with the prosecution.

The defence cannot rely entirely upon the investigative thoroughness of prosecuting authorities. Accordingly, states must facilitate and not unduly hinder the capacity of the defence to conduct its own non-coercive investigations. Such investigations may include an examination of the crime scene; searches for documentary or real evidence; conducting interviews with a view to finding additional witnesses; and carrying out relevant and practicable[56] expert tests, under conditions of procedural equality, on objects that may be relied upon by the prosecution.[57] If, however, a coercive measure is required and reasonable justification provided, the defence must be able to request the prosecution to undertake it, with the possibility for judicial determination of the matter in case of refusal.[58]

When a person is detained pending trial, the Court has also interpreted 'facilities' as possibly including '…such conditions of detention that permit the person to read and write with a reasonable degree of concentration.'[59] In *Moiseyev v Russia*, for example, the conditions of the applicant's detention on remand, transport to and from the courthouse and confinement therein amounted to inhuman and degrading treatment contrary to Article 3.[60] The Court considered that the consequential suffering and frustration felt by the applicant was prejudicial for it '…undoubtedly impaired his faculty for concentration and intense mental application in the hours immediately preceding the court hearings.'[61] It concluded that the applicant was not afforded adequate facilities for the advance preparation of his defence.[62]

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[54] Trechsel (n 13) 211.
[55] Stavros (n 39) 184, 186. See also Ch 2 text to n 117.
[56] 'If this is impossible then arrangements must be made by the prosecution so that the experts of the accused will be enabled to follow effectively the tests carried out by the prosecution experts and make their own observations…': LG Loucaides, 'Questions of Fair Trial Under the European Convention on Human Rights' (2003) 3 Hum Rts L Rev 27, 39.
[57] *Korellis v Cyprus* (App 60804/00) ECHR 3 December 2002 ('The Law').
[58] Trechsel (n 13) 227.
[59] *Mayzit* (n 10) [81]; *Moiseyev* (n 2) [221].
[60] *Moiseyev* (n 2) [127], [136], [143].
[61] ibid [222].
[62] ibid [222]–[225]. Contrast *Mayzit* (n 10) [42]–[43], [81], [84]: Despite accepting that the conditions of the applicant's detention on remand violated Art 3, thus did not favour intense mental work, the Court noted

It is also possible that access to law reference works for case preparation is a required facility when requested by a self-represented accused detained before appeal, though account must be taken of the practical limits to the steps which prison authorities could reasonably be expected to take to find such materials.[63]

Irrespective of whether or not an accused is detained pending hearing, diligence is required of the state with respect to the facility of notification. States must ensure that the defence is effectively notified of the date of the hearing[64] and of time-limits for filing a pleading.[65]

At the end of the trial, a particularly important facility is the provision of a reasoned judgement for it '…makes it possible for the accused to exercise usefully the rights of appeal available to him.'[66] An appeal is bound to fail, and the prosecution placed at an advantage, if the accused is unable to address the reasons for his conviction in his preparation (actual prejudice). The reasoning requirement, however, must be qualified to the extent that it allow for jury trials.[67] The Court has found non-prejudicial a reasoned judgement in abridged form that addressed the issues concerning the defence, though did not enumerate the items of evidence grounding the conviction.[68] Despite the entitlement to a reasoned judgement, if a copy is not supplied to the defence, it is required to exercise a certain diligence and either procure a copy of it itself or take advantage of any opportunities for inspection.[69]

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that appropriate facilities were, nevertheless, available because access to the case-file and legal assistance was unrestricted. In *Moiseyev*, however, access to the case-file and counsel was severely restricted ([207], [218]).

[63] *Ross* (n 52) 184. The prison purchased two textbooks requested by the applicant and made unsuccessful attempts to acquire his other materials by contacting local libraries, the Procurator Fiscal and the Justiciary Office. Given these efforts and the fact that the self-represented applicant was still able at the appeal hearing to argue his points of appeal and raise the issue of the possible nullity of proceedings, it was not established that he was given inadequate facilities to prepare for it.

[64] *Goddi* (n 23) [30].

[65] *Vacher v France* (App 20368/92) ECHR 1996-VI [27], [28]: '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.'

[66] *Hadjianastassiou* (n 4) [33]. See also within a civil context *Van de Hurk v the Netherlands* (App 16034/90) (1994) Series A no 288 [61]; *Hiro Balani v Spain* (App 18064/91) (1994) Series A no 303-B [27]; *Hirvisaari v Finland* (App 49684/99) ECHR 27 September 2001 [30].

[67] *R v Belgium* (App 15957/90) (1992) 72 DR 195, 198.

[68] *Zoon v the Netherlands* (App 29202/95) ECHR 2000-XII [46]–[48], [50]–[51].

[69] eg *Melin v France* (App 12914/87) (1993) Series A no 261-A [24]–[25]: The self-represented applicant (lawyer) complained that, despite his request, he had not been supplied a copy of the Court of Appeal's judgement before the subsequent Court of Cassation hearing. The European Court opined that he could have consulted the judgement at the appeal court registry; repeated his request for it; or made enquiries at the Court of Cassation's registry as to the date on which the court was to give judgment and sought an adjournment. Art 6 was held not to have been infringed. However, the view in the Joint Diss Op of Judge Bernhardt and others that the extent of the diligence required was excessive appears reasonable in light of the full facts of the case.

Zoon (n 68) [36]–[38], [51]: The applicant complained that he did not have available a copy of the first-instance judgment before expiry of the time-limit for lodging an appeal. A violation of Arts 6(1) and 6(3)(b) was not found because the operative part of the judgement was read out to the defence at first-instance and was available for inspection in abridged form at the court registry well before expiry of the time-limit, and a copy could also have been supplied on request.

2. Disclosure

Whereas the aforementioned facilities are important in their own right for maintaining equality of arms, the facility of disclosure is the most prominent in the Court's jurisprudence, hence the remaining discussion is devoted entirely thereto.

(a) Character of Disclosure

A brief sketch of the character of disclosure serves as a useful prelude to the subsequent analysis of the Court's approach to the concept of equality of arms as applied to issues of disclosure.

(i) Content of Disclosure

Within the remit of 'facilities' in Article 6(3)(b), the state bears the burden of disclosing to the defence 'all material evidence' (adequate disclosure): information and objects that incriminate or exculpate the accused.[70] The test of what should be disclosed is, therefore, based on materiality rather than relevance, the latter including all information and objects associated with the case. Accordingly, the materiality standard requires a lesser degree of disclosure than the relevance standard and thus accords with the minimum standard setting mandate of the Court under Article 6. It also accords with the Court's consistent application of the prejudice proviso as material information and objects will influence the position of the defence and, in turn, the trial outcome. It is perhaps an appropriate standard given that implementation of a test of relevance is likely to cause proliferation of disclosure of material negligible in value. This could impair the effective functioning of disclosure regimes and provide a readily available opportunity for strategic misuse of disclosure requests by the accused. Alternatively, dignitarian concerns could be met by lowering the disclosure threshold from materiality to relevance in cases where

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[70] eg *Edwards v UK* (App 13071/87) (1992) Series A no 247-B [36]; *Fitt v UK* (App 29777/96) ECHR 2000-II [44]; *Dowsett v UK* (App 39482/98) ECHR 2003-VII [41]; *V v Finland* (App 40412/98) ECHR 24 April 2007 [74].

For examples of exculpatory material, see Attorney General's Office, 'Attorney General's Guidelines on Disclosure' (April 2005) <http://www.attorneygeneral.gov.uk/Publications/Documents/disclosure.doc.pdf> [12]: '(i) Any material casting doubt upon the accuracy of any prosecution evidence. (ii) Any material which may point to another person, whether charged or not… having involvement in the commission of the offence. (iii) Any material which may cast doubt upon the reliability of a confession. (iv) Any material that might go to the credibility of a prosecution witness. (v) Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. (vi) Any material which may have a bearing on the admissibility of any prosecution evidence.'

Specific examples of disclosable material include tape recordings, transcripts, notes, first drafts of statements, documentation of interviews with the accused, results of expert tests and experiments, crime reports and custody records: J Niblett, *Disclosure in Criminal Proceedings* (Blackstone, London 1997) 98.

See further *Hardiman v UK* (App 25935/94) EComHR 28 February 1996 [2] ('The Law'): Prison psychiatric reports on defendants, obtained for the judge to determine fitness to plead and stand trial, and in murder cases, issues of insanity and diminished responsibility, need not be disclosed to co-defendants as they are designed to protect their subjects.

reasonable suspicion of suppression of material evidence by the prosecution exists.[71] It is worth noting that the Court is prone to employing interchangeably the terms 'material evidence' and 'relevant evidence' despite its application in practice of the materiality standard.[72] This standard was applied in *Jespers v Belgium* where it was pronounced that, for the purposes of exoneration from charge or securing a reduced sentence, both of which require material evidence, Article 6(3)(b) grants a right of access to '…the results of investigations carried out throughout the proceedings' and '…all relevant elements that have been or could be collected by the competent authorities.'[73] The reference to elements that 'could be collected' exists to render unlawful the deliberate suppression of material evidence. Access to material evidence in proceedings of the inquisitorial tradition includes access to the official case-file because its content is evidential and integral to the conduct of such proceedings.[74] Disclosure may only reasonably be expected of evidence the prosecution is aware or ought to have been aware of. There may be occasion when the prosecution is aware of but elects not to rely upon a particular piece of evidence (unused material). If that evidence appears prima facie immaterial, the accused must briefly provide specific justification for requiring it.[75]

Material evidence is not the only object requiring disclosure. Cases have come before the European Court concerning final appeals in civil law systems where a legal officer joined to the proceedings has submitted written observations to the tribunal.[76] These observations are material because they allow the author to express his position on the appeal with a view to influencing the court, thus merit a defence reaction. It should be recalled from Part B above that, under the adversarial principle, it is not just evidence but also 'observations' that the defence is entitled to be informed of. It is on the basis of this principle and that of equality of arms, and Article 6(3)(b), that material observations are relevant to disclosure requirements.

(ii) Timing of Disclosure

It is not only what must be disclosed that is important but also the timing of disclosure. It is, of course, in the interests of the accused that all material evidence collected before being charged be disclosed as soon as actual charges are lodged, thereby maximising his time to react thereto. This

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[71] Stavros (n 39) 179: 'Should not the standard of proof be significantly lowered in cases where the general behaviour of the prosecution warrants legitimate suspicions as to its willingness to comply with the rules of disclosure?'

[72] eg *Jasper v UK* (App 27052/95) ECHR 16 February 2000 [51]–[52]; *Rowe and Davis v UK* (App 28901/95) EHCR 2000-II [60]–[61]; *PG and JH v UK* (App 44787/98) ECHR 2001-IX [67]–[68]; *Botmeh and Alami v UK* (App 15187/03) ECHR 7 June 2007 [37], [39]–[41].

[73] *Jespers* (n 1) [56], [58]. See also eg *Galstyan* (n 4) [84].

[74] See further *Foucher v France* (App 22209/93) ECHR 1997-II [36].

[75] *Bendenoun v France* (App 12547/86) (1994) Series A no 284 [52]–[53]. The applicant failed to provide such justification and was aware of most of the content of the non-disclosed evidence. On this basis, the Court held the equality of arms principle not to have been infringed.

[76] Ch 4 Pt D s 2(b)(ii).

is not, however, the standard applied by the Court. Instead, the Article 6(3)(b) right to adequate time implies that disclosure need only be made in time sufficient to afford the defence a reasonable opportunity to acquaint itself with the nature and weight of the material and address it effectively in its preparations.[77] Disclosure within adequate time should not necessarily be construed as a one-off act. There is a continuing duty on the state to disclose the material findings of all investigations associated with the case[78] and any written observations submitted to the court. Thus, disclosure can be required at several points from the pre-trial stage to final appeal, depending on the content of the material involved.

(iii) Recipient of Disclosure

It naturally follows from the above that one must also address who precisely disclosure should be made to. Conventionally, disclosed material comes into the possession of counsel and his client is able to consult or have a copy of it. According to *Kamasinski v Austria* and *Kremzow v Austria*, however, a procedural disadvantage does not occur when access to the court-file is restricted to defence counsel,[79] the rationale being to prevent misuse by the accused[80] and that Article 6(3)(b) is a provision for the defence in general.[81] The same is applicable to disclosed material within common law systems. Under this approach, the accused may be denied a full opportunity to highlight particular evidential weaknesses and inaccuracies in the file or other material that only his unique knowledge can. To avert such disadvantage, it is submitted that there should be a specific right of indirect access to the case-file or other material for the represented accused, whether by inspection or a copy thereof. This would be a dignitarian measure for it affords the accused a feeling of greater participation in the preparation of his defence and the proceedings

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[77] See further *Krčmář and others v the Czech Republic* (App 35376/97) ECHR 3 March 2000 [42]: 'A party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance.'

Basic Principles on the Role of Lawyers (Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1 118 (1990) Principle 21: 'It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.'

[78] *Jespers* (n 1) [56]: '...results of investigations carried out throughout the proceedings.'; '…the Commission cannot restrict the scope of the term "facilities" to acts carried out during certain specified phases of the proceedings, e.g. the preliminary investigation. …Any investigations [the prosecuting authority] causes to be carried out… and the findings thereof consequently form part of the "facilities" within the meaning of Article 6, paragraph 3(b)…'.

[79] *Kamasinski v Austria* (App 9783/82) (1989) Series A no 168 [87]–[88]; *Kremzow* (n 4) [51]–[52]. See also eg *Svinarenkov* (n 34) [3(d)] ('The Law').

[80] *Kitov v Denmark* (App 29759/96) ECHR 16 March 1999 [2(d)] ('The Law').

[81] *Ofner v Austria* (App 524/59) (1960) 3 Yearbook 322 (EComHR) 352. See further Stavros (n 39) 184–185 who argues that as a legally-aided accused may lack effective controlling power over appointed counsel, a right for the defence in general does not provide adequate protection unless appropriate national mechanisms are in place to ensure that counsel exercises his duties adequately.

overall. If he is not entitled access to the case-file but remains unrepresented, the Court, unsurprisingly, considers this to be an inequality of arms.[82]

(b) Disclosure and Equality of Arms

The right of the accused to fair and proper disclosure is an integral attribute of fair trial.[83] It is intended to serve the concept of equality of arms. The accused is vulnerable to the unrivalled resources of his opponent. This is reflected aptly by Fitzpatrick: '…massive differentials in information access… pertain between State and individual, in a forum in which the nexus of knowledge and power is at its most pronounced.'[84] In view of this disparity, it was pronounced in *Jespers* that '[i]t is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries... instructs the... [prosecuting authority] to gather evidence in favour of the accused as well as evidence against him.'[85] Disclosure also serves the adversarial principle, which Part B above reaffirmed is encompassed within the equality of arms concept, for it affords the defence an opportunity to be aware of and comment on the observations and evidence submitted by the other side.[86] Adequate awareness of all material evidence and observations in advance is fundamental to preparing an effective defence response to the issues before the court.[87] Consequently, non-disclosure is capable of placing the accused at a disadvantage with the state, hence creating an inequality of arms.[88] It also runs contrary to the principle of open justice, the 'internal openness' aspect of which refers to the right of the defence to have access to material pertaining to the case.[89]

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[82] *Foucher* (n 74) [35]–[36].

[83] An observation echoed in *R v Brown (Winston)* [1994] 1 WLR 1599 (CA) 1606; *R v Brown (Winston)* [1998] AC 367 (HL) 374; Attorney General's Office (n 70) [1].

[84] B Fitzpatrick, 'Disclosure: Principles, Processes and Politics' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone, London 1999) 151.

[85] (n 1) [55].

[86] For cases where non-disclosure was held to infringe both the adversarial and equality of arms principles, see eg *Borgers v Belgium* (App 12005/86) (1991) Series A no 214-B [27]–[29]; *Bulut v Austria* (App 17358/90) ECHR 1996-II [49]–[50]; *Werner v Austria* (App 21835/93) ECHR 1997-VII [67] (civil); *Reinhardt and Slimane-Kaïd v France* (Apps 23043/93; 22921/93) ECHR 1998-II [103], [105]–[107]; *Kuopila v Finland* (App 27752/95) ECHR 27 April 2000 [38]; *Lanz v Austria* (App 24430/94) ECHR 31 January 2002 [62]–[64].

[87] For further elaboration of the role of disclosure, see JA Epp, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish, London 2007) 29, 31–32, 254.

[88] The same is recognised by the International Criminal Tribunal for the former Yugoslavia (ICTY): *Prosecutor v Krajišnik & Plavšić* (Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65 *ter*, 66(B) and 67(C)) (Trial Chamber) ICTY-00-39 & 40-PT (1 August 2001) [7]: 'The only way in which the Defence can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely, including exhibits. The Prosecution, by not disclosing the documents prior to trial, places the Defence in a position in which it will not be able to prepare properly; and it is this fact that is likely to lead to a violation of the principle of equality of arms.'

For an in-depth account of equality of arms and disclosure at the ICTY, see G McIntyre, 'Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia' (2003) 16 LJIL 269, 271–320.

[89] M Malsch, 'Victims on View: Are Victims Served by the Principle of Open Justice?' in H Kaptein and M Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Aldershot, Ashgate 2004) 115. See also *Brown* 1998 (n 83) 374 (Lord Hope): 'It would be contrary to that principle [of open justice] for the

Case-law on equality of arms within the context of complaints of non-disclosure splits into two categories: non-disclosure of material evidence and non-disclosure of material observations.

(i) Non-Disclosure of Material Evidence

The defence right to disclosure of all material evidence is not an absolute requirement of procedural fairness.[90] The Court accepts that circumstances may arise where departure from the disclosure norm is legitimate:

> In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of 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.[91]

It must be emphasised that it is not within the competence of the Court to determine whether non-disclosure is strictly necessary, for that is an evidential matter for domestic courts.[92] Crucially, its mandate is to assess whether the decision to withhold disclosure was reached in a fair procedure compliant with the concept of equality of arms and the adversarial principle encompassed therein.[93] If the procedure applied involves a restriction of defence rights, the Court requires that it must only be to an extent strictly necessary and, to prevent actual prejudice, must involve sufficient counterbalancing measures.[94] This is a reapplication of principles derived from the right to challenge witness evidence.[95] In some cases, the Court has also had regard to whether the non-disclosed material at issue formed any part of the prosecution case and was put to the tribunal of fact as an influential indicator of prejudice.[96]

The most marked jurisprudence in this area concerns evidence withheld by the UK on grounds of public interest immunity (PII). A successful application for PII '…enables the

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prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence.'

[90] *Jasper* (n 72) [52]; *Rowe and Davis* (n 72) [61]; *Fitt* (n 70) [45]; *Edwards and Lewis v UK* (Apps 39647/98; 40461/98) ECHR 2004-X [46]; *V* (n 70) [75].

[91] ibid. See further *Klass and others v Germany* (App 5029/71) (1978) Series A no 28 [48] for an earlier indication of the Court's acceptance that secretive methods of investigation may be '…necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.'

[92] *Jasper* (n 72) [53]; *Rowe and Davis* (n 72) [62]; *Fitt* (n 70) [46]; *Atlan v UK* (App 36533/97) ECHR 19 June 2001 [41]; *PG and JH* (n 72) [69]; *Dowsett* (n 70) [43]; *Edwards and Lewis* (n 90) [46].

[93] ibid.

[94] *Jasper* (n 72) [52]; *Rowe and Davis* (n 72) [61]; *Fitt* (n 70) [45]; *Atlan* (n 92) [40]; *PG and JH* (n 72) [68]; *Dowsett* (n 70) [42]; *Edwards and Lewis* (n 90) [46]; *V* (n 70) [75].

[95] Ch 3 Pt F ss 2–3.

[96] *Jasper* (n 72) [55]; *Fitt* (n 70) [48]; *PG and JH* (n 72) [71]; *Edwards and Lewis* (n 90) [46].

prosecution to withhold disclosure of material where, in the court's view, the public's interest in non-disclosure outweighs the defendant's interest in having full access to all relevant material.'[97] The case-law may be grouped into two broad categories: cases where undisclosed material was not put before the trial judge and cases where it was. Whereas Article 6(3)(b) is often invoked within both categories, the Court is inclined to refer to it as a right subsumed by Article 6(1) and thus deal with PII non-disclosure matters under the latter.[98]

(a) Undisclosed evidence not examined by trial judge

Cases have arisen wherein certain material evidence has been withheld from the defence at trial on public interest grounds solely on the initiative of the prosecuting authorities. This unilateral manner of making a non-disclosure decision was considered inconsistent with Article 6(1) in *Rowe and Davis v UK*, *Atlan v UK* and *Dowsett v UK*.[99] It was an acknowledgement that such a procedure cannot satisfy a test of strict necessity. It was also recognition of the disadvantage created for the applicants by the prosecution acting as judge in their own cause on the disclosure issue and precluding arguments being put on behalf of the defence.

This disadvantage gives rise to the issue of whether it may be sufficiently counterbalanced through an appeal procedure.

Both *Rowe and Davis* and *Atlan* featured hearings in the absence of the defence (ex parte) where the appeal court reviewed the material and ruled non-disclosure justified. The Strasbourg Court considered that, rather than the appeal judges, '…the trial judge is best placed to decide whether or not the non-disclosure of public interest immunity evidence would be unfairly prejudicial to the defence.'[100] This is because the appeal judges were reliant upon prosecution counsel and trial transcripts for their understanding of the possible relevance of the undisclosed material, whereas the trial judge observed witness testimony and was fully acquainted with all the issues and evidence.[101] Furthermore, the appeal court carried out its assessment *ex post facto*, and may have been unconsciously influenced by the jury's verdict into underestimating the significance of the undisclosed material, whereas the trial judge would have been in a position to review its importance throughout the trial.[102] The Court also added in *Atlan* that '…had the trial judge seen the evidence he might have chosen a very different form of words for his summing up

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[97] Auld LJ, 'Review of the Criminal Courts of England and Wales' (HMSO, London 2001) 476.
[98] eg *Jasper* (n 72) [50]; *Rowe and Davis* (n 72) [59]; *Fitt* (n 70) [43]; *IJL and others v UK* (Apps 29522/95; 30056/96; 30574/96) ECHR 2000-IX [77]; *V* (n 70) [73]; *Botmeh and Alami* (n 72) [36]. The Court in *Dowsett* (n 70) [40], [52] appeared so inclined but referred expressly to finding a violation of Art 6(1) taken in conjunction with Art 6(3)(b).
[99] *Rowe and Davis* (n 72) [63]; *Atlan* (n 92) [44]; *Dowsett* (n 70) [44].
[100] *Atlan* (n 92) [45] on the authority of *Rowe and Davis* (n 72) [65].
[101] *Rowe and Davis* (n 72) [65]; *Atlan* (n 92) [45].
[102] ibid. Of course, the judge must be made aware of the content of the material to be in a position to adequately monitor its importance*: V* (n 70) [78].

to the jury.'[103] The conclusion reached in both cases was that the appeal court review was not sufficient to counterbalance the disadvantage at trial created by bypassing the scrutiny of the trial judge.[104] Rather than relying almost entirely on this missed scrutiny, it is submitted that the Court should also have placed greater emphasis on the lack of adversarialism in the appeal procedure, for there was no opportunity to put arguments on behalf of the defence. Its silence on this ex parte aspect of the procedure suggests, by implication, that it is an aspect not in itself incompatible with procedural fairness. Nevertheless, as the significant disadvantage of the trial disclosure procedure remained uncured, the applicants suffered prejudice vis-à-vis the prosecution in contravention of the concept of equality of arms.

Rowe and Davis and *Atlan* should not, however, be understood as demonstrating that disadvantage to the defence arising from excluding the trial judge from the disclosure process can never be remedied at appeal.

In *Botmeh and Alami v UK*,[105] the prosecution sought PII from the appeal court for material not put before the trial judge. Following an ex parte hearing, a summary of the undisclosed material and the reasons for non-disclosure at trial were supplied to the applicants. Thereafter, before a differently constituted appeal court, the applicants were afforded an opportunity to make submissions on the summary and its significance to the case. Having regard to these submissions, the court concluded that non-disclosure had not created injustice as the material added nothing of significance to that already disclosed at trial. Taking this into account with the extent of the disclosure at appeal, and the consideration given to the impact of the new material on the safety of the convictions after detailed defence arguments, the European Court did not regard the exclusion of the trial judge from the disclosure process as prejudicial; the defect was remedied on appeal.[106]

The case can be distinguished from *Rowe and Davis* and *Atlan* to justify the difference in outcome. Crucially, the adversarial argument missing from these cases was present in *Botmeh and Alami* because an inter partes appeal hearing on disclosure took place and, given the summery disclosure, the defence submissions were informed as far as possible without revealing the material in full. The appeal judges considered the material in the light of these submissions. Adversarialism at appeal, therefore, counterbalanced the procedural disadvantage for the defence

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[103] *Atlan* (n 92) [45].

[104] *Rowe and Davis* (n 72) [65]–[67]; *Atlan* (n 92) [45]–[46]. In *Dowsett* (n 70) [49], the Court commented that if an ex parte review procedure at the appeal court had taken place therein, it '...could not be regarded as an adequate safeguard for the defence.'

See further T Owen, 'Disclosure' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001) 150–151: 'No doubt the prospect of having no choice but to quash a conviction and order a retrial whenever public interest immunity material emerges after conviction is an unpalatable one to both the prosecuting authorities and courts. But this seems an inevitable consequence of a procedure whose somewhat fragile integrity crucially depends on the role of the first instance judge in conducting a scrupulous and continuing review of the disclosure issue.'

[105] (n 72).

[106] *Botmeh and Alami* (n 72) [44].

in the trial disclosure procedure. This conclusion is even more likely when adversarial argument is informed by material withheld at trial but disclosed in full before the appeal hearing.[107]

It appears, therefore, that a failure to lay material evidence before the trial judge is capable of being cured so as not to occasion actual prejudice to the accused vis-à-vis the prosecution and thus an inequality of arms. This can be achieved through an inter partes appeal hearing on the possible prejudice the non-disclosure might have had on the trial, in advance of which the material should be disclosed either in full or to an extent allowing defence submissions to be informed as far as possible without revealing it in full. The approach is consistent with the Article 35(1) exhaustion of all domestic remedies rule which affords states the opportunity to put right the alleged procedural shortcoming through their own courts before the matter can be referred to the Strasbourg Court, the latter being of subsidiary character.[108]

(b) Undisclosed evidence examined by trial judge

Cases have also been referred to the Court when PII has been applied to material evidence upon assessment by the trial judge.

Most have not resulted in the Court registering an inequality of arms, one such case being *Jasper v UK*.[109] The prosecution were successful in their ex parte application to the trial judge for PII for material evidence. Beforehand, the defence were notified that an application was to be made, permitted to outline their case to the judge and request disclosure of material relevant thereto. This satisfied the Court that the defence were kept informed, able to make representations and participate in the disclosure decision-making process as far as was possible without revealing to them the withheld material.[110] It also noted that this material formed no part of the prosecution case and was never put to the jury, and attached importance to the safeguard of the judge assessing continuously, before and during trial, whether the material need be disclosed.[111] Furthermore, the appeal court's consideration of whether such disclosure was needed was viewed as an additional safeguard.[112] The Court concluded that the disclosure decision-making process satisfied Article 6(1) in that it adequately safeguarded the interests of the defence and complied with the requirements of adversarial proceedings and equality of arms.[113]

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[107] *Edwards* (n 70) [36]–[37], [39] (PII claim not made); *IJL and others* (n 98) [114], [117]–[119].
[108] *Selmouni v France* (App 25803/94) ECHR 1999-V [74]; *Kudła v Poland* (App 30210/96) ECHR 2000-XI [152]; *Cocchiarella v Italy* (App 64886/01) ECHR 2006-V [38]–[39]; *Orlova v Russia* (App 21088/06) ECHR 9 October 2008 [22]–[23].
[109] (n 72).
[110] *Jasper* (n 72) [55].
[111] ibid [55]–[56].
[112] ibid [56].
[113] ibid [58].

The reasoning and conclusion herein were mirrored in *Fitt v UK* for an ex parte procedure held under the same conditions.[114]

It is submitted, however, that *Jasper* was decided incorrectly. This is reflected in the considerable dissent therein, the decision being made on a bare majority of nine votes to eight. The dissent relied upon four key arguments, which were also reproduced in the dissent in *Fitt*.[115]

First, the non-adversarial character of the disclosure procedure at first instance placed the parties on an unequal footing. Argument is adversarial only if it is informed. When outlining their case to the judge, the defence were unaware of any particulars of the withheld material, including even the category thereof, thus it was purely a matter of chance whether they made any relevant points. They were also uninformed of the reasons for the non-disclosure decision, hence could not respond adequately thereto. Additionally, the ex parte aspect of the procedure afforded the prosecution an opportunity to influence the judge in the absence of the defence. The absence and uninformed position of the defence evidences a lack of adversarialism in the disclosure procedure. Without adversarial argument, the prosecution is better placed than the defence to influence the disclosure decision in their favour.

Second, the monitoring by the judge of the need for disclosure throughout the trial was insufficient to counterbalance the defence's absence from the ex parte procedure. Proper fulfilment of his role requires that he be informed by the opinions of both parties, not just the prosecution.

Third, the appeal proceedings were inadequate to remedy the inequality at first instance because the inability of the defence to make informed submissions continued there also.

Fourth, the Government failed to demonstrate that the PII procedure placed restrictions on the defence which were strictly necessary. A less restrictive measure, already applied by the Government to other contexts, would have been to instruct special independent counsel[116] to represent the interests of the accused in the ex parte proceedings. This would introduce an adversarial element to counterbalance the defence's absence therefrom. The independence of special counsel would also ensure that he could consult the material in issue but keep confidential any information which cannot be disclosed. The defence could brief him before he viewed the material and communication thereafter would be only with the leave of the court. Furthermore, it

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[114] (n 70) [47]–[50].

[115] *Jasper* (n 72) Diss Op Judge Palm and others; Diss Op Judge Hedigan; *Fitt* (n 70) Diss Op Judge Palm and others; Diss Op Judge Hedigan.

[116] Special counsel, unlike traditional counsel, is not responsible to the instructing party. His position is contrasted with the classic lawyer-client relationship in Constitutional Affairs Select Committee, 'The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates' HC (2004–2005) 323-I [62].

For an example of a UK special counsel scheme, see Special Immigration Appeals Commission Act 1997 s 6(1); Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003/1034 (as amended) Rules 9A–10A, 34–38, 44, 47.

On the origins, expansion and effectiveness of special counsel in the UK, see J Ip, 'The Rise and Spread of the Special Advocate' [2008] PL 717, 718–737.

was not demonstrated by the Government that the practical difficulties in adapting an existing system of special counsel to criminal cases were insurmountable. Use of special counsel was thus an example of a viable alternative measure which would place a lesser restriction on the defence, hence undermining the claim of strict necessity for the PII procedure actually applied.

To add to these arguments, one must also address the account taken by the Court of the fact that the withheld material formed no part of the prosecution case and was never put to the jury. The implication is that this fact was viewed as strengthening the case that the PII procedure did not result in actual prejudice to the defence. The above arguments demonstrate that this procedure lacked adversarial argument and sufficient counterbalancing measures to compensate for the defence's absence, thereby placing the parties on an unequal footing. Furthermore, the restrictions on the defence were not strictly necessary, for an alternative less restrictive measure was available and adaptable. Special counsel would have introduced an adversarial element to make sufficiently equal between the parties the opportunity to influence the disclosure decision. It is submitted, therefore, that PII was not attached to the evidence under a condition of procedural fairness. Evidence withheld as a result of an unfair procedure should not be withheld; its relevance or possible relevance to the defence cannot be viewed as having been properly assessed. This should be considered prejudicial to the defence, which is unduly denied the use of this evidence, irrespective of the fact that it was not used by the prosecution and never put to the jury.

In the light of the arguments discussed herein, one can submit that the defence were placed at a disadvantage vis-à-vis the prosecution, contrary to the concept of equality of arms, and an Article 6(1) violation should have been registered. The same can be said of *Fitt*.

Relying on much of the same reasoning as *Jasper* and *Fitt*, the Court reached the same conclusion as in those cases in *PG and JH v UK*[117] where the non-disclosure on PII grounds included both oral and documentary evidence. The trial judge decided in a *voir dire* (legal submissions made in the absence of the jury) that part of the documentary evidence relating to the authorisation of a surveillance listening device could be withheld. Additionally, during a defence cross-examination therein, a witness refused to answer certain questions related to the background of the surveillance for fear of divulging sensitive material. The judge proceeded to put those unanswered questions to the witness alone in chambers and concluded that the answers need not be divulged to the defence. The Court was satisfied that the defence were kept informed and permitted to participate in the PII process as far as was possible without revealing to them the sensitive oral and documentary evidence.[118] It also took into account that this evidence formed no part of the prosecution case and was never put to the jury, and the judge monitored the need for disclosure throughout the trial.[119] Finally, it pointed out that the

[117] (n 72).
[118] *PG and JH* (n 72) [71].
[119] ibid.

applicants failed to include non-disclosure as a ground of appeal, hence denying themselves the additional safeguard of an appellate review of the disclosure issue as undertaken in *Jasper* and *Fitt*.[120] In these circumstances, the Court did not consider the disclosure decision-making procedure to have been prejudicial to the defence, hence equality of arms was secured and no violation of Article 6(1) resulted.[121]

It certainly had greater justification for reaching this conclusion than had been the case in *Jasper* and *Fitt*. The defence were more engaged in the disclosure decision-making process. They were aware of the category into which the documentary material fell and its non-disclosure was decided on the basis of an inter partes hearing. The decision to withhold this material was thus informed by adversarial argument. The same may be said of the oral evidence. The defence were able to put their own unanswered questions to the witness through the judge, ensuring a degree of adversarialism was maintained. There is no reason to suspect that an independent and impartial judge will not adequately press the witness and elicit a full response. Additionally, the questions were adequately informed, for the defence again knew the category into which the evidence fell. Given the adversarial elements of the disclosure procedure, the judge was informed by the opinions of both parties when monitoring the need for disclosure throughout the trial, a feature missing in *Jasper* and *Fitt*. The Court may also be viewed as having responded appropriately to the absence of an appellate review of the non-disclosure. It is reasonable to expect a certain diligence from the defence to the effect that non-disclosure be cited as a ground of appeal before a review can be undertaken.

In contrast to the three cases mentioned hitherto, an inequality of arms was registered in *Edwards and Lewis v UK*[122] when the Court considered the procedure used to determine the issues of disclosure and police entrapment. The issue of whether entrapment occurred was of 'determinative importance' because, had impropriety been established, the prosecution would have to be discontinued.[123] It was for the trial judge in each case to decide this issue. Following ex parte hearings, the judges ruled that certain evidence related, or potentially related, to the issue could be withheld from the defence on PII grounds. The Court viewed this non-disclosure as preventing the defence in both cases from subsequently arguing the case on entrapment in full before the judge.[124] It also observed that the trial judges had already seen the withheld evidence in their rejection of the defence submissions on entrapment.[125] These circumstances infringed Article 6(1):[126] '…the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide

[120] ibid [72].
[121] ibid [73].
[122] (n 90).
[123] *Edwards and Lewis* (n 90) [46].
[124] ibid.
[125] ibid.
[126] ibid [48].

adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.'[127]

This conclusion merits approval. The judges were the tribunal of fact on the entrapment issue and also reviewed the PII material in a procedure without adversarial argument, for only the prosecution were represented therein. No measures were implemented to counterbalance this inequality such as, for example, appointing special counsel to represent defence interests.[128] The material may have influenced, albeit unconsciously, the judges' decision on entrapment which was an issue of decisive importance to the outcome of the proceedings. Accordingly, the disclosure decision-making procedure was prejudicial to the defence vis-à-vis the prosecution. An influential factor for the Court's opposite conclusion in *Jasper*, *Fitt* and *PG and JH* was that the PII procedures in those cases did not concern material put before the tribunal of fact (jury).[129]

(ii) Non-Disclosure of Material Observations

Aside from cases of non-disclosure of material evidence, there exists a series of cases arising from appeal proceedings in civil law systems on non-disclosure of written observations made by legal officers joined to the proceedings. Chapter 2 identified these officers as capable of attracting opponent status within the definition of the concept of equality of arms,[130] their intention being to influence the outcome of the proceedings. Unlike in the case of non-disclosure of evidence, there is no legitimate justification for departure from the disclosure norm for material observations. The Court thus adopts a stricter approach towards states in determining whether or not equality of arms was upset. Whereas cases on observations were decided under Article 6(1), their consideration of the issue of disclosure renders them relevant to Article 6(3)(b), which is a specific aspect of the former.

Bulut v Austria[131] provides a useful illustration of the Court's application of the concept of equality of arms when observations are involved. The Attorney-General submitted observations on the applicant's appeal to the Supreme Court which were not served on the defence. The Court considered that the opinion of the Attorney-General could not be regarded as neutral, particularly as his office was charged with the prosecution.[132] It thereafter held it inconsistent with the principle of equality of arms for an opponent to make submissions to a court without the knowledge of the defence, thus finding an Article 6(1) violation.[133] This conclusion was

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[127] ibid [46].
[128] Subsequently, the former House of Lords in *R v H and others* [2004] UKHL 3; [2004] 2 AC 134 [22] (Lord Bingham) accepted that there could possibly be a place for special counsel in criminal PII matters but only as '…a course of last and never first resort.'
[129] *Jasper* (n 72) [55]; *Fitt* (n 70) [48]; *PG and JH* (n 72) [71].
[130] Ch 2 Pt D s 1(b).
[131] (n 86).
[132] *Bulut* (n 86) [48].
[133] ibid [49]–[50].

reached notwithstanding the observations being purely procedural in nature, for '[i]t is a matter for the defence to assess whether a submission deserves a reaction.'[134] The element of prejudice in the inequality of arms thus did not stem from the content of the observations. Rather, prejudice arose because the Attorney-General was afforded an additional opportunity to assert his position and influence the appeal outcome without possibility of a response from the accused that may have been material.[135] The approach herein, which derives from *Borgers v Belgium*,[136] has also been reflected in other cases to confirm an inequality of arms on account of the non-disclosure of observations.[137]

Yet, in *JJ v the Netherlands*,[138] *Meftah and others v France*[139] and *Şahin Çağdaş v Turkey*,[140] the Court did not refer to the concept of equality of arms but only the adversarial principle as the basis for finding Article 6(1) infringed, an approach applied particularly in civil cases.[141] The adversarial principle entitles the accused to have knowledge of and comment on all observations filed, even by an independent member of the national legal service.[142] Doing so allowed the Court to avoid addressing whether or not the legal officer could be regarded as an 'opponent', a status necessary for the equality of arms doctrine to be applicable, but also created an inconsistency with its approach in *Bulut* and other cases. Though the facts of *Meftah and others* do not reveal the content of the observations of the legal officer therein, the observations in *JJ* and *Şahin Çağdaş* were manifestly not neutral.[143] Accordingly, in the latter two cases at least, there would have been adequate justification for affording opponent status to the legal officers and dealing with the non-disclosure also as an inequality of arms, thereby fostering greater consistency in the case-law. Consistency would, of course, further encourage the Court to use the concept of equality of arms for resolving future similar cases.

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[134] ibid [49]. This principle is repeated in eg *Kuopila* (n 86) [28]; *Josef Fischer v Austria* (App 33382/96) ECHR 17 January 2002 [19]; *Lanz* (n 86) [58]; *Sharomov v Russia* (App 8927/02) ECHR 15 January 2009 [44]; *Nasteska v the former Yugoslav Republic of Macedonia* (App 23152/05) ECHR 27 May 2010 [28].

[135] *Bulut* (n 86) [49]; Ch 2 Pt D s 4(d).

[136] (n 86) [26]–[27], [29]; Ch 2 Pt D s 1(b).

[137] *APEH Üldözötteinek Szövetsége and others v Hungary* (App 32367/96) ECHR 2000-X [42]–[44] (civil); *Josef Fischer* (n 134) [21]–[22]; *Lanz* (n 86) [60], [64]. See also *Reinhardt and Slimane-Kaïd* (n 86): The EComHR expressly followed this approach, declaring that an inequality of arms (reporting judge's file only made available to advocate-general) had been accentuated by non-disclosure of the advocate-general's observations ([103]). The Court, however, implied that the advocate-general was an opponent ([105]) but seems to have relied solely on the adversarial principle to declare the non-disclosure unfair ([106]–[107]).

[138] (App 21351/93) ECHR 1998-II [42]–[43].

[139] (Apps 32911/96; 35237/97; 34595/97) ECHR 2002-VII [51]–[52].

[140] (App 28137/02) ECHR 11 April 2006 [28]–[30].

[141] Ch 2 n 95.

[142] *Lobo Machado v Portugal* (App 15764/89) ECHR 1996-I [31] (civil); *JJ* (n 138) [43]; *Kress v France* (App 39594/98) ECHR 2001-VI [65] (civil); *Meftah and others* (n 139) [51].

[143] *JJ* (n 138) [14]: The advocate-general expressed the view that the decision of the Court of Appeal had been correct and gave extensive reasons why the applicant's alternative submission should be rejected; *Şahin Çağdaş* (n 140) [15], [20]: Principal Public Prosecutors advised that the applicant should not be granted compensation for non-pecuniary damage, the appeal be rejected and first-instance judgment be approved.

See further *Borgers* (n 86) [26]: 'By recommending that an accused's appeal be allowed or dismissed, the official of the procureur général's department becomes objectively speaking his ally or his opponent.'

In resolving complaints of inequality of arms, the Court has encountered the argument that indirect disclosure of observations is sufficient. This argument was raised in *Brandstetter v Austria*.[144] The Commission considered that, as the observations of the Senior Public Prosecutor were 'reproduced almost literally' in the appeal judgement, the applicant had the opportunity to deal with them in the second set of proceedings.[145] Disagreeing, the Court held that Article 6(1) was violated: 'An indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution.'[146] The same approach was evident in *Lanz v Austria*[147] where the Government argued that it was unnecessary to serve the Senior Public Prosecutor's written observations on the applicant as they were essentially repeated at an oral hearing. Relying on *Brandstetter*, the Court attached no weight to this indirect disclosure: '...[W]here a court... has at its disposal in addition to oral statements made at a hearing written statements filed beforehand, a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent.'[148] Indirect disclosure of observations is thus not adequate disclosure and, accordingly, remains prejudicial to the defence.

Whenever observations are not served on the applicant, it is also tempting for states to argue that his counsel could have consulted or obtained a copy of such material, at or from the court registry, had he made efforts to that effect. The Court was unpersuaded by this argument in the civil case of *Göç v Turkey*, considering it incumbent on the registry, as a matter of fairness, to inform the applicant that the Principal Public Prosecutor's observations had been filed and a response could be submitted.[149] Additionally, requiring the applicant's counsel to take the initiative and inform himself periodically on whether new additions had been made to the case-file was viewed as a disproportionate burden on him, and would not necessarily have guaranteed a real opportunity to comment on the observations.[150] Citing *Göç*, the Court did not depart from these findings in the subsequent criminal case of *Şahin Çağdaş*.[151] The onus, therefore and rightly, is on the state to take measures to ensure that the defence will be aware that observations have been filed and get a real opportunity to comment thereon[152] if it is to avoid placing the accused at a disadvantage.

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[144] (Apps 11170/84; 12876/87; 13468/87) (1991) Series A no 211.
[145] ibid [68].
[146] ibid [68]–[69].
[147] (n 86).
[148] *Lanz* (n 86) [62].
[149] (App 36590/97) ECHR 2002-V [57].
[150] ibid.
[151] *Şahin Çağdaş* (n 140) [28]–[29].
[152] *Brandstetter* (n 144) [67].

E. CONCLUSION

This discussion was concerned with the Strasbourg approach to equality of arms in assessments on adequacy of time and facilities.

It first established a nexus between equality of arms and Article 6(3)(b). As with Article 6(3)(d), the nexus is acknowledged in law by the Court, Commission and Human Rights Committee, and derives at Convention level from both elements being part of the Article 6(1) fair hearing right. A conceptual nexus derives from the instrumental, intrinsic and collateral values of equality of arms being served by the realisation of Article 6(3)(b). The provision also falls conceptually into the equality of arms remit as it is feasibly reciprocal and essential for case preparation, and linked to the adversarial principle.

Equality of arms does not imply that the accused be afforded time and facilities equal to that of the prosecution; he need only be afforded time and facilities adequate to his preparatory needs to prevent disadvantage. As preparatory needs vary between accused persons, adequacy of time and facilities is determined not in a vacuum but by reference to the demands of the specific circumstances of each case. When such circumstances are assessed at Strasbourg, it is decisive to a finding of inadequate time or facilities, and thus inequality of arms, that actual prejudice was suffered. On this approach, it was suggested in the discussion that the state should bear a burden of proving the absence of prejudice if the preparatory time or facilities appear prima facie inadequate for purpose; if such time or facilities seem prima facie adequate, the applicant should prove prejudice. Nevertheless, an alternative approach is preferred to strengthen the concept of equality of arms: if, on the circumstances of the case, the time or facilities are inadequate, an inequality of arms should be registered, irrespective of whether prejudice occurred (unequivocal inequality).

Whereas several examples of facilities important for securing equality of arms were highlighted in the discussion, the facility of disclosure is the most prominent in the case-law. Three elements elucidate its character: (i) its content is comprised of all material evidence and observations; (ii) it need only be made in time adequate to afford the defence a reasonable opportunity to familiarise itself with and comment on the material; (iii) disclosed material is conventionally accessible to counsel and his client but can be restricted to the former. This restriction, it was submitted, can disadvantage the defence case and thus a specific right of indirect access to the material should be afforded the accused.

The discussion explored equality of arms within the context of complaints of non-disclosure of material evidence and observations of legal officers joined to the proceedings.

The Court accepts that non-disclosure of material evidence can be legitimate on PII grounds. It is not within its remit to decide on whether non-disclosure was strictly necessary; it must determine whether the decision was made in a procedure that maintained equality of arms.

The actual prejudice proviso underpins cases where evidence was withheld on PII grounds without first being put before the trial judge. Though admitting that the trial judge is best placed to decide on non-disclosure, the Court accepts that the disadvantage to the defence of the prosecution bypassing his real-time scrutiny can be counterbalanced at appeal. This is possible through an inter partes, thus adversarial, appeal hearing on the possible prejudice at trial of the non-disclosure, in advance of which the material should be disclosed fully or to a degree enabling the defence to be informed as far as possible without full revelation. Informed adversarialism can thus counterbalance a disadvantage so as not to effect actual prejudice and an inequality of arms. A dignitarian approach would entail that the disadvantage to the defence at trial from the prosecution bypassing the scrutiny of the judge, and avoiding entering into adversarial argument for disclosure/non-disclosure, represents an inequality of arms, irrespective of subsequent remedial measures. This higher level of protection should be preferred.

Yet, if potential PII material is placed before the trial judge, the Court is willing to accept ex parte procedures on disclosure as not upsetting equality of arms. Reliance upon the actual prejudice proviso to this effect is evident in two respects. First, account is taken of whether the defence's absence from the ex parte procedure was counterbalanced through adequate safeguards. In *Jasper*, for example, the following were considered sufficient: the defence could outline their case to the judge before the ex parte hearing; the latter monitored the need for disclosure throughout the trial; and the appeal court assessed the disclosure issue. The discussion argued, however, that the value of such measures is undermined by an uninformed defence, and the trial and appeal judges not being informed by adversarial argument. Without adversarial argument, informed as far as possible, the prosecution are better placed than the defence to influence the disclosure decision in their favour. Thus, if counterbalancing measures are to be applied, it is submitted that they should involve informed adversarialism, a condition not always upheld by the Court. The second indicator of actual prejudice applied is whether the material formed part of the prosecution case or was ever put to the tribunal of fact. It was suggested in the discussion, however, that the relevance or possible relevance to the defence of evidence withheld as a result of a procedure lacking in adversarial argument cannot be considered as having undergone proper evaluation. This should be viewed as prejudicial, for the defence are unduly denied the use of this evidence, even if it was not part of the prosecution case or put to the tribunal of fact. The Court's application of the actual prejudice approach is thus an unsatisfactory means of safeguarding equality of arms.

A more dignitarian approach would prove a stronger safeguard. PII hearings in which the defence is not represented should be seen as involving an inequality of arms and never strictly necessary, irrespective of whether any prejudice arises therefrom. The decision to withhold disclosure must be informed by adversarial argument. Accordingly, in most cases, the defence should be notified of at least the category of material for which PII is sought and an inter partes

hearing held. If, in rare cases, revealing the category of material would defeat the purpose of the PII application, adversarialism could be maintained through measures such as the engagement of special counsel to represent the interests of the accused, the practical difficulties of which are not insurmountable. Any procedural restrictions imposed upon the defence in the inter partes hearing or upon special counsel that are not strictly necessary should be viewed as an inequality of arms, even in the absence of prejudice.

A stricter approach to that applied by the Court to PII cases is taken in respect of non-disclosure in civil law jurisdictions of written observations of legal officers joined to the proceedings. Opponent status can attach to these officers bringing them within the applicability remit of equality of arms. The Court does not recognise any legitimate grounds on which such observations can be exempt from disclosure. Indirect disclosure is not adequate, the onus rightly being on the state to ensure that the defence are informed directly that observations have been filed and provide adequate opportunity to comment thereon. The discussion established that it is not non-disclosure in itself but the prejudice arising therefrom that grounds the Court's findings of inequality of arms. It is submitted, however, that non-disclosure of observations put by an opponent to the court should in itself be viewed as a procedural inequality, regardless of prejudice (unequivocal inequality). The discussion also argued that in cases where the Court dealt with non-disclosure of observations solely under the adversarial principle, there was adequate justification for relying on equality of arms instead. The latter should be relied on in resolving similar cases to ensure consistency of approach.

The regard for prejudice in determining an inequality of arms from inadequate time or facilities continues also in respect of Article 6(3)(c), though the Court's approach to the latter, which is discussed hereafter, is associated not only with actual but also inevitable prejudice.

5

EQUALITY OF ARMS AND THE RIGHT TO LEGAL ASSISTANCE

A. INTRODUCTION

Article 6(3)(c) essentially secures for the accused a right to a defence. It encompasses three guarantees for this purpose: a right to defend himself in person (pro se accused); a right to defend himself through legal assistance of his own choosing (privately retained counsel); and, in certain cases, an entitlement to state-funded legal assistance (legal aid). Each right is linked in the English text by 'or', implying that they are alternatives and state discretion determines which right is conferred upon the accused, whereas the French text employs *'et'* ('and') between the second and third guarantees. The Court views the French version as authoritative given that it is more consistent with ensuring effective protection of the rights of the defence, hence an accused cannot be compelled to mount a pro se defence.[1] The pro se accused, who assumes a burden of diligence,[2] is not of particular concern to this chapter, except insofar as he raises the issue of whether counsel can be imposed upon him, for his condition is self-prescribed.[3] The concept of equality of arms is at issue only when a disadvantageous procedural condition is the fault of the state and, within the context of Article 6(3)(c), this occurs most often in respect of its legal assistance provisions. It is these provisions that occupy the substance of the discussion herein.

The provision of an opportunity for legal assistance is a manifestation of the concept of equality of arms, hence the absence thereof may disadvantage the accused vis-à-vis the significant prosecutorial expertise of the state. Indeed, the value of the rights to challenge witness evidence and to adequate time and facilities—rights discussed in Chapters 3 and 4 respectively—is reliant heavily upon the right to engage legal assistance.[4] The essence of this assistance for the purposes of criminal proceedings, and steps preliminary or incidental thereto, is the delivery of legal advice,

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[1] *Pakelli v Germany* (App 8398/78) (1983) Series A no 64 [31].

[2] *Melin v France* (App 12914/87) (1993) Series A no 261-A [25]. See further DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London 1995) 258: 'The duty to show diligence does not mean that any accused who defends himself should be held to the standards of a professional lawyer; account must be taken of the particular accused's capabilities and the knowledge and expertise that can be expected of them.'

[3] See further *R v Brown and others* [2001] EWCA Crim 1771; [2001] All ER (D) 392 (Jul): A defendant who chooses to exercise his right under Art 6(3)(c) to a pro se defence cannot ordinarily pray in aid his own incompetence in conducting the defence in support of an argument that an inequality of arms had occurred to render his conviction unsafe.

[4] See further WV Schaefer, 'Federalism and State Criminal Procedure' (1956) 70 Harv L Rev 1, 8: 'Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'

taking relevant practical measures on behalf of the accused, and representation before any court. The norm in practice is that the provider of effective legal assistance will be a qualified lawyer, all references to counsel in this chapter being to this effect, though others may also be considered competent for this purpose where domestic rights to give legal advice and of audience permit.[5] Whoever is instructed in this regard, the state cannot suppress him from defending a client merely on account of the latter's absence at hearing.[6] The interest in achieving equality of arms must prevail.

The interest of this discussion is to examine the Strasbourg approach to equality of arms in the application of the Article 6(3)(c) right to legal assistance. It begins in Part B by establishing a nexus between these two requirements of fair trial. Part C thereafter concentrates specifically on the right to privately retained counsel, the predominant focus being the Strasbourg response to domestic restrictions thereupon. It is not a right, however, that impacts upon the majority of accused persons for their indigence renders more relevant the right to legally aided assistance. Part D, accordingly, gives greater consideration to the latter to reflect its importance. The grant of legal aid is, nevertheless, subject to an accused fulfilling financial and interests of justice criterions. The Court's interpretation of these eligibility criterions is assessed. Once an accused is eligible for legal aid, the issue of whether he is entitled to influence the selection of appointed counsel also becomes relevant and is addressed. Even if an accused is so eligible, or capable of privately retaining counsel, he may wish instead to conduct his case pro se. Part E examines whether a state can set aside this preference and insist that counsel be instructed. Howsoever counsel is instructed, the procedural conditions under which his assistance is rendered in the pre-trial phase of proceedings can be of crucial importance to the effectiveness of the defence presented at trial. Part F considers the Court's approach to pre-trial legal assistance when issues of access to and private communication with counsel have arisen. Legal assistance at this or any stage of the proceedings can make a useful contribution to securing equality of arms only insofar as it is effective in practice. Part G reveals the circumstances in which a state can be held responsible when faced with a complaint of ineffective assistance.

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[5] eg *X v Germany* (App 509/59) (1960) 3 Yearbook 174 (EComHR) 180, 182 where adequate legal assistance was held to include that provided by a probationary legal trainee (*Gerichtsreferendar*); *Ofner v Austria* (App 524/59) (1960) 3 Yearbook 322 (EComHR) 352 where 'defending counsel' was interpreted as meaning '…the legal representative of the accused or simply a person acting on his behalf…'; *Engel and others v the Netherlands* (App 5100/71 et seq) (1976) Series A no 22 [91] concerning legal assistance in military disciplinary proceedings supplied by '…a fellow conscript who was a lawyer in civil life.'; *F v Switzerland* (App 12152/86) (1989) 61 DR 171, 175 in which a pupil advocate was held to have conducted an effective defence.

[6] *Poitrimol v France* (App 14032/88) (1993) Series A no 277-A [34]–[35] (suppression of legal assistance is a disproportionate response to an absent accused); *Lala v the Netherlands* (App 14861/89) (1994) Series A no 297-A [33]; *Pelladoah v the Netherlands* (App 16737/90) (1994) Series A no 297-B [40]; *Van Geyseghem v Belgium* (App 26103/95) ECHR 1999-I [33]–[35]; *Krombach v France* (App 29731/96) ECHR 2001-II [89]–[90]; *Sejdovic v Italy* (App 56581/00) ECHR 2006-II [91].

B. THE NEXUS BETWEEN EQUALITY OF ARMS AND ARTICLE 6(3)(C)

The right to legal assistance in Article 6(3)(c) is an application of the concept of equality of arms. A legal and conceptual based nexus can be established.

1. Legal Nexus

A nexus between Article 6(3)(c) and the principle of procedural equality is recognised readily in law by the Strasbourg organs. The former Commission pronounced that the aim of the article '…is primarily to place the accused in a position to put his case to the court in such a way that he is not at a disadvantage *vis-à-vis* the prosecution…'.[7] The same is also expressed in the Court's acknowledgement that undue restrictions on the right to legal assistance undermine the equality of arms concept.[8] A legal nexus is made possible because both aspects are encompassed within the wider fair hearing provision of Article 6(1). Articles 6(1) and 6(3)(c) are thus sometimes considered conjointly.[9] Whereas the application of Article 6(3)(c) will not always be accompanied by an express reference to the concept of equality of arms, the latter still remains relevant for it assumes an implied presence.

2. Conceptual Nexus

The nexus is also appreciable from a sound conceptual standpoint. Chapter 2 made known that feasibly reciprocal procedural rights useful for case preparation and/or presentation live within the ambit of the equality of arms concept.[10] The right of legal representation belongs self-evidently to this category of rights. Additionally, the proper exercise of this right serves the fundamental values highlighted in the same chapter that are represented in the concept.[11]

The opportunity to engage counsel contributes to furthering the instrumental value of procedural equality: accuracy of outcome. The investigation and subsequent trial process exposes

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[7] *Goddi v Italy* (App 8966/80) EComHR Report 14 July 1982 [55]; *X v Germany* (App 10098/82) (1984) 8 EHRR 214, 225. See also *Glaser and others v Austria* (App 834/60 et seq) EComHR Report 17 December 1963, 66: '…the denial to an accused person of legal assistance on appeal or the exclusion of his lawyer from the hearing of that appeal raise the… issue of "equality of arms"...'; *X v UK* (App 8295/78) (1978) 15 DR 242, 244: 'In examining questions under Article 6(3)(c) the Commission takes… "particular regard to the principle of equality of arms…".'

[8] *Moiseyev v Russia* (App 62936/00) ECHR 9 October 2008 [207]. See also *Salduz v Turkey* (App 36391/02) ECHR 27 November 2008 [53]: Legal assistance '…contribute[s] 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.'

[9] eg *Granger v UK* (App 11932/86) (1990) Series A no 174 [43]; *Twalib v Greece* (App 24294/94) ECHR 1998-IV [57]; *Öcalan v Turkey* (App 46221/99) ECHR 2005-IV [148]; *Popov v Russia* (App 26853/04) ECHR 13 July 2006 [174]; *Klimentyev v Russia* (App 46503/99) ECHR 16 November 2006 [113]; *Moiseyev* (n 8) [225].

[10] Ch 2 Pt D ss 2–3(a), (c)–(d).

[11] ibid Pt B.

the accused, who is not expected to have legal acumen and skills,[12] to the vast resources of the state and the considerable legal, evidential and procedural expertise and experience of its investigative and prosecuting authorities. The danger, therefore, is that the prosecution, to whom a right of representation is always available, may be in a position to exert a disproportionate influence over the decision-maker(s) when establishing the case against the accused and compromise the accuracy of the verdict. To counterbalance this threat is the right of the accused to instruct counsel which '…guarantees… that the proceedings against him will not take place without an adequate representation of the case for the defence…'.[13] To allow adequate representation of the defence case is to promote equality of opportunity with the prosecution to influence the court which renders an accurate outcome more probable.

Counsel, for whom it is incumbent to 'fearlessly and by all proper and lawful means'[14] obtain an acquittal or the most lenient outcome possible, is better placed than the accused to adequately counter prosecutorial influence because of his understanding of relevant legal, evidential and factual issues, and capacity to guard against any inaccuracies arising therefrom; strategically sound judgement[15] based on experience and an objective eye;[16] expertise in testing witness evidence, especially those practising within adversarial style legal systems; and proficiency in the preparation and presentation of skilled argument. Additionally, counsel is competent to observe whether procedural integrity has been maintained throughout the proceedings[17] and acquaint the accused with his procedural and substantive rights. These attributes are acknowledged by the US Supreme Court as being of such fundamental importance that '[t]he right to be heard would be,

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[12] See further S Rogers, 'The Ethics of Advocacy' (1899) 15 LQR 259, 261: 'The natural man when inquiring into anything knows nothing of the inadmissibility of evidence. He admits everything, hearsay or otherwise, and concerns himself solely with its credibility.'

Powell v Alabama 287 US 45, 69 (1932) (Sutherland J): '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. …[H]e 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.'

[13] *X v Austria* (App 2676/65) (1967) 23 CD 31, 35; *Pakelli v Germany* (App 8398/78) (1981) 24 DR 112, 119–120. See also *Ensslin, Baader and Raspe v Germany* (Apps 7572/76; 7586/76; 7587/76) (1978) 14 DR 91, 114: '…the purpose of… [Article 6(3)(c)] is to ensure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional.'

[14] Bar Standards Board, 'Code of Conduct' (8th edn, 31 October 2004) <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/> [303(a)]. Improper conduct can include eg counsel deceiving or knowingly or recklessly misleading the court ([302]). See also *Re G Mayor Cooke* (1889) 5 TLR 407, 408 (Lord Esher MR): An advocate is '…bound to use his utmost skill for his client, but… [not] to degrade himself for the purpose of winning his client's case.'

[15] See further *Pishchalnikov v Russia* (App 7025/04) ECHR 24 September 2009 [84]: '…criminal law… and… proceedings are a rather complex and technical matter which is often incomprehensible to laypersons… . Moreover, practically at every stage of criminal proceedings decisions have to be taken, the wrong decision being able to cause irreparable damage. Reliable knowledge of law and practice is usually required in order to assess the consequences of such decisions.'

[16] The pro se accused risks compromising his objectivity because of his deep personal attachment to the case, hence the familiar proverb 'whosoever is his own counsel has a fool for his client.'

[17] In *Ensslin, Baader and Raspe* (n 13) 114 counsel was described as '…"the watchdog of procedural regularity".'

in many cases, of little avail if it did not comprehend the right to be heard by counsel.'[18] This observation was essentially shared by the European Court in *Pakelli v Germany* when it pronounced that the accused could not have made a useful contribution to his appeal on a point of law without the services of counsel.[19] It was held, therefore, that the refusal to appoint defence counsel during the oral stage of the proceedings deprived the accused of the opportunity to influence the case outcome.[20] Without this opportunity of real influence and the balancing effect thereof on the decision-maker(s), the accuracy of the case outcome may be jeopardized. Thus, the provision of an opportunity to rely on counsel can make the right to be heard effective, hence conducive to an accurate outcome.

It also contributes to the realisation of the intrinsic value of the concept of equality of arms: preservation of the dignity of the accused. The counsel-client relationship is a manifestation of the maxim *qui facit per alium, facit per se* (he who acts through another, acts for himself). The adequate representation of the accused's interests through this vicarious relationship ensures that the accused is a meaningful rather than passive participant in the proceedings against him. Greater value is added to his right, drawn from the adversarial principle inherent in the concept of equality of arms,[21] to comment on observations filed and evidence adduced by the prosecution. As his contribution to the process becomes effective,[22] he will feel that the opportunity of influencing the outcome of his case is a real one.[23] Therefore, the accused becomes conceptually a meaningful participant equal sufficiently to his opponent in legal knowledge and skill, and opportunity of influence. His dignity is preserved.[24] The dignitarian value of the right to legal assistance is evidenced further in the accompanying power of choice granted the accused in the second clause of Article 6(3)(c). Respect is afforded his capacity to choose through independent will and reason his own counsel in the determination of his fate.

The collateral repercussion of this dignitarian value and the contribution legal assistance makes to accuracy of outcome serves the additional value of equality of arms: procedural

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[18] *Powell* (n 12) 68–69 (Sutherland J).

[19] (n 1) [38]. See also *Granger* (n 9) [47]: '…free legal assistance… would… have served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings.'

[20] *Pakelli* (n 1) [39]. See also *Shulepov v Russia* (App 15435/03) ECHR 26 June 2008 [34]: '…the Court considers that the assistance of a legal-aid lawyer… was essential for the applicant, as the former could effectively draw the appeal court's attention to any substantial argument in the applicant's favour, which might influence the court's decision.'

[21] On the relationship between the adversarial and equality of arms principles, see Ch 2 Pt D s 3(b).

[22] *Granger* (n 9) [47]; *Lagerblom v Sweden* (App 26891/95) ECHR 14 January 2003 [49]; *Popov* (n 9) [170]; *Vozhigov v Russia* (App 5953/02) ECHR 26 April 2007 [40].

[23] *Pakelli* (n 1) [39].

[24] See further DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon, Oxford 1996) 364: 'For those who value a hearing for its own sake, legal representation might be seen as a way of making it more meaningful and, in that way, enhancing dignitarian values.'

S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 246 offers a valid different dignitarian perspective, though it is not associated with procedural equality: 'The assistance of counsel… also serves the humanitarian aim of providing the defendant with a human companion, to lessen the feeling that he… has been abandoned by the world only to be "processed" by the judicial machinery which can be perceived as distant and cold, if not downright hostile.'

legitimacy. An opportunity to procure adequate legal advice and representation contributes to creating a public perception that the accused was not disadvantaged by his lack of legal knowledge and skill vis-à-vis the expertise of the prosecuting authorities. Legal assistance instills confidence in society that the defence case was adequately impressed upon the court and procedural irregularities were guarded against, increasing its perception that an accurate trial outcome was reached and the dignity of one of its members was rightly respected by the state conducting a prosecution on its behalf. Defence counsel, therefore, not only serves the accused but also exercises a public function by infusing greater legitimacy into criminal proceedings.

C. LEGAL ASSISTANCE BY PRIVATELY RETAINED COUNSEL

The Article 6(3)(c) guarantee of the accused to 'legal assistance of his own choosing' refers to his entitlement, provided his means are sufficient to pay representation fees, ordinarily to retain counsel of his choice for the purposes of his defence.[25] If the financial assets of the accused are seized by the state, the motive thereof must not be to prevent him from securing such counsel.[26] A legitimate purpose of seizure would be to preserve the proceeds of alleged crime, the collateral effect of which may require an application for legal aid. An accused of sufficient legitimate means cannot be denied an opportunity to retain private counsel and compelled instead to accept ex officio appointed counsel.[27] No distinction is made in the aforementioned article between privately retained and court assigned counsel in respect of their competence to conduct an effective defence,[28] hence both are capable of counterbalancing adequately prosecutorial expertise to secure equality of arms. The essence of such equality is, nevertheless, better preserved in the advocate of personal choice for choice attaches a greater dignitarian quality to that intrinsic to legal assistance. This greater degree of dignitarianism is more conducive to creating from the outset a relationship of trust and confidence between advocate and client.

It is in view of the importance of this relationship '…that as a general rule an accused must not be deprived, against his will or without his knowledge, of the assistance of… counsel he has appointed.'[29] This dignitarian rule is not, however, absolute and states are recognised as entitled

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[25] *X v Germany* (App 646/59) (1960) 3 Yearbook 272 (EComHR) 276, 278; *X v Austria* (App 4338/69) (1970) 36 CD 79, 82.

[26] *X* 1970 (n 25) 82.

[27] *Goddi* (n 7) [64]: The Convention '...gives a defence lawyer assigned by the court a subsidiary role in so far as such a lawyer is called upon only in the absence of one chosen by the accused.'

See also infringements found by the Human Rights Committee (HRC) of International Covenant on Civil and Political Rights (ICCPR) Art 14(3)(d) (right to legal assistance of own choosing) following the undue imposition of ex officio counsel in Uruguay: eg *Miguel Angel Estrella v Uruguay* (Comm 74/1980) UN Doc Supp No 40 (A/38/40) 150 (1983) [1.8], [8.6], [10]; *Delia Saldias de Lopez v Uruguay* (Comm 52/1979) UN Doc CCPR/C/OP/1 88 (1984) [2.3], [11.5], [13]; *Antonio Viana Acosta v Uruguay* (Comm 110/1981) UN Doc Supp No 40 (A/39/40) 169 (1984) [13.2], [15].

[28] *Goddi* (n 7) [64].

[29] ibid.

to place reasonable restrictions on the right to privately retained counsel,[30] the exclusion of certain counsel outright or during the proceedings being the consequence thereof. Exclusion is an especially serious measure:

> It… may intimidate other potential defence counsel or cast discredit on the defence in general; further, a succession of defence lawyers may be damaging to the presentation of the case and introduce greater uncertainty into the barrister's role as "the watchdog of procedural regularity".[31]

Reasonableness implies that the restriction must be appropriate to its intended purpose. Reasonable restrictions are acceptable because the exigencies of justice and securing the adequate defence of the accused may so require. Where such restrictions result in the exclusion of particular counsel,[32] a real opportunity to choose suitable alternative counsel should be made available within ample time to maintain a procedural equilibrium. Where the choice of counsel is interfered with on the basis of an undue restriction, the environment created is not conducive to a right that is practical and effective, thus the position of the accused reliant upon the right is compromised unreasonably. The reasonableness of a particular domestic restriction is not the sole criterion for Convention compliance. The Convention organs have also considered critical whether the exclusion of counsel was prejudicial to the presentation of an effective defence and undermined an essential safeguard against procedural irregularity, hence placed the accused at a disadvantage vis-à-vis the prosecution. The prejudice proviso is thus consistent with that applied to the principle of equality of arms within the context of the rights to test witness evidence and to adequate time and facilities, which were discussed in Chapters 3 and 4 respectively.

Several examples of the application of the aforementioned prejudice and reasonableness criteria in response to domestic restrictions on the right to privately retained counsel merit attention as a point of guidance.

It is conventional and uncontroversial for rights of audience to be restricted to persons qualified for having complied with all applicable practising requirements imposed by the state of

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[30] eg *X* 1978 (n 7) 244; *Popov* (n 9) [171]; *Klimentyev* (n 9) [116]; *Rozhkov v Russia* (App 64140/00) ECHR 5 February 2007 [6(b)(b)] ('The Law').

Contrast *X v Germany* (App 722/60) (1962) 5 Yearbook 104 (EComHR) 106 where, though the Commission also confirmed the non-absolute nature of the right to privately retained counsel, it did not refer expressly to reasonableness and seemed to award states an excessive margin of appreciation in their restrictive powers, namely '…full discretion to exclude lawyers from appearing before the courts…'.

[31] *Ensslin, Baader and Raspe* (n 13) 114.

[32] See further S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993) 206 who proposes that counsel should be excluded only when 'necessary', which he interprets as exclusion only on grounds of criminal conduct. It is submitted that such a standard could render most reasonable restrictions ineffective, thus limiting states' margin of appreciation to a level inconsistent with the minimum standard setting mandate of the Convention. Accordingly, a reasonableness standard is more appropriate.

jurisdiction.[33] This includes restricting rights of audience to an additional extent in the supreme courts to specialist advocates[34] and precluding representation by lawyers qualified exclusively in a foreign jurisdiction.[35] Such regulations on the qualification of those supplying legal assistance are overwhelmingly in the interests of justice and the accused, for they establish a minimum standard of competence in representation, hence are reasonable and non-prejudicial to an adequate defence.

Reasonable regulations are also permissible concerning the conduct of counsel in court to preserve procedural order and the integrity of the proceedings. It was thus considered in *Ensslin, Baader and Raspe v Germany* that the right to privately retained counsel is limited by the obligation on counsel not to infringe rules on professional ethics.[36] Certain lawyers therein were excluded from the defence because they were strongly suspected of supporting the criminal organisation affiliated with the accused. The Commission held this measure reasonable to maintain procedural probity, especially given the prosecution of the lawyers themselves, and non-prejudicial since the accused were still adequately represented by other counsel, some of whom were chosen.[37] Also based on a rationale of professional ethics was the exclusion in another case of counsel who was representing his accused father.[38] The Commission viewed the exclusion as reasonable not because of the filial relationship itself but the fact that counsel was involved intimately in the subject matter of the charge.[39] Furthermore, it was non-prejudicial as the accused had ample opportunity to choose another advocate but made no effort in this regard.[40] Also considered reasonable was the exclusion of defence counsel in an earlier case for refusing to wear robes.[41] Though the accused was requested to choose alternative counsel and given adequate time to do so, he failed to act and the court appointed ex officio another counsel. The reasonable exclusion was thus not prejudicial to the right of the accused to an adequate defence or to choose counsel.[42] The same was held when a defence counsel was excluded for disrespect to the court and the accused was provided the opportunity to choose alternative representation.[43] It is submitted that reliance upon this ground to effect exclusion should only be considered reasonable and proportionate if the level of disrespect is gross.

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[33] See eg Bar Standards Board (n 14) Pt 2 for the practising requirements of barristers in England and Wales. See also *Mayzit v Russia* (App 63378/00) ECHR 20 January 2005 [25], [68]–[71]: The Court considered that the applicant's wish to have his lay mother and sister act as counsel was rejected reasonably as, inter alia, '…they would not be able to ensure the applicant's efficient defence in compliance with the procedure' ([68]). Prejudice did not arise consequently as the court appointed effective defence counsel in the absence of any effort by the applicant to choose alternative representation.
[34] eg *Meftah and others v France* (Apps 32911/96; 35237/97; 34595/97) ECHR 2002-VII [30]–[32], [47].
[35] *V v UK* (App 11465/85) EComHR 3 March 1986 ('The Law').
[36] (n 13) 114.
[37] ibid.
[38] *X* 1978 (n 7).
[39] ibid 243–244.
[40] ibid 244.
[41] *X and Y v Germany* (Apps 5217/71; 5367/72) (1972) 42 CD 139, 139.
[42] ibid.
[43] *X v UK* (App 6298/73) (1975) 2 Digest 831.

Aside from the acceptable regulation of the conduct of counsel in court, limits are also permissible on the number of defence counsel chosen in a case.[44] Such limits are reasonable to ensure against unnecessary practical and logistical difficulties that prevent the proceedings from progressing with the requisite expediency. Additionally, the limitation does not occasion prejudice provided that the number of counsel is sufficient to counterbalance the prosecution. It was thus that the restriction to a maximum of three chosen defence lawyers in *Ensslin, Baader and Raspe* was held acceptable.[45]

It is evident from all the above examples that the Strasbourg approach has been consistently to ensure that the accused has representation of his own choosing to guard against disadvantage vis-à-vis the prosecution, though not always accommodating his initial choice of counsel or every individual in a group of counsel he wishes to retain.

A further issue arising is that of the extent to which a court should accommodate private counsel when he is unavailable for a particular hearing date. In *Hanževački v Croatia*,[46] private counsel had suddenly fallen ill a day before the concluding hearing and duly informed the trial court on the morning of the hearing of his inability to attend. The court denied a request for an adjournment and the accused was compelled to proceed without representation. The European Court considered this prejudicial as counsel was required, and the failure to adjourn rendered unreasonable, given the significance of the final hearing which was an opportunity to present influential closing arguments and the defence view of the entire case.[47] The case should not be regarded as providing support for the proposition that observance of equality of arms requires an adjournment in every instance private counsel is unable to attend. Where adequate preparatory time is available, the engagement of another private counsel in the alternative will be sufficient to comply with Article 6(3)(c), rendering an adjournment unnecessary. An adjournment is, nevertheless, the dignitarian option as it evidences respect for and secures continuity of the accused's first choice of counsel, though it is good practice for domestic courts to take account of the availability of first choice counsel as far as practicable when scheduling hearing dates.

An occasion may arise wherein the accused is unable to secure acceptable or any private counsel because those approached are unwilling to represent him. Article 6(3)(c), nonetheless, operates on the flawed presumption that the accused will always be able to secure private counsel provided he is of sufficient financial means. It is a common and legitimate practice for counsel to refuse any instructions that would cause professional embarrassment.[48] However, the accused

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[44] *Ensslin, Baader and Raspe* (n 13) 114.
[45] ibid. See also *Popov* (n 9) [172]–[174] where the refusal to admit the accused's uncle as his additional representative was held permissible as the accused was represented by an advocate of his choosing which was sufficient to secure equality of arms.
[46] (App 17182/07) ECHR 16 April 2009.
[47] ibid [25]–[26], [29].
[48] Bar Standards Board (n 14) [603] provides useful examples of circumstances in which professional embarrassment may arise, including where counsel lacks adequate experience or competence to handle the matter; is unable to adequately prepare the case given his other professional commitments; is likely to be a

may find that counsel's refusal is rooted unduly in the political unpopularity of the case.[49] Given that the Convention remedies acts attributable to the state rather than private individuals, the refusal of private counsel can compel the accused, who is not entitled to legal aid, to mount a pro se defence and create an inequality of arms for which the state is not liable. As a remedial measure at domestic level, Bar regulatory bodies should, if not already in existence, enforce through professional disciplinary measures a regulation to the effect of that applied to a barrister in England and Wales who must not withhold his services: '(a) on the ground that the nature of the case is objectionable to him or to any section of the public; (b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public'.[50] At Convention level, provision should be made requiring the assignment of legal assistance by competent national authorities in cases where the accused has made all reasonable efforts to secure private counsel but has failed to do so. Article 14(3)(d) of the International Covenant on Civil and Political Rights offers such a solution, the accused being entitled '…to have legal assistance assigned to him, in any case where the interests of justice so require…',[51] though a proviso allowing him to select one of the possible appointees should be added to ensure retention of the choice element in ECHR Article 6(3)(c). Article 6(3)(c) does, nevertheless, invoke state responsibility for procedural inequality when the refusal of private counsel '…is really due to pressure or manoeuvres by the public authority…'.[52] Such pressure or manoeuvres may be manifested, for example, as the threatened or actual intimidation, harassment, maltreatment, detention, exile, disappearance or murder of lawyers representing the politically unpopular, conditions which have in the past been acutely present in states within the jurisdiction of the Inter-American Commission on Human Rights.[53]

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witness in the matter; the accused's instructions require him to act illegally or contrary to professional regulations; and a conflict of interest arises between the accused and other clients.

[49] See the US based discussion of M Alexander, 'The Right to Counsel for the Politically Unpopular' (1962) 22 Law in Transition 19 who refers to the difficulties of retaining counsel for those associated, inter alia, with Communism in the 1940s and 1950s.

[50] Bar Standards Board (n 14) [601].

[51] See further D Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 ICLQ 352, 365 who suggests that the failure to include such protection in ECHR Art 6(3)(c) '…may well fall short of an acceptable standard…'.

[52] *X and Y v Belgium* (Apps 1420/62; 1477/62; 1478/62) (1963) 6 Yearbook 590 (EComHR) 628.

[53] eg Cuba: Case 2286 in Inter-American Commission on Human Rights (IACHR), 'Sixth Report on the Situation of Political Prisoners in Cuba' OEA/Ser.L/V/II.48 doc 24 (1979) Ch 3 s C [1]: Representation refused by counsel as risked imprisonment; IACHR, 'Seventh Report on the Situation of Human Rights in Cuba' OEA/Ser.L/V/II.61 doc 29 rev 1 (1983) Ch 4 s D [21]–[23]: 'Testimony from several detainees affirmed that their attorneys had been intimidated about defending them from fear of being "sanctioned".' ([23]).

Paraguay: IACHR, 'Report on the Situation of Human Rights in Paraguay' OEA/Ser.L/V/II.43 doc 13 corr 1 (1978) Ch 5 [8]–[13]: 'The Commission has specific denunciations by attorneys who have been victims of every kind of violence due only to their active participation in the defense of detainees for reasons of state security or for assumed violations against the public order.' ([13]).

Suriname: IACHR, 'Second Report on the Human Rights Situation in Suriname' OEA/Ser.L/V/II.66 doc 21 rev 1 (1985) Ch 3 s C [2]: 'Since December of 1982 when four prominent attorneys... were murdered, not surprisingly private lawyers have been loath to represent persons accused of crimes against state security.'

D. LEGALLY AIDED ASSISTANCE

The right to legal assistance should not in practice merely be the preserve of those with sufficient financial means. Not only would it create an inequality of arms between those lacking such means and the prosecution, with all its expertise and experience, but also render unequal the treatment between the indigent and non-indigent accused. The legal aid guarantee of Article 6(3)(c) is designed to ensure that such inequalities are not suffered for reason of financial insufficiency.[54] It establishes for the indigent accused a right to free legal assistance when the interests of justice so require. States are thus obliged positively to implement a system of legal assistance[55] in which the defence is funded from the public purse. The existence of this funding is in itself dignitarian: society is prepared to delve into its own purse to confer legal assistance upon those whose indigence would otherwise preclude it to counterbalance state power applied on its behalf. Whereas several well-established models for the delivery of this assistance exist,[56] states must strive in their chosen model to achieve cost[57] and systemic efficiency without compromising to an extent incompatible with Article 6(3)(c) the availability and quality of legal service provision for those most in need. Though adults can be expected to inform themselves of the possible availability of legal aid, no such presumption applies to young persons who must be informed by

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Uruguay: IACHR 'Report on the Situation of Human Rights in Uruguay' OEA/Ser.L/V/II.43 doc 19 corr 1 (1978) Ch 6 [36], [39]–[41]: 'Intimidation, harassment and imprisonment of defense lawyers have the effect that more and more prisoners are reduced to having *defensores de oficio* (court-appointed counsel), and not lawyers of their own choice as defense counsel.' ([39]).

Argentina: IACHR, 'Report on the Situation of Human Rights in Argentina' OEA/Ser.L/V/II.49 doc 19 corr 1 (1980) Ch 6 s G [1]–[3]: '…complaints… alleging the death, disappearance, detention or maltreatment of defense lawyers.' ([1]).

Guatemala: IACHR, 'Report on the Situation of Human Rights in the Republic of Guatemala' OEA/Ser.L/V/II.53 doc 21 rev 2 (1981) Ch 5 s E [1]–[2]: Lawyers murdered.

[54] Concerning inequality between prosecution and indigent accused, see *Pakelli v Germany* (App 8398/78) EComHR Report 12 December 1981 [92]: 'This legal aid clause constitutes a specific application of the principle of "equality of arms"…'. Concerning inequality between indigent and non-indigent accused, see *Luedicke, Belkacem and Koç v Germany* (Apps 6210/73; 6877/75; 7132/75) EComHR Report 18 May 1977 [35]: Art 6(3)(c) is intended '…to avoid any inequality between accused persons...'.

[55] *Artico v Italy* (App 6694/74) (1979) 2 Digest 836–837.

[56] Three models predominate: (i) judicare model: delivery by private practitioners paid by the case; (ii) staff model: delivery by salaried practitioners employed directly by the legal aid authority; (iii) contract model: delivery by individual practitioners or firms/organisations under contract with the legal aid authority. These models may also be applied in combination to create a model involving both state salaried and private practitioners.

The advantages and disadvantages of each model are considered in: AG Watson, 'The Public Defence Solicitors' Office: The Background to its Introduction in Scotland' (Scottish Legal Aid Board) <http://www.slab.org.uk/pdso/pdso_background.htm#top>; Scottish Office Home Department, 'A Literature Review of Public Defender or Staff Lawyer Schemes' (Legal Studies Research Findings No 19, 1998) <http://www.scotland.gov.uk/Publications/1998/12/39b894a7-b729-4715-901f-033fc34767a6>; R Smith, 'Criminal Legal Aid: International Law and Practice' (JUSTICE 2003) <http://www.justice.org.uk/images/pdfs/crimlegalaid.pdf> [25]–[28]; MJ Trebilcock and RJ Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, Cheltenham 2008) 243–246.

[57] See further *M v UK* (App 9728/82) (1983) 36 DR 155, 158: '…financial restraints may be necessary to ensure the most cost-effective use of the funds available for legal aid…'.

states of the right to apply for it and given the opportunity to do so.[58] If the accused accepts legal aid, he cannot instruct counsel to not heed basic principles of his professional duty when presenting the defence.[59] Where the result of such instruction is the accused having necessarily to conduct a pro se defence, '…any consequent "inequality of arms" can only be attributable to his own behaviour.'[60] An accused thus seeking to benefit from legal aid and the concept of equality of arms must be willing to act in conformity with legitimate requirements designed to preserve the integrity of the proceedings.

1. Eligibility for Legal Aid

The Article 6(3)(c) entitlement to access state funded legal services to secure equality of arms is confined to accused persons able to fulfil financial and interests of justice criterions, the Strasbourg interpretations of which thus hold crucial importance.

(a) Financial Criterion

The grant of legal aid is first dependent upon whether the accused is at the material time of insufficient means to retain counsel.[61] The issue is not one that has encountered extensive deliberation by the Court which has left 'sufficient means' undefined and avoided ruling on the resources and thresholds pertaining to means testing, hence affording states a wide margin of appreciation.

The Court has, nevertheless, provided some useful guidance on the matter. It is discernible from *Pakelli* that the applicant bears the burden of proving indigence,[62] though the standard of proof is not one of 'beyond all doubt' but that of 'some indications' that such is the case.[63] The indications of indigence therein that satisfied the financial criterion were that the applicant had been in custody for two years preceding the case; he supplied the Commission with an uncontested and officially confirmed declaration of means for which it granted legal aid; and he

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[58] *Lloyd and others v UK* (App 29798/96 et seq) ECHR 1 March 2005 [141]–[142]. Two applicants therein were under 21.
[59] *X v UK* (App 8386/78) (1980) 21 DR 126, 130. Neither can one insist that counsel act without regard for his professional opinion: *X v Switzerland* (App 9127/80) (1981) 26 DR 238, 240: '…the Convention does not entitle the accused to require his lawyer to adopt a particular defence strategy which the latter regards as impossible to maintain especially if the accused is given the opportunity to address the court himself.'
[60] *X* 1980 (n 59) 130. The accused was, nevertheless, offered every assistance and advice for the conduct of his own defence after the withdrawal of counsel (131).
[61] See further S Duke, 'The Right to Appointed Counsel: *Argersinger* and Beyond' (1975) 12 Am Crim L Rev 601, 626 who argues that all accused persons should be offered free defence counsel. However, such a scheme could prove economically unsustainable for some states, thus they can only be expected realistically, and under the minimum standard setting mandate of the Court, to target their limited resources on those most in need.
[62] See further *Croissant v Germany* (App 13611/88) (1992) Series A no 237-B [37]: '…the burden of proving a lack of sufficient means should be borne by the person who pleads it.'
[63] *Pakelli* (n 1) [34].

offered to prove his indigence before the Federal Court.[64] Reliance upon indications as adequate confirmation of indigence was also evidenced in *Twalib v Greece* where the Court referred to the fact that the applicant was represented at trial and appeal proceedings by lawyers who were either court-appointed or supplied by a humanitarian organisation; he had been in prison for over three years at the time of lodging his appeal; he had made enquiries about the availability of legal aid; and the Commission granted him legal aid in the proceedings before it.[65] The approach is further consistent with *RD v Poland* where the indications of an undue denial of legal aid for an intended cassation appeal were that legal aid was earlier granted in the appellate proceedings and there was no improvement thereafter in the applicant's financial situation.[66]

Pragmatism appears to underpin the Court's resort to indications of indigence in these cases. This is a reasonable response having regard to state failure to conduct a proper and reasoned assessment of means and that conclusive proof of indigence at the material time cannot be expected of the applicant when significant time has transpired between the domestic and Strasbourg proceedings.[67] States should thus undertake a proper and reasoned assessment whenever the applicant's financial situation is at issue. The same was reinforced in the civil context of *Kreuz v Poland* wherein the applicant's financial standing was relevant to his Article 6(1) right of access to a court and the fact that he had been subject to an assumption rather than evidence based means assessment contributed to a breach thereof. [68]

Official confirmation of indigence raises the accompanying issue of whether the 'free' aspect of legal assistance affords the accused a definitive or merely provisional or partial exemption from liability for the costs incurred in his defence. The term 'free' is also employed in Article 6(3)(e) in relation to interpreter assistance. Within the context of this provision, the Court in *Luedicke, Belkacem and Koç v Germany* interpreted the term to denote '…a once and for all exemption or exoneration.'[69] However, it emphasised that its intention was not to establish such an interpretation for Article 6(3)(c), a right it was not called upon to evaluate.[70] Crucially, this article is distinguishable from the former because its grant of legal aid is conditional upon the accused being of insufficient means, hence exposing itself to an alternative textually valid interpretation. The Commission thus held it compatible with Article 6(3)(c) to interpret 'free' to mean '…a mere temporary exemption from costs…' which could after final and binding conviction be withdrawn, and an order for reimbursement issued, if the accused no longer remains of insufficient financial standing.[71] It is not only provisional but also partial exemptions

[64] ibid.
[65] (n 9) [49], [51].
[66] (Apps 29692/96; 34612/97) ECHR 18 December 2001 [46].
[67] *Pakelli* (n 1) [33]–[34]; *Twalib* (n 9) [51], [56]; *RD* (n 66) [46].
[68] (App 28249/95) ECHR 2001-VI [63]–[64], [67].
[69] (Apps 6210/73; 6877/75; 7132/75) (1978) Series A no 29 [40], [46].
[70] ibid [44].
[71] *X v Germany* (App 9365/81) (1982) 28 DR 229, 231; *Croissant v Germany* (App 13611/88) EComHR Report 7 March 1991 [36], [38].

from costs that are compatible with the same. Partial exemptions require the legally aided accused to contribute such a sum as his means reasonably allow towards the anticipated or incurred defence costs. The Court in *Morris v UK* accordingly considered that an offer of legal aid subject to a down-payment commensurate with the accused's income was neither arbitrary nor unreasonable.[72]

The Strasbourg authorities' interpretation of 'free' as non-definitive has attracted the criticism that an indigent accused may be inappropriately inclined to limit or forgo the use of counsel in order to mitigate or avoid potential liability for legal aid expenses.[73] It is difficult to lend significant weight to this criticism. The accused understands that he will bear the burden of compliance with contribution or reimbursement orders only if he is or becomes on proper and reasoned assessment capable financially of doing so, hence the burden is not in principle unreasonable, unsustainable or disproportionate. He would also wish for his case to be represented in the most effective manner possible and the integrity of the proceedings protected. These factors render it unlikely that an indigent accused aspiring to the full benefit of legal aid provision would in practice feel discouraged sufficiently from exercising his entitlement thereto and jeopardising his defence. Costs orders imposed with proper regard to the financial situation of the accused thus in principle themselves neither deprive the accused of a practicable opportunity for legal assistance nor in turn impact negatively on equality of arms. Orders such issued are indeed a prudent measure for their capacity to ensure that those who are subject to them both benefit from and replace legal aid funds. Such funds are limited and their replacement contributes to the delivery of sustainable legal aid schemes. Where a legally aided person has been acquitted, it is submitted that he should be remitted due expenses or reimbursed those incurred; his legal innocence should preclude financial suffering because of a failed prosecution to which he was subject involuntarily.

(b) Interests of Justice Criterion

Upon satisfaction of the means criterion, the grant of legal aid is subject to whether the circumstances of the case are such that it is required in the interests of justice. This merits criterion is to be applied without regard for instances of public disapproval of their funds benefiting an unpopular accused, who remains entitled to '…a realistic chance to defend himself throughout the entire trial.'[74] On account of the principal purpose of legal aid being to effect equality of arms, the Court's application of the interests of justice criterion amounts essentially to an assessment of the underlying question of whether the absence of legal assistance, having

[72] (App 38784/97) ECHR 2002-I [89], [93].
[73] eg *Croissant* (n 71) [32]; D Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 317. The same concern was raised within the context of interpreters and costs in *Luedicke, Belkacem and Koç* (n 69) [42].
[74] *RD* (n 66) [49].

regard to the entirety of the proceedings, occasioned a procedural inequality. The accused will not, in principle, be placed necessarily in a position of disadvantage vis-à-vis a represented prosecution if an adequate representation of the defence case can be achieved without counsel.

Consideration of the role of prejudice for the purpose of the aforementioned assessment was provided in *Artico v Italy*.[75] The indigent applicant therein was unrepresented before the Court of Cassation but the Government contended that this condition did not contravene the interests of justice as prejudice had not arisen. The European Court was of the view that requiring proof of prejudice arising from a lack of assistance was impracticable.[76] It could not, for instance, be proven indubitably that a defence counsel would have been successful on the crucial issue of statutory limitation and obtained a public hearing to counter the prosecution pleadings on the appeal.[77] Consequently, the Court held that the interests of justice criterion could be met merely by demonstrating that it was prima facie 'plausible' in the circumstances that counsel would have been of assistance, such as had been done in the case, which contributed to finding a breach of Article 6(3)(c).[78] In effect, therefore, prejudice is intrinsic to the absence of legal aid when it appears plausible on the facts that counsel was required in the interests of justice (inevitable prejudice). This progressive approach deserves merit for its contribution to creating a real opportunity for an indigent accused to fulfil the interests of justice criterion; an opportunity which would otherwise be illusory were it susceptible to frustration by an impracticable requirement of proving prejudice. Indeed, rather than requiring proof, it is a self-evident truth that the non-provision to the accused of necessary legal assistance will create a disadvantage vis-à-vis the prosecution pervading all aspects of the proceedings. The absence of this assistance in *Artico* deprived the accused of an opportunity, which was available to the prosecution, to put his case adequately to the court because an adequate representation of the defence would have required certain acts[79] only a lawyer would plausibly have done. Accordingly, in holding that legal assistance was required in the interests of justice, the Court was simultaneously but implicitly declaring an inequality of arms without attaching a requirement of proving prejudice; inevitable prejudice was sufficient.

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[75] (App 6694/74) (1980) Series A no 37.
[76] ibid [35].
[77] ibid [34]–[35].
[78] ibid [35], [37]. This approach is also evident in *Biondo v Italy* (App 8821/79) (1983) 64 DR 5 [46], [49], [51].
[79] *Artico* (n 75) [34]: 'A qualified lawyer would have been able to… give the requisite emphasis to the crucial issue of statutory limitation which had hardly been touched on… . In addition, only a lawyer could have countered the pleadings of the public prosecutor's department by causing the Court of Cassation to hold a public hearing devoted… to a thorough discussion of this issue.'

(i) Key Assessment Factors

Certain key factors are to be taken into consideration in deciding whether the interests of justice 'plausibly' necessitated free legal assistance in a particular case. The Court has certainly been more inclined than the former Commission, which relied heavily upon state discretion,[80] to conduct its own effective assessment of the issue.[81] States would thus be wise in cases where doubt arises as to whether counsel is required to ensure that it falls to be resolved in favour of the accused. They certainly cannot rely upon appointing counsel at appeal to cure the lack thereof at first instance where the scope of review at appeal precludes a redetermination of all disputed questions of fact and law.[82] Whereas a Strasbourg presumption in favour of the grant of legal aid would be desirable in view of the positive contribution professional expertise can offer towards securing equality of arms,[83] it does not exist. The Court has principal regard to three factors: severity of the sentence risked; case complexity; and the competence of the accused to defend himself.[84] It is submitted that the Court has rightly focussed on these particular factors for they harbour the capacity to provide the most persuasive arguments for granting legal assistance in the interest of preserving equality of arms. After all, '…it will not be sufficient to argue that equality is automatically absent where… the state is legally represented and the accused is not…'.[85] Each factor is in itself capable of revealing an imbalance between the capacities of the unrepresented accused and the prosecution to present adequately their cases and thus rendering unjustified the refusal of legal assistance.[86] Nevertheless, the Court will reinforce its conclusion drawn from one factor that legal assistance was necessitated with additional reference to the remaining factors

[80] eg *X v Germany* (App 599/59) (1961) 8 CD 12, 18; *X v UK* (App 5871/72) (1974) 1 DR 54, 54–55; *Bell v UK* (App 12322/86) EComHR 13 October 1987 [1] ('The Law'): 'The evaluation of the requirements of the interests of justice under Article 6 para. 3(c)… lies in the first place with the domestic courts.'; *Drummond v UK* (App 12917/87) EComHR 9 December 1987 [1] ('The Law').

[81] An especially apt example of which is *Quaranta v Switzerland* (App 12744/87) (1991) Series A no 205 [31]–[38]: Though the Court viewed the factors relied upon by the Government to refuse legal aid as relevant, it applied them with its own assessment on the facts and found Art 6(3)(c) infringed.

[82] ibid [37].

[83] Stavros (n 32) 214.

[84] Whereas these factors correspond to the interests of the accused, it has been suggested that an additional factor may be whether the case raises a wider issue of public interest: JES Fawcett, *The Application of the European Convention on Human Rights* (Clarendon, Oxford 1987) 192; P van Dijk and M Viering, 'Right to a Fair and Public Hearing (Article 6)' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerpen 2006) 643; Harris and others (n 73) 318 fn 1134 cite *Pakelli* (n 1) [37] in support as regard was had by the Court to the value of the case '…for the development of case-law.'

Contrast Trechsel (n 24) 272 who dismisses this suggestion on the ground that Art 6 is only for the benefit of the accused. Additionally, there is insufficient support in the case-law for establishing the wider public interest as a relevant criterion.

[85] P Plowden and K Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish, London 2002) 259.

[86] eg *Quaranta* (n 81) [33]; *Boner v UK* (App 18711/91) (1994) Series A no 300-B [41]; *Twalib* (n 9) [52]; *Shulepov* (n 20) [34]; *Shilbergs v Russia* (App 20075/03) ECHR 17 December 2009 [122].

whenever the facts of the case allow.[87] Alternatively, it will declare that the interests of justice called for legal aid only once all applicable factors have been referred to.[88]

(a) Severity of potential punishment

Marked account is taken of the severity of the possible penalty at stake for the accused,[89] which corresponds naturally to the seriousness of the offence. A defence is adequate only if the quality of its presentation reflects appropriately the seriousness of charge and severity of potential punishment. An adequate defence to a modest charge and penalty is achievable without counsel.[90] However, the more serious the offence and severe the possible repercussions, the greater the need for professional expertise and experience capable of counterbalancing the prosecution effort and securing equality of arms. When assessing severity of penalty, the Court evidenced in *Quaranta v Switzerland* that it will rely upon the maximum sentence imposable theoretically (three years imprisonment) rather than a subjective state assessment of the likely sentence on the facts (imprisonment not exceeding 18 months).[91] Legal assistance was held warranted.[92] The approach is essentially one of disregard for state discretion in favour of protecting the accused from possible misjudgement as to likely penalty and consequent denial of legal assistance. Though the approach is favourable from a dignitarian stance, it is difficult not to be sympathetic to Trechsel's view that it is unduly strict on states: 'The Convention rights are meant to be practical, not theoretical; this does not only work for the applicant but also for the domestic authorities.'[93] It is, of course, the severity of the imposed rather than possible sentence that is to be considered where appeals are concerned.[94] Significantly, it was asserted in *Benham v UK* and thereafter consistently that '...where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.'[95] Deprivation of liberty, for the purposes of this

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[87] eg *Quaranta* (n 81) [33]–[36], [38]; *Twalib* (n 9) [52]–[54]; *Shilbergs* (n 86) [122].
[88] eg *Granger* (n 9) [47]–[48]; *Benham v UK* (App 19380/92) ECHR 1996-III [61]–[62], [64]; *Perks and others v UK* (App 25277/94 et seq) ECHR 12 October 1999 [76]; *Gutfreund v France* (App 45681/99) ECHR 2003-VII [33]–[34], [40].
[89] eg *Quaranta* (n 81) [33]; *Boner* (n 86) [41], [44]; *Maxwell v UK* (App 18949/91) (1994) Series A no 300-C [38], [41]; *Benham* (n 88) [61], [64]; *Twalib* (n 9) [52]; *Perks and others* (n 88) [76]; *Gutfreund* (n 88) [33]–[34], [40]; *Lloyd and others* (n 58) [138]; *Shulepov* (n 20) [34].
[90] See further *Hinds v Attorney General of Barbados* [2001] UKPC 56; [2002] 1 AC 854 [17] (Lord Bingham): 'There will be very many cases… which may be fairly heard without representation of the defendant. The less serious the charge, the more straightforward the facts and the more modest the potential penalty, the likelier this is to be true.'
[91] (n 81) [33].
[92] *Quaranta* (n 81) [33], [38].
[93] (n 24) 274.
[94] eg *Boner* (n 86) [41]; *Maxwell* (n 89) [38]; *Shilbergs* (n 86) [122].
[95] (n 88) [61]; *Hooper v UK* (App 42317/98) ECHR 16 November 2004 [20]; *Lloyd and others* (n 58) [134]; *Beet and others v UK* (App 47676/99 et seq) ECHR 1 March 2005 [38]; *Shabelnik v Ukraine* (App 16404/03) ECHR 19 February 2009 [58].

The HRC also applies this approach to ICCPR Art 14(3)(d) cases involving capital sentences: eg *Frank Robinson v Jamaica* (Comm 223/1987) UN Doc CCPR/C/35/D/223/1987 (1989) [10.3]; *Carlton Reid v Jamaica* (Comm 250/1987) UN Doc CCPR/C/39/D/250/1987 (1990) [11.4]; *Henry v Jamaica* (Comm

general principle, refers to real imprisonment and not to other penalties restricting liberty, such as community service or curfew orders, or to a suspended sentence of imprisonment. Legal aid is not called for exclusively in cases where actual imprisonment is possible. In *Pham Hoang v France*, it was the imposition of a substantial financial penalty (joint and several liability for FRF 5,670,000) that contributed to the conclusion that counsel was required in the interests of justice.[96] In contrast, the same was not found in *Y v Germany* and *Gutfreund v France* for they involved minor offences and small fines of DM 160 and FRF 5000 respectively.[97] As 'severity' of possible punishment is crucial, it is submitted that the Court would do well to be mindful of whether such punishment is also likely to lead to a loss of livelihood or serious damage to reputation, both of which could be regarded as of sufficient severity to justify legal assistance.[98]

(b) Case complexity

The Court is, nonetheless, minded to consider the degree of factual, legal and evidential complexity in a particular case during its evaluation of whether legal aid was called for.[99] The appropriate handling of a case demands a level of competence commensurate with its complexity. Unrepresented accused persons facing simple and accessible procedures will not be much cause for concern.[100] The more complex the case, however, the less competent the accused is reasonably expected to be in handling it in a manner conducive to an effective defence. Accordingly, an accused involved in a case entailing complexities beyond his competence requires legal assistance to stem an advantage being afforded the prosecution, which has an inherent right of representation, and thus preserve equality of arms. The Court observed in *Benham* that the applicant ought to have benefited from legal assistance as the applicable legal test had proven difficult to understand and operate.[101] It also viewed such assistance as necessary in *Shilbergs v Russia* given that the applicant could not competently address several legal issues of 'particular

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230/1987) UN Doc CCPR/C/43/D/230/l987 (1991) [8.3]; *Campbell v Jamaica* (Comm 248/1987) UN Doc CCPR/C/44/D/248/1987 (1992) [6.6]; *Wright v Jamaica* (Comm 459/1991) UN Doc CCPR/C/55/D/459/1991 (1995) [10.2]; *Robinson LaVende v Trinidad and Tobago* (Comm 554/1993) UN Doc CCPR/C/61/D/554/1993 (1997) [5.8]; *Abdool Saleem Yasseen and Noel Thomas v Republic of Guyana* (Comm 676/1996) UN Doc CCPR/C/62/D/676/1996 (1998) [7.8]; *Devon Simpson v Jamaica* (Comm 695/1996) UN Doc CCPR/C/73/D/695/1996 (2001) [7.3]; *Oral Hendricks v Guyana* (Comm 838/1998) UN Doc CCPR/C/76/D/838/1998 (2002) [6.4]. See also HRC, 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial' (2007) UN Doc CCPR/C/GC/32 [38].

[96] (App 13191/87) (1992) Series A no 243 [40]–[41].

[97] (App 11777/85) EComHR 13 October 1986 ('The Law'); *Gutfreund* (n 88) [33]–[34], [40]. See further an example of the same before the HRC: *Lindon v Australia* (Comm 646/1995) UN Doc CCPR/C/64/D/646/1995 (1998) [6.5].

[98] These elements are considered relevant to the interests of justice in Access to Justice Act 1999 (UK) (AJA) Sch 3 [5(2)(a)].

[99] eg *Granger* (n 9) [47]; *Quaranta* (n 81) [34]–[35]; *Pham Hoang* (n 96) [40]; *Benham* (n 88) [62], [64]; *Twalib* (n 9) [53]; *Perks and others* (n 88) [76]; *Gutfreund* (n 88) [33]–[34], [40]; *Shilbergs* (n 86) [122]. See further *X* 1980 (n 59) 130: '…the right to counsel, especially in a complex criminal trial, must normally be considered an essential ingredient of a fair trial.'

[100] eg *Gutfreund* (n 88) [33].

[101] *Benham* (n 88) [62], [64].

complexity' arising therein, involving, for example, determination of the constituent elements of numerous offences and assessment of the degree of individual liability of several co-defendants, hence he was unable to defend himself effectively.[102] Even where a legal issue is not particularly complex, but is sufficiently so as to render an accused unable competently to address it, *Boner v UK* and *Maxwell v UK* make evident that legal aid is still warranted.[103] Interestingly, these cases also indicate that it should not be a concern of the legal aid decision that the accused's prospects of success at appeal are little or none.[104] The decision must rest simply on whether the preservation of equality of arms in the particular case requires legal assistance.

Further guidance can also be offered. Cases raising human rights arguments are generally of sufficient complexity to merit legal assistance.[105] In *Pham Hoang*, the accused sought to challenge before the Court of Cassation the compatibility of customs legislation with Articles 6(1) and 6(2). In the eyes of the European Court, the presentation and development of arguments on such a complex matter could only be undertaken by experienced counsel, the absence of whom thus infringed Article 6(3)(c).[106] The accused in *Twalib* similarly sought to challenge at cassation level the fairness of earlier proceedings and the Court observed that the preparation of a notice of appeal required the knowledge, skills and experience of a legal practitioner.[107] It noted, additionally, that the domestic requirement that parties be represented in cassation proceedings also confirmed the complexity of the case.[108] A case could further be considered complex to a degree above the competence of the accused where it requires the tracing or more than modest handling of witnesses in court.[109] Occasion may also arise in a case where it reveals itself at a subsequent stage to be more complicated than reasonably anticipated at the time of the legal aid refusal decision. If such a situation were permitted to stand, the unassisted accused could be placed in a disadvantageous position. Fortunately, in such circumstances, the Court maintained in *Granger v UK* that states must make available a mechanism to have the refusal reconsidered.[110] This review requirement must be applicable equally to any relevant change in the circumstances under which legal aid was refused.

(c) Competence of accused to defend himself

Cognisance is further taken of the contribution the accused was capable of making without counsel to the presentation of his defence, a factor that sometimes overlaps with that of case

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[102] *Shilbergs* (n 86) [122]–[124].
[103] *Boner* (n 86) [41], [44]; *Maxwell* (n 89) [38], [41].
[104] ibid respectively [40]–[41]; [37]–[38].
[105] Plowden and Kerrigan (n 85) 261.
[106] *Pham Hoang* (n 96) [40]–[41].
[107] (n 9) [53]–[54].
[108] *Twalib* (n 9) [53].
[109] See further AJA Sch 3 [5(2)(d)] in which the interests of justice require account to be taken of 'whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses…'.
[110] (n 9) [47].

complexity.[111] An accused capable of providing an adequate representation of his case will not require counsel in order to be placed on an equal footing with the prosecution.[112] However, the personal circumstances of an accused may provide cogent reason to believe that were he unrepresented, he would be incapable of mounting an effective defence, and the expertise and representation of the prosecution would deny equality of arms between them. Personal circumstances of relevance include mental or physical impairment. It was thus held in *Timergaliyev v Russia* that as the accused's hearing impairment undermined his capacity for effective participation in the proceedings, the interests of justice called for legal representation before the appeal court.[113] Legal assistance was also held warranted at the trial stage in *Prežec v Croatia* in which the accused suffered from a severe mental illness.[114] In the absence of mental or physical impairment, it may simply be that the accused requires legal assistance because he lacks the aptitude to understand sufficiently the proceedings or state his case. The Court in *Twalib*, for instance, had regard to the accused being a foreigner unfamiliar with the Greek language and legal system who was unable to indicate any grounds of appeal in his written appeal notice.[115] In *Quaranta*, the Court appeared to indicate that it could not expect an underprivileged young adult of foreign origin, with repeated involvement in criminality and drug-use, and lacking real occupational training, to present an adequate defence to the serious charge faced.[116] Even where submissions are prepared on behalf of an accused, he may lack the aptitude to develop the arguments raised therein when acting alone.[117] Such was the case in *Granger* where a solicitor without rights of audience prepared for the accused statements to read out concerning his grounds of appeal. The Court considered that the accused was unable to comprehend fully these statements or opposing arguments and would not, had occasion arisen, have been capable of responding to such arguments or to judicial questioning.[118]

2. Choice and Consultation in the Appointment of Counsel

The state obligation to deliver legally aided assistance to an eligible accused does not include a condition that he be entitled to exercise the same power of choice in the appointment of counsel as that attached to the right to privately retained counsel. The Court was unequivocal in its view in *Franquesa Freixas v Spain* that Article 6(3)(c) '...does not guarantee the right to choose an official defence counsel who is appointed by the court, nor does it guarantee a right to be consulted with

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[111] eg *Granger* (n 9) [47]; *Quaranta* (n 81) [35]; *Pham Hoang* (n 96) [40]; *Twalib* (n 9) [53]; *Vaudelle v France* (App 35683/97) ECHR 2001-I [58], [60]–[61]; *Timergaliyev v Russia* (App 40631/02) ECHR 14 October 2008 [59]; *Prežec v Croatia* (App 48185/07) ECHR 15 October 2009 [29]; *Shilbergs* (n 86) [122].
[112] eg *X v Germany* (App 7300/75) (1976) 2 Digest 857; *X v Norway* (App 8202/78) (1979) 2 Digest 857.
[113] (n 111) [59]–[60].
[114] (n 111) [29], [32]. See also the relevance of mental condition in *Vaudelle* (n 111) [58], [60]–[61].
[115] (n 9) [53]–[54].
[116] (n 81) [35], [38].
[117] eg *Pham Hoang* (n 96) [40]–[41]; *Shilbergs* (n 86) [122], [124].
[118] *Granger* (n 9) [47]–[48].

regard to the choice of an official defence counsel.'[119] This is consistent with the settled view of the Commission.[120] There exist three cases, however, that prima facie invite an alternative interpretation of the article, the Court pronouncing in each one that the accused '…must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled… to be given it free when the interests of justice so require.'[121] The legal aid limb herein could on one textual interpretation be viewed as sharing the choice element of the previous limb ('such assistance'), thus conferring a right to choose counsel upon the legally aided.[122] Nevertheless, these cases lend no further weight to this interpretation in their subsequent legal and factual analysis as choice in the selection of legal aid counsel was never at issue. In the absence of the Court making a clear and direct connection in each case between choice and legal aid, a right of choice for the indigent accused remains insufficiently substantiated.[123]

The reading of this right into Article 6(3)(c) would, nonetheless, be desirable on two levels. First, the values of the concept of equality of arms would be better reinforced. The dignitarian quality of a right to choose is evidenced in its respect for the independent will and reason of the accused. Additionally, accuracy of outcome is more achievable when defence representation is effective. The prospect of effective representation is increased when a relationship of trust exists between client and counsel; a relationship that is more probable when counsel is actually chosen by his client. In view of this context, the legitimacy of counsel appointment processes could be strengthened in the eyes of the public were choice a feature thereof. On a second level, a right of choice would create greater parity between those retaining private counsel, for whom choice is available, and the indigent. This right could be conferred upon indigent defendants through a less restrictive, though still textually valid, interpretation of Article 6(3)(c) in the manner proffered by Stavros: '…the word "it" in the third clause could be read as referring to "legal assistance of his

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[119] (App 53590/99) ECHR 2000-XI [1] ('The Law').

[120] eg *X v Germany* (App 6946/75) (1976) 6 DR 114, 116–117; *F* (n 5) 175; *Bazil v UK* (App 14385/88) EComHR 10 March 1989 [1] ('The Law'). Other cases also deny the existence of a right to choose but without an accompanying comment concerning a right of consultation: eg *X* 1960 (n 25) 276, 278; *X* 1970 (n 25) 82; *M* (n 57) 158; *K v Denmark* (App 19524/92) EComHR 5 May 1993 [2] ('The Law').

[121] *Pakelli* (n 1) [31]; *Frommelt v Liechtenstein* (App 49158/99) ECHR 2003-VII [2] ('The Law') (slight variation on quoted text); *Balliu v Albania* (App 74727/01) ECHR 16 June 2005 [32].

[122] P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998) 468, 471; Trechsel (n 24) 277.

[123] See further the rejection of a right to choose legal aid counsel at a broader international level: eg HRC: *Wright* (n 95) [10.5]: '…article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge…'; *Hezekiah Price v Jamaica* (Comm 572/1994) UN Doc CCPR/C/58/D/572/1994 (1996) [9.2].

Amnesty International, 'International Criminal Tribunal for Rwanda: Trials and Tribulations' (Report) (31 March 1998) AI-Index IOR 40/003/1998 38: '…international law does not guarantee the accused the right to choose defence counsel where they are indigent…'.

International Criminal Tribunal for Rwanda: *Prosecutor v Kambanda* (Judgement) (Appeals Chamber) ICTR-97-23-A (19 October 2000) [33]; *Prosecutor v Akayesu* (Judgement) (Appeals Chamber) ICTR-96-4-A (1 June 2001) [61]: '…in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel.'

own choosing", as guaranteed in the second clause…, and not to "legal assistance"… mentioned in the clause setting the conditions for the third right.'[124] A proposed right of choice for indigent defendants should necessarily be capable of reasonable restriction to overcome justifiable qualification, availability, number of counsel and ethical concerns, as per the case in the above discussion on privately retained counsel. Where the accused is detained in custody without a particular counsel in mind, he should be offered an opportunity to choose counsel from a supplied list of those who have expressed their availability to attend detainees. Irrespective of whether the accused is in custody or at liberty, if he is incapable manifestly of making a meaningful choice of counsel, perhaps by reason of insufficient age or mental competence, or simply fails to make a choice within proper time constraints, the selection decision should be deferred to the legal aid authority.

Whereas a right of choice has evaded the indigent accused, states do not appear to be entitled arbitrarily to exclude him altogether from the process of selecting counsel. The Court seems to recognise that securing a relationship of confidence between client and counsel requires that the accused be entitled at least to exercise a qualified influence over the appointment of his representative. With the exception of *Franquesa Freixas* above, the Court has asserted recurrently that '[w]hen appointing defence counsel the national courts must certainly have regard to the defendant's wishes… . However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.'[125] 'Interests of justice' in this context can encompass, inter alia, concerns over the availability of proposed counsel, the adequacy of his experience and qualifications to handle the matter, and the financial[126] or ethical[127] repercussions of such an appointment. Where the necessity of the appointment of more than one counsel is at issue, '…a court should pay heed to the accused's views as to the number needed…' but those views are also susceptible to being countervailed by '…relevant and sufficient justification.'[128] These statements of respect for the views and wishes of the accused attest to a right of consultation in the appointment of counsel.

Whilst this right contributes to strengthening the values of the concept of equality of arms if one follows, *mutatis mutandis*, the same reasoning applied to the abovementioned link between the concept and the right of choice, it does so to a lesser extent than would the latter. Such is so because choice, in principle, curtails the capacity of the appointing authority to interfere with the will of the accused to a stronger extent than consultation. An accused permitted to choose

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[124] (n 32) 215 fn 678.

[125] *Croissant* (n 62) [29]. See also *Kitov v Denmark* (App 29759/96) ECHR 16 March 1999 [2(c)] ('The Law'); *Lagerblom* (n 22) [54]; *Mayzit* (n 33) [66]; *Mironov v Russia* (App 22625/02) ECHR 5 October 2006 [5(b)(2)] ('The Law'); *Vozhigov* (n 22) [41].

[126] *Lagerblom* (n 22) [59]: '…general desirability of limiting the total costs of legal aid…'.

[127] eg *Croissant* (n 62) [30]: '…a possible conflict of interests…'.

[128] ibid [27]–[28], [30]. The appointment of a third counsel against the wishes of the accused was held justified on the grounds of ensuring that his trial proceeded without interruptions or adjournments, and that the accused would be adequately represented throughout his trial, considering its anticipated length and the size and complexity of the case.

counsel bears greater individual responsibility for the appointment than one merely consulted. Considering that individual autonomy and responsibility are conditions of human dignity,[129] the right of choice is more dignitarian in design than its counterpart. It also follows that the broader scope for interference with the will of the accused in the right of consultation creates a lesser likelihood of his preferred counsel being appointed than would be the case had the right of choice instead been available. The latter right is thereupon more conducive to ensuring a relationship of full confidence between client and counsel for effective representation, which in turn contributes to achieving an accurate outcome. Confidence in the relationship is additionally important because once counsel is appointed, Article 6(3)(c) does not secure a right to have him replaced.[130] Given the value attributed herein to the right of choice over consultation, a counsel selection process involving the former could raise the overall legitimacy of the trial procedure to a higher standard than the latter. A right of choice should, therefore, be preferred to consultation having regard to its superior contribution to furthering the fundamental values of the concept of equality of arms.

E. IMPOSED LEGAL ASSISTANCE

Some accused wish to forgo available legal assistance in favour of appearing pro se.[131] An issue arising therefrom is whether states are permitted to dismiss such a preference in certain cases and insist instead on the engagement of counsel on the ground that it is the interests of the accused. The issue may be viewed from two dignitarian standpoints. Non-interference with the desire of the accused for self-representation is dignitarian for its respect for the individual's autonomy of choice in the manner of his defence. Yet, a mandatory requirement of counsel is also dignitarian for it protects the interests of the accused with professional rigour. It ensures that he does not place himself readily in a position of inequality of arms and thus suffer irreparable prejudice to his defence.

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[129] O Schachter, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848, 851.
[130] *Östergren v Sweden* (App 13572/88) (1991) 69 DR 198, 204; *Lagerblom* (n 22) [55].
[131] Several possible rationales exist: eg an accused ineligible for legal aid may be unwilling to instruct private counsel as he wishes to avoid representation fees either in themselves or because of little or negligible prospects of acquittal; he may seek to establish a strong personal rapport with a jury and appeal to their natural sympathy; JF Decker, 'The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after *Faretta*' (1996) 6 Seton Hall Const LJ 483, 485–487: 'Some defendants may proceed pro se to symbolize their lack of respect for any kind of authority, such as that of the courts, or because they are unable to get their way and so represent themselves as an act of defiance. ...Other criminal defendants may be cleverly manipulating the criminal justice system for their own secret agenda… . On the other hand, while some pro se defendants may not harbor a hidden motive behind the request, …they believe they can do it all themselves.'; EJ Hashimoto, 'Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant' (2007) 85 NC L Rev 423, 463: '…dissatisfaction with, or distrust of, lawyers.'

It appears that the position adopted at Strasbourg is that the Article 6(3)(c) right to a pro se defence is not absolute and the wishes of the accused can consequently be overridden.[132] The Commission ruled on a number of occasions that the accused does not under this provision have '…the right to decide himself in what manner his defence should be assured.'[133] It thus follows '…that a requirement to be represented by a lawyer in proceedings before a higher court is not incompatible with Article 6…'.[134] The Court has held the same for first instance proceedings[135] and formulated the following general principle: 'A legal requirement that an accused be assisted by counsel in criminal proceedings cannot be deemed incompatible with the Convention.'[136]

Its position was elaborated further in *Correia de Matos v Portugal*.[137] It viewed states as enjoying a margin of appreciation in their determination of whether to allow self-representation or impose legal assistance in a particular case.[138] It considered that the legitimate imposition of legal assistance at certain stages of proceedings requires states to invoke sufficient and relevant reasons to justify the measure as being in the interests of justice.[139] The accused is thus rightly safeguarded from arbitrary interference with his right to self-representation. The interests of justice therein were the proper defence of the accused's interests who, despite being a lawyer himself, was not necessarily in a position to assess the interests at stake properly and thus defend himself effectively.[140]

The Court has assumed the right position. It is essential that representation be imposable when a case requires it for the realisation of equality of arms. The benefit a position of equality of arms offers to the achievement of an effective defence outweighs that offered by allowing an accused complete freedom to choose self-representation. Such freedom of choice is indeed susceptible in some cases to uninformed or frivolous decision-making even when professional expertise is needed most. Though the focus hitherto has been on the imposition of counsel to protect defence interests, it is submitted that one should also regard such a measure as acceptable and in the interests of justice on two other grounds: to prevent further obstruction, where it has already been substantial and persistent, of the proper and expeditious conduct of the case;[141] and to prevent vulnerable witnesses suffering further distress or intimidation if the accused were to

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[132] The same approach has been applied to ICCPR Art 14(3)(d): HRC (n 95) [37].
[133] eg *X* (n 13) 35; *X v Norway* (App 5923/72) (1975) 3 DR 43, 44; *X v Austria* (App 7138/75) (1977) 9 DR 50, 52; *X* 1978 (n 7) 244.
[134] *Philis v Greece* (App 16598/90) EComHR 11 December 1990 [1] ('The Law').
[135] *Croissant* (n 62) [27].
[136] *Lagerblom* (n 22) [50]. The accused may be liable to pay the fees of imposed counsel: eg *Croissant* (n 62) [28], [36]; *Pfister v Germany* (App 19512/92) EComHR 7 September 1993 ('The Law').
[137] (App 48188/99) ECHR 2001-XII.
[138] ibid Pt C ('The Law').
[139] ibid.
[140] ibid.
[141] *Prosecutor v Slobodan Milošević* (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel) (Appeals Chamber) ICTY-02-54-AR73.7 (1 November 2004) [13]; *Prosecutor v Šešelj* (Decision on Appeal against the Trial Chamber's Decision (No 2) on Assignment of Counsel) (Appeals Chamber) ICTY-03-67-AR73.4 (8 December 2006) [19].

question them directly.[142] Mandatory representation in such circumstances is a reasonable and proportionate response, and unlikely to adversely affect case outcome.

F. PRE-TRIAL ACCESS TO AND PRIVATE COMMUNICATION WITH COUNSEL

The pre-trial phase of proceedings is often highlighted as being of crucial importance because the evidence obtained therein determines the framework in which the charge will be assessed at trial.[143] Article 6(3)(c) is applicable at this stage if and insofar as the fairness of the trial in a particular case is likely to be seriously prejudiced by an initial failure to comply therewith.[144] It is also at the pre-trial stage that the natural imbalance of power and resources between the accused and the investigative and prosecutorial machinery of the state is most pronounced. Legal assistance is intended to contribute towards mitigating this imbalance and allow for the competent undertaking of all preparatory activities conducive to an effective defence at trial. The absence or undue restriction of such assistance is capable of occasioning a pre-trial disadvantage for the accused that bears adversely on the quality of defence presented in the ensuing proceedings and, in turn, the case outcome. The Strasbourg approach to pre-trial legal assistance is thus of profound importance to whether or not the defence case was presented at trial under a condition of equality of arms. The focus of the approach is directed towards the capacity of a detained accused to access legal assistance throughout the pre-trial stage, including periods of questioning in particular, and confer with counsel in private.[145]

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[142] HRC (n 95) [37]. On vulnerable witnesses, see Ch 3 Pt F s 3.

[143] *Can v Austria* (App 9300/81) EComHR Report 12 July 1984 [50]; *Salduz* (n 8) [54]; *Pishchalnikov* (n 15) [69]; *Eraslan and others v Turkey* (App 59653/00) ECHR 6 October 2009 [12]; *Fatma Tunç v Turkey (No 2)* (App 18532/05) ECHR 13 October 2009 [14]; *Diallo v Sweden* (App 13205/07) ECHR 5 January 2010 [24]; *Melnikov v Russia* (App 23610/03) ECHR 14 January 2010 [79]; *Pavlenko v Russia* (App 42371/02) ECHR 1 April 2010 [101].

See further JH Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1994) 92 Mich L Rev 1047, 1059: '...the everyday reality is that pretrial is vastly more important than trial. The evidence gathered determines many more outcomes than how it is subsequently presented. The trial is mostly a pageant that confirms the results of the pretrial investigation...'.

[144] *Imbrioscia v Switzerland* (App 13972/88) (1993) Series A no 275 [36]; *John Murray v UK* (App 18731/91) ECHR 1996-I [62]; *Magee v UK* (App 28135/95) ECHR 2000-VI [41]; *Brennan v UK* (App 39846/98) ECHR 2001-X [45]; *Öcalan* (n 9) [131]; *Salduz* (n 8) [50]; *Pishchalnikov* (n 15) [65].

[145] Save for the issue of representation during periods of questioning, matters of counsel visits and confidentiality during consultations have sometimes been considered conjointly under Art 6(3)(c) and the 'facilities' component of Art 6(3)(b): eg *Bonzi v Switzerland* (App 7854/77) (1978) 12 DR 188, 190; *Schertenleib v Switzerland* (App 8339/78) (1979) 17 DR 205, 225–226; *Kröcher and Möller v Switzerland* (App 8463/78) (1981) 26 DR 24, 52–53; *Campbell and Fell v UK* (Apps 7819/77; 7878/77) (1984) Series A no 80 [99]; *Lanz v Austria* (App 24430/94) ECHR 31 January 2002 [46]–[47].

1. Access to Counsel at Interrogation

Counsel is of great importance to an accused thrust into the psychologically intimidating atmosphere of pre-trial interrogations into his suspected criminality. Interrogation can '…subjugate the individual to the will of his examiner'[146] and lead even the innocent to undermine their credibility irreparably or incriminate themselves. It is '…the central investigative strategy',[147] generating evidence highly influential or decisive to trial outcome, and thus '…regarded by most informed observers as a critical—perhaps the most critical—stage in the processing of almost all criminal cases.'[148] The interposition of counsel at this critical questioning stage is capable of redressing the inequality of arms between examiner and accused, the latter presumed to have little or no legal knowledge or skills. Counsel can protect his client from the application of improper interrogation techniques; make him aware of his rights; advise on whether or not to remain silent; ensure that his client's version of events is fully presented; keep faithful account of the proceedings; and provide moral support at a time of distress. It is thus a rule of the Court that '…Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.'[149] There is an onus on the accused or his representative to first specifically request joint attendance at such interrogations before the state can be required to facilitate it.[150]

The requirement of counsel at interrogation is, however, capable of restriction for 'good cause',[151] a term the Court has failed to define. Such qualification presents an affront to the importance of establishing a just balance between examiner and accused as soon as possible. The latter, it is submitted, should not be questioned without immediate access to counsel upon being detained in custody. A comment made without legal advice and in the presence of the investigating authorities can influence their handling of the case to the prejudice of the accused even when such comment is inadmissible at trial.[152] Nevertheless, the Court has at least limited the effect of the qualification to the extent that it accepts that even a justified restriction of access to counsel is capable of depriving the accused of a fair hearing when proceedings are viewed in their entirety.[153]

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[146] *Miranda v Arizona* 384 US 436, 457 (1966) (Warren CJ).
[147] M McConville, A Sanders and R Leng, *The Case for the Prosecution* (Routledge, London 1991) 57.
[148] J Baldwin, 'Police Interrogation: What are the Rules of the Game?' in D Morgan and GM Stephenson (eds), *Suspicion and Silence: The Right to Silence in Criminal Investigations* (Blackstone, London 1994) 66.
[149] eg *John Murray* (n 144) [63]; *Magee* (n 144) [41]; *Brennan* (n 144) [45]; *Öcalan* (n 9) [131]; *Galstyan v Armenia* (App 26986/03) ECHR 15 November 2007 [89]; *Salduz* (n 8) [52]; *Pishchalnikov* (n 15) [67].
[150] *Imbrioscia* (n 144) [39], [42], [44].
[151] eg *John Murray* (n 144) [63]; *Brennan* (n 144) [45]; *Öcalan* (n 9) [131]; *Salduz* (n 8) [52]; *Pishchalnikov* (n 15) [67].
[152] See further Trechsel (n 24) 283: '…the behaviour of the suspect immediately after the arrest will *always* have consequences.'
[153] eg *John Murray* (n 144) [63], [65]–[66]; *Salduz* (n 8) [52]; *Pishchalnikov* (n 15) [67].

It is when such a restriction during pre-trial questioning raises prejudice for the accused in the ensuing proceedings that an inequality of arms will be effected. Such is evidenced both in cases where the accused responded to questioning and in those where he exercised his right to silence. The accused in *John Murray v UK* was denied access to counsel for a 48-hour period at the interrogation stage and his decision to maintain silence resulted in adverse inferences being drawn legitimately[154] at trial. The Court maintained that such a significant and difficult decision[155] should have been informed by legal advice in view of the prejudice arising therefrom at trial, irrespective of the justification for the restriction.[156] In effect, the restriction was unduly advantageous to the prosecution. This undue advantage was present also in *Magee v UK*[157] where the accused was questioned without counsel for the same period but he chose not to remain silent. The Court has a certain regard to the particulars of the environment in which such decisions are made. The conditions of the accused's detention and his incommunicado status created an '…intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators.'[158] Counsel was held to have been required as a 'counterweight' to this atmosphere.[159] Indeed, his absence was prejudicial as statements made without legal advice formed the basis of the conviction.[160] It appears crucial to finding Article 6(3)(c) infringed that a statement given during an interrogation in which access to counsel was denied be prejudicial to the defence. The Court has acknowledged consistently that a statement made under this restriction will be prejudicial where it is used for a conviction.[161] The statement need not be the sole basis for the conviction but merely have a significant bearing upon it.[162] Such prejudice is

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[154] (n 144) [54], [56]–[58].

[155] *John Murray* (n 144) [66]: 'If he chooses to remain silent, adverse inferences may be drawn against him... . On the other hand, if the accused opts to break his silence…, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.'

[156] ibid [63] ('National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings.'), [65]–[66], [68] ('…the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence.'), [70]. The same was held in *Averill v UK* (App 36408/97) ECHR 2000-VI [59]–[61] after the accused was denied access to counsel for a 24-hour period of interrogation and his silence was invoked to his prejudice at trial.

[157] (n 144).

[158] *Magee* (n 144) [43].

[159] ibid [43], [46].

[160] ibid [45].

[161] *Öcalan* (n 9) [131], [148]; *Salduz* (n 8) [55] ('The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'), [57]–[58], [63]; *Shabelnik* (n 95) [53], [59]–[60]; *Płonka v Poland* (App 20310/02) ECHR 31 March 2009 [35], [39], [40]–[42]; *Pishchalnikov* (n 15) [70], [90]–[92]; *Oleg Kolesnik v Ukraine* (App 17551/02) ECHR 19 November 2009 [35], [37]–[38]; *Musa Karataş v Turkey* (App 63315/00) ECHR 5 January 2010 [90]–[91], [97].

See also *Brennan* (n 144) [46], [48] where prejudice did not result from a 24-hour deferral of access to counsel during interrogation, applied in good faith and on reasonable grounds, as no incriminating admissions were made or adverse inferences subsequently drawn.

[162] *Panovits v Cyprus* (App 4268/04) ECHR 11 December 2008 [76]; *Płonka* (n 161) [39]; *Pishchalnikov* (n 15) [90]. See also *Öcalan* (n 9) [131] ('major contributing factor'); *Salduz* (n 8) [55] ('main evidence'); *Shabelnik* (n 95) [59] ('decisive extent'); *Oleg Kolesnik* (n 161) [37] ('crucial element'); *Musa Karataş* (n 161) [91] ('relied on it in convicting the applicant').

confirmation of the occurrence of an inequality of arms.[163] This inequality will be even more marked when the statement is made by a minor because of his vulnerability and capacities.[164] A state is not, of course, liable for an inequality of arms if the prejudicial statement is made when counsel is absent through no measure imposed by the authorities.[165]

2. Visitation by and Private Communication with Counsel

Not only is effective representation of the accused's interests important for equality of arms in interrogations but also throughout the entire pre-trial stage. Counsel is entitled during this stage to visit his detained client with a view to his defence.[166] To find otherwise would be to limit his capabilities for effective case preparation to the advantage of the prosecution and thus upset equality of arms. It is during these custodial client conferences that discussions will occur concerning the factual and evidential aspects of the case, defence activities and strategy. These discussions must be full and frank if counsel is to represent his client's interests effectively. Full and frank communication will be interfered with or made impossible if conducted within earshot, either direct or indirect, of the investigative or prosecutorial authorities because of a legitimate fear of them becoming better informed against the accused to his prejudice. Such an affront to confidentiality not only limits the effectiveness of legal assistance[167] but also undermines the counsel-client relationship of trust and confidence. Supervised conferences are thus capable of placing the prosecution in an unduly advantageous position in contravention of the concept of equality of arms. The Court consequently recognises in Article 6(3)(c) a right of the accused to communicate with his advocate out of the hearing of third parties.[168] It does not necessarily require third parties to actually hear defence discussions before free discussion is inhibited and the right to be effectively defended is hampered; a genuine belief held on reasonable grounds that

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[163] *Pishchalnikov* (n 15) [91].

[164] *Salduz* (n 8) [57]–[58], [60] ('…the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.'), [63]; *Panovits* (n 162) [67], [71]–[77].

See further *T v UK* (App 24724/94) ECHR 16 December 1999 [84]: '…it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.'

[165] *Brennan* (n 144) [47]–[48].

[166] *Bonzi* (n 145) 190: '…the opportunity for the accused to confer with his defence counsel is fundamental to the preparation of his defence.'; *Schertenleib* (n 145) 226; *Kröcher and Möller* (n 145) 53; *Campbell and Fell* (n 145) [99]: '…a lawyer could scarcely "assist" his client... unless there had been some previous consultation between them.' A violation of Arts 6(3)(b) and (c) was found therein because no provision was made for consultations with counsel before the hearing; *Can* (n 143) [54]: '…Art 6(3)(c)… gives the accused a… right to assistance and support by a lawyer throughout the whole proceedings.'

[167] *S v Switzerland* (Apps 12629/87; 13965/88) (1991) Series A no 220 [48]: 'If a lawyer were unable to confer with his client and receive confidential instructions from him without… surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.'; *Brennan* (n 144) [58]; *Lanz* (n 145) [50]; *Öcalan* (n 9) [133]; *Marcello Viola v Italy* (App 45106/04) ECHR 2006-XI [61]; *Moiseyev* (n 8) [209]; *Rybacki v Poland* (App 52479/99) ECHR 13 January 2009 [56].

[168] eg ibid. The EComHR recognised the same earlier in *Can* (n 143) [57].

such discussions were not confidential may suffice.[169] It may be during these discussions that documents are exchanged between counsel and client. The routine reading of these documents by the prosecuting authorities can reveal defence strategy and has been held to offend against equality of arms.[170]

Nevertheless, the entitlement to both receive visits from counsel and confer with him in private is susceptible of restriction where cogent justification exists.[171] Cases indicate that cogent justification could relate, for example, to a risk of collusion with or through counsel,[172] the questionable professional ethics or lawfulness of his conduct at any time in the case,[173] or security considerations.[174] Regard seems to be had also to two particular factors when cogency of justification is assessed. Account is taken of the duration of the restriction as a measure of proportionality. Violations have been found where the restriction was imposed for periods of two[175] or three[176] months, over five[177] or seven[178] months, and throughout and beyond the entire pre-trial stage.[179] Yet, more critical to finding these violations was consideration of whether or not the restrictions were necessary on the facts. An unnecessary restriction can infringe Article 6(3)(c) even if it is of very limited duration.[180] It is quite straightforward for the Court to find the supervision of client-counsel conferences, and limitations upon the number and length thereof, unnecessary when a state fails to adduce the grounds, even of a general nature, for the restriction.[181] Even when grounds are provided, a restriction cannot be considered necessary if a less restrictive measure can suffice.[182] Thus, it was held unnecessary in *Öcalan v Turkey* that counsel-client meetings were conducted within the hearing of the authorities to ensure the

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[169] *Oferta Plus SRL v Moldova* (App 14385/04) ECHR 19 December 2006 [147]; *Castravet v Moldova* (App 23393/05) ECHR 13 March 2007 [51]; *Istratii and others v Moldova* (Apps 8721/05; 8705/05; 8742/05) ECHR 27 March 2007 [91]; *Modarca v Moldova* (App 14437/05) ECHR 10 May 2007 [89]; *Cebotari v Moldova* (App 35615/06) ECHR 13 November 2007 [60].

[170] *Moiseyev* (n 8) [211]–[212]. In specific respect of interference with 'correspondence' between counsel and client, the matter is treated usually as an ECHR Art 8 concern: eg *Campbell and Fell* (n 145) [108]–[110]; *Schönenberger and Durmaz v Switzerland* (App 11368/85) (1988) Series A no 137 [23]–[30]; *Campbell v UK* (App 13590/88) (1992) Series A no 233 [33]–[54]; *Erdem v Germany* (App 38321/97) ECHR 2001-VII [53]–[70].

[171] eg *Campbell and Fell* (n 145) [113]; *Can* (n 143) [52], [57]; *S* (n 167) [49]; *Brennan* (n 144) [58]; *Lanz* (n 145) [52]; *Öcalan* (n 9) [133], [135]; *Marcello Viola* (n 167) [61]; *Rybacki* (n 167) [56].

[172] *Can* (n 143) [59]; *S* (n 167) [49].

[173] *S* (n 167) [49]; *Rybacki* (n 167) [59].

[174] *Campbell and Fell* (n 145) [113]. Security considerations could include eg when a detained accused exhibits a demonstrable propensity to escape or the presence of counsel at certain times would interfere with essential security protocols.

[175] ibid [111], [113]; *Lanz* (n 145) [51], [53].

[176] *Can* (n 143) [59]–[61].

[177] *Rybacki* (n 167) [60], [62].

[178] *S* (n 167) [49], [51].

[179] *Öcalan* (n 9) [133], [148]; *Moiseyev* (n 8) [204], [207], [224]–[225].

[180] eg *Brennan* (n 144) [59]–[60], [63]. A police officer was present at only one client-counsel interview, the unnecessary restriction being applicable for a 48-hour period.

[181] eg *Campbell and Fell* (n 145) [113]; *Öcalan* (n 9) [135]: '…the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport [to his location], thereby increasing the length of each individual visit...'; *Rybacki* (n 167) [58]–[59].

[182] *Van Mechelen and others v the Netherlands* (App 21363/93 et seq) ECHR 1997-III [58]; *Visser v the Netherlands* (App 26668/95) ECHR 14 February 2002 [43]; *Marcello Viola* (n 167) [62].

applicant's security because visual surveillance, accompanied by other measures, would have been adequate.[183] Justified visual surveillance is tolerable[184] from an equality of arms standpoint for the interference with confidentiality is not of an extent to really disadvantage defence discussions.

States often rely on the risk of collusion to justify the necessity of listening in on discussions. Merely assuming a danger of collusion cannot necessitate a restriction; compelling arguments must be made.[185] Collusion does not include several defence counsel collaborating in order to coordinate their defence strategy, a practice that is not unusual.[186] It refers instead, for example, to influencing witnesses and/or tampering with or removing incriminating documents or other evidence not yet seized. Even if an argument based on collusion or the questionable legal or ethical conduct of counsel at any time during the case is compelling in its justification for holding consultations within the hearing of third parties, or placing limitations upon necessary counsel visits, it is submitted that equality of arms remains undermined. Less restrictive alternatives to both measures that also avoid hampering state investigations must thus be proposed. A lawyer could be appointed, either officially or through the competent Bar authority, to accompany defence counsel in consultations and act as intermediary in exchanges of documents and correspondence.[187] A second alternative, though less preferable than the first, would be for an officially or Bar authority appointed counsel to act as sole representative from the outset or as replacement counsel during the case depending on prevailing circumstances.[188] These alternative solutions would avoid the contradiction between allowing legal representation and limiting through restrictive measures the representative's capacity to perform his role effectively, and thereby sufficiently secure equality of arms.

It was the need to secure equality of arms that weighed heavily on the Court's mind in its assessment of the restriction upon counsel visits in *Moiseyev v Russia*.[189] Counsel was required for the entire duration of the proceedings to apply for a permit from the prosecuting authority before each visit to the applicant. The imposition of this condition was viewed by the Court as

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[183] (n 9) [133].

[184] See further Standard Minimum Rules for the Treatment of Prisoners (adopted 30 August 1955, First UN Congress on the Prevention of Crime and the Treatment of Offenders) UN Doc A/CONF/611 (1955) Annex 1 Rule 93: 'Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.'; Basic Principles on the Role of Lawyers (Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1 118 (1990) Principle 8.

[185] *Can* (n 143) [59]–[60]; *Brennan* (n 144) [59]; *Lanz* (n 145) [51]–[52].

Contrast *Kempers v Austria* (App 21842/93) EComHR 27 February 1997 [1] ('The Law') where the EComHR considered that fear of collusion was justified, and thus surveillance of discussions necessary, as several co-suspects were still at large. The decision is unconvincing. Collusion was possible only through counsel and neither his integrity was ever called into question nor the risk of any sophisticated coded message being forwarded unwittingly through him adequately substantiated.

[186] *S* (n 167) [49].

[187] Trechsel (n 24) 282.

[188] Stavros (n 32) 62 also advocates using officially appointed counsel as a less prejudicial measure, citing *S* (n 167) [49] in support because the European Court therein considered the court-appointed status of counsel to be one of the factors negating a risk of collusion.

[189] (n 8).

unnecessary given that it was devoid of legal basis in domestic law, which merely required advocates to present proof of identity and status during visits.[190] It also considered that the 'excessively onerous' character of the condition must have detracted time and effort from substantive defence activity.[191] It seems in this respect that the defence did not have to establish prejudice because prejudice was assumed inevitable.[192] The essence of the restriction was that '…the prosecuting authority enjoyed unrestricted access to the applicant for its own purposes but exercised full and effective control over his contacts with… counsel…'.[193] It was thus especially concerning to the Court that the defence were compelled to be dependent on, and subordinate to, prosecution discretion and it acknowledged, accordingly, an inequality of arms.[194] Whereas one must accept naturally that custodial contact with counsel requires state facilitation, unfettered discretion in this regard should never be a power bestowed the opponent of the accused if equality of arms is to be assured.

Not only does an assumption of inevitable prejudice feature in the inequality of arms in *Moiseyev*, but also in cases involving consultations within the hearing of the authorities where such inequality was implicit and Article 6(3)(c) held violated. *S v Switzerland* made evident that proof of actual prejudice stemming from supervised consultations was unnecessary for finding Article 6(3)(c) infringed.[195] The same was evidenced in *Brennan v UK* but accompanied with an express requirement for the applicant to demonstrate that he was '…directly affected by the restriction in the exercise of the rights of the defence.'[196] The first consultation since arrest therein was supervised and the consequent impairment of free communication acknowledged:

> …the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him. Both… had been warned that no names should be mentioned and that the interview would be stopped if anything… said… was perceived as hindering the investigation.[197]

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[190] *Moiseyev* (n 8) [206].
[191] ibid [205]–[206].
[192] See further *Campbell and Fell* (n 145) [99] which implies that prejudice can be readily assumed when there is no opportunity for a lawyer to visit his client before a hearing.
[193] *Moiseyev* (n 8) [205].
[194] ibid [205], [207].
[195] (n 167) [50]–[51]. The same was implied in *Can* (n 143) [60]–[61] and *Lanz* (n 145) [49]–[53].
[196] (n 144) [58].
[197] *Brennan* (n 144) [62]. A similar observation was made in *Öcalan* (n 9) [133]: '…the inevitable consequence of that restriction... was to prevent the applicant from conversing openly with his lawyers and asking them questions that might prove important to the preparation of his defence.'

The applicant thus satisfied the aforementioned condition of being 'directly affected by the restriction' at a time he undeniably needed legal advice.[198] This was sufficient to constitute a joint infringement of Articles 6(3)(c) and 6(1).[199] The finding indicates that the Court was prepared to accept, upon taking account of the above manner in which supervision affected the applicant during the consultation, that such supervision would, as a natural and self-evident consequence, have been prejudicial to a fair hearing. This was essentially an assumption of inevitable prejudice. It is self-evident that significant detriment to free communication can pervade all subsequent defence activity to the prejudice of the trial outcome. Implicit in this assumed prejudice was an acknowledgement that the defence incurred an inequality of arms. The concept of equality of arms is indeed stronger when an applicant need not prove actual prejudice arising from an inequality. The Court's willingness to assume prejudice reflects the importance it attaches to meaningful counsel-client communication for ensuring equality of arms and procedural fairness generally, and signals an appreciation that proving actual prejudice from supervised consultations can be an impractical endeavour. Prejudice was also assumed in the similar circumstances of *Rybacki v Poland*: '…it cannot be said that the applicant's contacts with his lawyer were, in such a setting, capable of assisting him in the effective exercise of his defence rights.'[200] The Court considered this disadvantage vis-à-vis the prosecution to have been reinforced by the fact that supervision lasted over five months.[201] The strength of an assumption of prejudice, therefore, will be greater the longer the restriction lasts. Given that the Court is content to assume inevitable prejudice, the thrust of its approach to counsel visits and private consultations is thus firmly fixed on determining whether a particular restriction is necessary and proportionate in duration.

G. EFFECTIVE LEGAL ASSISTANCE

The Court has observed recurrently that:

> ...the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.[202]

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[198] *Brennan* (n 144) [62].
[199] ibid [63].
[200] (n 167) [60], [62].
[201] *Rybacki* (n 167) [61].
[202] *Artico* (n 75) [33]; *Coëme and others v Belgium* (App 32492/96 et seq) ECHR 2000-VII [98]; *Dolenec v Croatia* (App 25282/06) ECHR 26 November 2009 [215].

The accused is thus entitled under Article 6(3)(c) to legal assistance that is effective in practice. The mere pro forma appointment of counsel will consequently not suffice.[203] It is only through effective performance of the essential functions of a legal representative that Article 6(3)(c) can pursue meaningfully its primary aim of redressing, in accordance with the principle of equality of arms, the inherent imbalance in the capacities and competencies of the state and accused to present adequately their cases. The value of legal assistance to the realisation of equality of arms thus becomes illusory when such assistance is ineffective. Whereas the Court has opted not to define clearly the meaning of 'effective' in this context, one can infer from its minimum standard setting competence that an accused is only entitled to expect from his counsel no more than adequate representation of the defence case. Adequate representation requires counsel to at least use the ordinary level of skill and care appropriate to the circumstances of the case. The concept of equality of arms does not demand that he be of equal skill to his prosecution counterpart,[204] but only equal in procedural rights as far as their respective roles allow. The Court's reluctance to establish exacting rules defining effective assistance is explained by a wish to avoid inevitable interference, actual and perceived, with the independent decision-making of counsel on the conduct of the defence. It is essential that counsel enjoy a strong degree of professional independence to perform his duties, from both the Court and states, if he is to make a necessary contribution towards upholding the rule of law.

It is not, however, counsel but exclusively the state against whom complaints of ineffective assistance can be directed under Article 6(3)(c).[205] Counsel is not a state organ, even when officially appointed, for his professional independence affords him the status of private individual.[206] It follows from this independence that the conduct of the defence is essentially a matter between client and counsel, whether the latter is instructed privately or under a legal aid scheme, and states cannot be held responsible for every professional shortcoming arising from

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[203] *Artico* (n 75) [33]; *Kamasinski v Austria* (App 9783/82) (1989) Series A no 168 [65]; *Imbrioscia* (n 144) [38]; *Daud v Portugal* (App 22600/93) ECHR 1998-II [38]; *Czekalla v Portugal* (App 38830/97) ECHR 2002-VIII [60]; *Prežec* (n 111) [31]; *Sabirov v Russia* (App 13465/04) ECHR 11 February 2010 [43]; *Pavlenko* (n 143) [99].

[204] See further *Attorney-General's Reference (No 82a of 2000)* [2002] EWCA Crim 215; [2002] 2 Cr App R 24 [14] (Lord Woolf CJ): 'The principle of equality of arms... does not necessarily entail representation by a Queen's Counsel merely because the Crown are represented by a Queen's Counsel.'

[205] It results from ECHR Arts 19 and 25(1) that there is no competence *ratione personae* at Strasbourg to admit applications directed against private individuals: *X v Germany* (App 2646/65) (1966) 19 CD 89, 92; *X* (n 13) 36; *X v UK* (App 3852/68) (1969) 32 CD 38, 39–40; *X and Z v Germany* (App 3897/68) (1970) 35 CD 75, 80–81.

[206] *Jopkiewicz v Poland* (App 24248/94) EComHR 17 January 1997 [2(b)] ('The Law'); *Rutkowski v Poland* (App 45995/99) ECHR 2000-XI [2] ('The Law'); *Skrobol v Poland* (App 44165/98) ECHR 8 July 2003 [2] ('The Law'); *Bakalov and others v Bulgaria* (App 55796/00) ECHR 18 September 2007 [3] ('The Law'). The same is applicable even if counsel has the status of 'officer of the court': *X v UK* (App 6956/75) (1976) 8 DR 103, 104. See also *Alvarez Sanchez v Spain* (App 50720/99) ECHR 2001-XI [1] ('The Law') which refers to '...the independence of the attorneys' professional association from the State.'

However, the possibility remains that a salaried 'public defender' employed by a government agency may be regarded as an organ of the state: Harris and others (n 73) 319 fn 1145.

such instruction.[207] Counsel is indeed presumed to render effective assistance. Nevertheless, his professional independence does not absolve states from all responsibility when such assistance is ineffective. There is an onus on the competent authorities to intervene whenever ineffective assistance is manifest or otherwise sufficiently brought to their attention.[208] In the case of manifest ineffectiveness, therefore, the accused is afforded the additional protection of the state being obliged to act on its own initiative. The duty of intervention is crucially important for safeguarding equality of arms which would otherwise suffer serious impingement if states could remain passive in the face of a prosecution advantage arising from known inefficacious representation. Intervention may take the form of either replacing counsel or causing him to fulfil his duties.[209] It is the positive steps taken in either of these regards, or lack thereof, that attracts the focus of the Court. In the event that intervention was necessary but absent or weak, it will occasionally even suggest specific steps the authorities could possibly have applied to enable counsel to fulfil his obligations.[210] The Court essentially seeks to determine whether steps were taken by the state to correct the serious shortcomings of counsel to a degree that ensured the accused effective representation, and ultimately equality of arms, when proceedings are viewed in their entirety. In so doing, it does not require the applicant to prove that the ineffective legal assistance was prejudicial.[211] Prejudice can instead be readily assumed as inevitable for such ineffectiveness will adversely pervade many or all aspects of the proceedings and frustrate equality of arms by undermining the representation of the defence case to the advantage of the prosecution.

It is the failure of the state to respond adequately to an inactive counsel, or one whose amount of defence activity falls well below that sufficient for purpose, that most often begets a finding of ineffective legal assistance with implied inequality of arms. Ineffectiveness in this

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[207] *Kamasinski* (n 203) [65]; *Daud* (n 203) [38]; *Czekalla* (n 203) [60]; *Prežec* (n 111) [30]; *Sabirov* (n 203) [44]; *Pavlenko* (n 143) [99].

[208] ibid. Though these cases associate the onus with legal aid counsel, it does not follow that it is inapplicable when counsel is privately retained. In *Imbrioscia* (n 144) [41] and *Stanford v UK* (App 16757/90) (1994) Series A no 282-A [28], the onus was expressed as applying simply to 'counsel' without distinction of status. Furthermore, in *Goddi v Italy* (App 8966/80) (1984) Series A no 76 [30]–[31], the Court considered that an effective defence required intervention as the accused's privately retained counsel was absent at hearing. Trechsel (n 24) 287 and Harris and others (n 73) 320 provide additional support.

See further HRC: *Hervin Edwards v Jamaica* (Comm 529/1993) UN Doc CCPR/C/60/D/529/1993 (1997) [5.2]: States can be held accountable for the shortcomings of privately retained counsel when it should have been manifest to the competent authorities that his behaviour was incompatible with the interests of justice.

It is right that states are obliged to intervene upon becoming aware of ineffective assistance by privately retained counsel. No ground exists in the present context for distinguishing between him and his legal aid counterpart given that even the latter is not a state organ, and states are obliged to ensure a fair trial even if counsel is not state-appointed. Additionally, either counsel is capable of advantaging the prosecution through ineffective representation. It is also important for those retaining private counsel, on grounds of parity of treatment between accused persons, and the general guarantee of practical and effective Convention rights, that there be equal rights to and safeguards for effective representation.

[209] *Artico* (n 75) [33]; *Kemal Kahraman and Ali Kahraman v Turkey* (App 42104/02) ECHR 26 April 2007 [35]; *Ananyev v Russia* (App 20292/04) ECHR 30 July 2009 [52]; *Sabirov* (n 203) [43].

[210] eg *Goddi* (n 208) [31]; *Daud* (n 203) [42]; *Czekalla* (n 203) [68].

[211] *Artico* (n 75) [35].

particular context is not infrequently manifest,[212] requiring the competent authority to intervene *proprio motu*. It was not so in *Artico*, however, where it was the accused who drew the attention of the Court of Cassation to the inactivity, from the outset, of his legal aid counsel. Refusing to accede to a request for a substitute counsel, the Cassation Court remained passive and left the accused unrepresented. According to the Strasbourg Court, positive state action was called for and its absence left the applicant without effective legal assistance,[213] a condition advantaging the prosecutor at hearing. It observed the same in cases of counsel failing to attend a hearing[214] or several hearings.[215] It did so also in circumstances where counsel took some action but the amount thereof far from constituted an effective defence and the authorities failed to intervene. Such circumstances have included counsel making oral appeal submissions but on the basis of four-year-old grounds originally filed by the applicant, having not prepared any herself, and without ever having contacted him;[216] lodging an appeal but without acquainting himself with his client's version of the facts as he failed to contact the latter who remained silent at trial;[217] being present for some interrogations and a victim identification procedure, though failing to attend and advise at most of the interrogations and undertake other pre-trial activity, such as arranging private consultations.[218] An obvious step towards avoiding such ineffectiveness in the first place, thereby encouraging equality of arms, would be for states to remunerate legal aid counsel on a basis commensurate with the reality of the efforts and outlays required for adequate case preparation and presentation.

It is not sufficient to merely replace a counsel who is inactive or fulfils only some of his defence obligations for the authorities must continue to take whatever measures necessary, if any, to effect an equality of arms. Counsel in *Daud v Portugal*[219] was inactive and eventually withdrew from the case, whereas counsel in *Goddi v Italy*[220] failed to attend an appeal hearing. Replacements were appointed, three days before trial in *Daud* and on the day of the hearing in *Goddi*, though neither counsel adequately prepared their cases. In the eyes of the Court, the preparatory time was inadequate and the domestic courts should not have remained passive after the appointments,[221] for doing so was advantageous to the prosecution. Instead, positive measures were required to enable the new representatives to conduct an effective defence, such as ordering an adjournment or suspending a sitting for a sufficient period of time, irrespective of the

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[212] eg *Goddi* (n 208) [30]–[31]; *Czekalla* (n 203) [68]; *Sannino v Italy* (App 30961/03) ECHR 2006-VI [51]; *Kemal Kahraman and Ali Kahraman* (n 209) [36]; *Ananyev* (n 209) [54]; *Sabirov* (n 203) [46].
[213] *Artico* (n 75) [33], [36]–[37].
[214] *Sabirov* (n 203) [46]–[48].
[215] *Kemal Kahraman and Ali Kahraman* (n 209) [36]–[37].
[216] *Ananyev* (n 209) [53]–[56].
[217] *Prežec* (n 111) [31]–[32].
[218] *Pavlenko* (n 143) [95], [109], [111]–[114].
[219] (n 203).
[220] (n 208).
[221] *Goddi* (n 208) [31]; *Daud* (n 203) [39], [42].

representatives' failure to request such measures.[222] The need for such intervention to ensure equality of arms can be recurrent when different lawyers are appointed ad hoc at each hearing in a series of hearings, especially if each lawyer fails to seek an adjournment to familiarise himself with the case.[223]

It is not only the inadequate state response to the shortcomings of counsel mentioned hitherto but also when the shortcoming concerns a failure to adhere to a formal procedural rule that may occasion a deprivation of both effective legal assistance and equality of arms. Counsel in *Czekalla v Portugal*[224] failed to comply with such a rule when lodging an appeal, resulting in its inadmissibility. Adding to the seriousness of this procedural negligence was the fact highlighted by the Court that the applicant was a foreigner, unfamiliar with the language of the proceedings, facing a long prison sentence.[225] It viewed the shortcoming as manifest which called for positive measures from the appeal court such as, for example, inviting counsel to add to or rectify her pleading instead of ruling the appeal inadmissible.[226] Such an invitation would be '...a manifestation of the judge's power to direct the proceedings, exercised with a view to the proper administration of justice', and neither impinge upon the independence of the legal profession nor deny the prosecution equality of arms.[227] Without it, or some other intervening measure, the state denied the accused an effective defence,[228] the implication being that he was disadvantaged vis-à-vis the prosecution.

Whereas the foregoing discloses circumstances where the conduct of counsel required intervention to secure effective assistance and equality of arms, it remains for the purpose of contrast to outline particular conduct for which state liability was held not to have arisen. As already indicated, state liability is not engaged when a shortcoming in representation is neither manifest nor sufficiently brought to the attention of the competent authorities. Thus, since chosen counsel in *Imbrioscia v Switzerland* did not request to be present at interrogations and the period of her pre-trial inactivity was brief, and not met with a complaint from the accused, '...the relevant authorities could scarcely be expected to intervene.'[229]

This necessary sensitivity towards preserving the independence of legal professionals also explains the exclusion of state liability for the conduct of counsel in matters of professional

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[222] ibid respectively [31]; [42].
[223] *Sannino* (n 212) [50]–[51]. See further *Köplinger v Austria* (App 1850/63) (1966) 9 Yearbook 240 (EComHR) 264, 266: Frequent changes in legal aid counsel do not in themselves deprive the accused of effective assistance.
[224] (n 203).
[225] *Czekalla* (n 203) [65].
[226] ibid [68]. No such intervention was held to have been required in *Alvarez Sanchez* (n 206) [1] ('The Law') where an *amparo* appeal to the Constitutional Court concerning the right to a fair trial was lodged by counsel but declared inadmissible as being out of time. The case is distinguishable from *Czekalla* as the task of the Constitutional Court was not to reconsider the validity of the accused's conviction or length of sentence imposed, which was reduced by the Supreme Court.
[227] *Czekalla* (n 203) [70].
[228] ibid [66], [71].
[229] (n 144) [41]. Neither was the sufficient notification of or manifest ineffectiveness condition satisfied in *Kamasinski* (n 203) [66], [68] and *Stanford* (n 208) [27]–[28].

judgement and strategy. Of course, if state liability cannot attach to such matters, the state is not obliged to intervene and the prospect of an inequality of arms does not arise. Intervention is not accordingly required when dissatisfaction with counsel stems from '...an injudicious line of defence or a mere defect of argumentation.'[230] Neither is intervention necessary when counsel takes adequate steps for the defence but acts contrary to what his client at the time or subsequently feels to be in his own best interests.[231] Even if the client seeks a particular remedy counsel is unwilling to pursue, it has been observed that it is not for a court to oblige the latter to lodge any remedy contrary to his opinion as to its prospects of success.[232] Such deference towards professional judgement and strategy was repeated when a counsel's tactical choice to remain silent about his client's hearing difficulties in court was not accompanied subsequently by state liability.[233] Neither did state responsibility arise for the misjudgement of a privately retained counsel who, despite knowing in ample time that he would be unable to attend an essentially written appeal hearing, failed to engage a substitute counsel and relied instead on his request for an adjournment which was subsequently rejected, and the hearing held in his absence.[234] The trend is clearly that there is little prospect of an applicant succeeding in a claim of ineffective assistance and implied inequality of arms when he feels that a professional misjudgement or strategic inadequacy occurred. If professional independence is to be upheld, an integral part of which is freedom of judgement and strategy, the Court inevitably finds itself constrained and unable to rely upon the principle of equality of arms to resolve the applicant's dissatisfaction.

H. CONCLUSION

This discussion sought to examine the approach taken at Strasbourg towards the concept of equality of arms in the application of the Article 6(3)(c) right to legal assistance.

A nexus between this provision and equality of arms was first identified. As is the case with Articles 6(3)(b) and (d), this nexus is accepted in law by the Court and former Commission, which have been able to do so because both aspects stem from the Article 6(1) fair hearing guarantee. A conceptual nexus also exists because the proper exercise of Article 6(3)(c) serves the instrumental, intrinsic and collateral values of equality of arms. This conceptual link is further evident because the provision is feasibly reciprocal and useful for case preparation and presentation, characteristics bringing it within the equality of arms remit.

The discussion next fell on equality of arms and the right to legal assistance by privately retained counsel. Whereas generally the accused must not be deprived of counsel he has

[230] *Czekalla* (n 203) [65].
[231] *Kamasinski* (n 203) [66], [70].
[232] *Rutkowski* (n 206) [2] ('The Law').
[233] *Stanford* (n 208) [27]–[28], [32].
[234] *Tripodi v Italy* (App 13743/88) (1994) Series A no 281-B [29]–[31]. Counsel had, nevertheless, made written submissions.

instructed, states are entitled to place reasonable restrictions on his choice, thus resulting in the exclusion of certain counsel outright or during the proceedings. Reasonableness implies that the restriction must be in the interests of securing justice and an adequate defence. It has also been considered crucial by the Strasbourg organs that the restriction not create actual prejudice and thus undermine equality of arms. Restrictions on the qualification, professional conduct and number of counsel have been sanctioned at Strasbourg as reasonable and not prejudicial if the accused is afforded adequate opportunity to instruct alternative counsel. Whilst these restrictions do not offend the dignity of the accused, it is submitted that if counsel is excluded because of a restriction deemed unreasonable, this should be sufficient to constitute an inequality of arms (unequivocal inequality), even if prejudice was averted through the instruction of alternative counsel. The Court's regard for prejudice also entails that maintaining equality of arms does not require an adjournment in every instance private counsel is unable to attend a particular hearing date; adequate opportunity to engage alternative counsel can avert prejudice. An adjournment is the dignitarian option—preserving the first choice of the accused—and should be preferred. State responsibility for procedural inequality can arise if private counsel refuses to act for his client because of undue state pressure. To protect an accused unable to secure private counsel through no fault of the state, it is suggested that provision be made at Convention level requiring the assignment of legal assistance by competent national authorities.

The assignment of state funded legal assistance to secure equality of arms is restricted to accused persons who meet financial and interests of justice criterions.

The financial criterion requires that the accused be of insufficient means to retain counsel at a material time. 'Sufficient means' is undefined but the Court rightly resorts, as a pragmatic solution, to indications of indigence when the state has failed to conduct a proper and reasoned assessment of means. The 'free' aspect of the legal assistance does not guarantee the accused a definitive exemption from costs; a temporary or partial exemption can be sufficient. This, it was argued, does not impact negatively on equality of arms by discouraging the accused to forgo the use of counsel, provided proper regard is had to the financial situation of the former.

If the financial criterion is satisfied, the grant of legal aid is dependent upon whether it is required in the interests of justice. *Artico* established that this second criterion could be met by demonstrating that it was prima facie 'plausible' in the circumstances that counsel would have been of assistance. If this is demonstrated, prejudice is considered inevitable and need not be proven to establish an inequality of arms. This is a progressive approach which recognises that proving actual prejudice is simply impracticable in this context and that the disadvantage flowing from denial of counsel pervades all aspects of the proceedings. Even more progressive and preferred would be a dignitarian approach: if legal assistance is in the interests of justice but not provided, this is an inequality of arms in itself and not because it would inevitably have caused prejudice. To determine whether counsel was plausibly required in the interests of justice, and

thus highlight an imbalance between the parties' capabilities to present their cases effectively, regard is had to three key factors, all of which have been reasonably applied: severity of the sentence risked; case complexity; and the competence of the accused to defend himself. Though the Court accepts each factor as sufficient in itself to justify legal assistance, it refers to all three whenever the facts permit.

In the event that legal aid is granted, the accused has a right of consultation in the appointment of counsel but not a right of choice. The discussion argued, however, that the latter would be more desirable, with reasonable restrictions, because it reinforces to a superior extent the values of equality of arms and creates greater parity between those retaining private counsel, for whom choice is available, and the indigent. Only if the accused is incapable manifestly of making a meaningful choice of counsel or fails to make a choice within proper time limits should the legal aid authority make the selection decision.

Even if an accused qualifies for legal aid or is capable of retaining private counsel, he may wish to forgo such assistance. The discussion established, however, that the Court allows states to insist upon the engagement of counsel if sufficient and relevant reasons justifying the measure as in the interests of justice are provided. This, it was argued, is the appropriate response since the value, through counsel, of a position of equality of arms to presenting an effective defence outweighs that in the freedom to choose self-representation; both are dignitarian. It was further suggested that the imposition of counsel is acceptable if the pro se accused purposefully frustrates the progress of the case or will likely cause a vulnerable witness distress or intimidation during questioning.

The discussion moved to consider the Strasbourg approach to legal assistance at the pre-trial stage, to which Article 6(3)(c) remains applicable, and equality of arms. This approach was assessed with regard to the capacity of a detained accused to access counsel at interrogation, generally receive visits from him and confer in private.

Whereas the general rule is that the accused is entitled to an opportunity for legal assistance at interrogations, the Court accepts that this may be restricted for 'good cause' (undefined). It appears that it is only when a restriction is prejudicial to the ensuing proceedings that an inequality of arms is recognised. Thus, in cases where access to counsel was denied, prejudice was acknowledged when adverse inferences from silence at interrogation were drawn at trial or a statement given during interrogation had significant bearing upon the conviction. It is submitted that the accused should not be questioned without immediate access to counsel upon being detained; a just balance must be preserved between examiner and accused at such an influential stage of proceedings. Infringing this condition should be an inequality of arms without regard for prejudice.

Outside of interrogations, the entitlement of the accused to both receive visits from counsel and confer with him in private may also be restricted for cogent justification. The case-law

indicates that this justification can refer, for example, to a risk of collusion or the questionable legal or ethical conduct of counsel. Cogency of justification is assessed also with regard to the duration of the restriction (proportionality) and whether the restriction was strictly necessary. Whereas the discussion suggested that justified visual surveillance of counsel-client consultations is tolerable as it does not disadvantage free discussion, it also argued that holding consultations within the hearing of third parties, or placing limitations upon necessary counsel visits, does and thus undermines equality of arms. The Court should never consider these measures strictly necessary. Less restrictive alternatives were proposed involving an officially or Bar authority appointed lawyer which secure equality of arms whilst avoiding hampering state investigations. Any other restrictive measures should be viewed as an inequality of arms, even if not prejudicial. Prejudice is a feature of cases within this context but it is not actual but inevitable prejudice that confirms a procedural disadvantage, for restrictions therein have indubitably upset the preparation of an effective defence, and actual prejudice can be impracticable to prove.

It is not only restricted but ineffective legal assistance that is capable of disadvantaging the accused vis-à-vis the prosecution. The discussion established that although the conduct of the defence is generally a matter for counsel and client, states are not immune from responsibility for ineffective legal assistance. The Court places an onus on the competent authorities to intervene whenever ineffective assistance is manifest or otherwise sufficiently brought to their attention. The categories of shortcomings from which an inequality of arms is possible include when counsel is inactive; his amount of defence activity falls well below that adequate for purpose; and he fails to comply with a formal procedural rule. State liability is not incurred if the shortcoming relates to misjudgement or strategic inadequacy for the Court seeks to preserve the essential professional independence of counsel. It assesses whether measures taken by the state, if any, to correct counsel's shortcomings were sufficient to ensure that the accused ultimately benefited from effective legal assistance and thus equality of arms. Prejudice is considered inevitable and need not be proven if legal assistance is ineffective. The dignitarian approach, which should be preferred, is that ineffective assistance is an inequality of arms in itself and not because prejudice therefrom is inevitable.

In the analysis presented herein, it appears that, under Article 6(3)(c), it is only in cases on restrictions on the choice of private counsel or on denial of access to counsel at interrogation that actual prejudice need be proven to indicate an inequality of arms. In other cases of procedural shortcomings concerning legal assistance, proving prejudice can be impracticable but one cannot but conclude that prejudice must inevitably have arisen, hence prejudice need not be proven.

CONCLUDING OVERVIEW

States parties to the Convention recognise in their criminal justice systems that the control of crime is not an objective that should be pursued in disregard of the interests of accused persons. This recognition is manifested in their accepted obligation, which also reflects a commitment to the rule of law, to secure to everyone within their jurisdiction the right to fair trial in Article 6.

The content of the right is a product of a gradual historical evolution in Western standards of procedural fairness. This evolution began with developments in trial rights in national laws designed to secure a correct outcome. Article 6 has benefited from the lessons gleaned from both progressive and regressive developments therein. Its content was also influenced by procedural rights entrenched in constitutional instruments, for procedural fairness evolved to become affiliated with a just political order and good governance. It was the emergence of a shared respect for the dignity of the individual after World War II that procedural fairness became a concern to be protected in international law, the fair trial provisions in the UDHR and early drafts of the ICCPR becoming influential precursors to Article 6.

Article 6 does not exhaustively define the concept of fair trial. It merely requires that the accused have adequate opportunity to exercise certain minimum procedural rights. These rights consist of those that are express and implied in the article. The concept of equality of arms has a legal basis as an implied element of the Article 6(1) fair hearing guarantee. Indeed, it is also a well-established aspect of fair trial in wider international law.

The value of equality of arms to procedural fairness derives predominantly from its instrumental and intrinsic value. It is instrumental to rendering more probable a correct trial outcome. More importantly, its intrinsic value is one of respect for the dignity of the accused, enabling him to be a meaningful participant in the proceedings in which his fate will be determined. These values jointly give birth to a collateral value of equality of arms: procedural legitimacy.

Equality of arms calls for equality in the parties' procedural opportunities, as far as their naturally dissimilar roles permit, to prepare and present their cases. These procedural opportunities refer both to rights that can feasibly and desirably be reciprocal and those that are not logically required by the prosecution but are designed to remove disadvantage (non-reciprocal). In both cases, the rights must be those required for case preparation and/or presentation.

Equality of arms is a construct applicable only to opponents. Whilst the opponent of the accused is predominantly the conventional prosecutor, a party joined to the proceedings, such as an *avocat général* or similar quasi-judicial officer, whose position or observations cannot be regarded as neutral can also attract opponent status.

Article 6(3) contains rights designed to ensure procedural equality between prosecution and defence. The concept of equality of arms thus underlies these rights and this nexus was elaborated upon with

specific regard to Articles 6(3)(b)–(d). This nexus is authoritatively recognised in law by the Court and former Commission and made possible in the Convention because these rights and equality of arms are both components of fair hearing in Article 6(1). A nexus also exists at a conceptual level because these rights serve the instrumental, intrinsic and collateral value of equality of arms. The conceptual nexus is further reflected in the fact that these rights are feasibly reciprocal and useful for case preparation and presentation, thus come within the equality of arms remit. Despite the strong nexus, the principle of equality of arms is not referred to expressly in all cases concerning these rights; it has an underlying presence.

Articles 6(3)(b)–(d) were relied upon as the context in which the Court's approach to equality of arms was demonstrated and assessed. Whereas the fairness of a trial as a whole cannot be compromised, the case-law of the Court reveals that these rights may be qualified by states for a proper public interest, but only so far as is strictly necessary.

The predominant approach applied is that an inequality of arms is registered if the procedural inequality gave rise to actual prejudice (material effect on defence case). This approach accords with the Court's emphasis on examining the trial as a whole and presents an opportunity for states to offset the impact of inequalities with additional procedural safeguards to prevent them becoming prejudicial and registering an inequality of arms. It confirms, therefore, that the Court is willing to accept a degree of unequal treatment, which offends the dignity of the accused. The burden on applicants of proving that an inequality was prejudicial can in some cases be an especially challenging one. It was submitted that, on the actual prejudice approach, applicants should only bear this burden in cases where the Court does not reasonably expect prima facie that the inequality was prejudicial.[1]

Rather than requiring proof of prejudice, the Court has in finding inequality of arms been willing to accept that certain inequalities relevant to the right to legal assistance in Article 6(3)(c) are such that prejudice is manifestly inevitable. This progressive approach also recognises that proving prejudice can in some instances be impracticable. It is only in cases on restrictions on the choice of private counsel or on denial of access to counsel at interrogation that resort is had to the actual prejudice approach.

An alternative and more progressive approach would be to consider that any procedural inequality is sufficient in itself to cause an inequality of arms, regardless of actual or inevitable prejudice arising therefrom. This is the only approach that allows the concept of equality of arms to realise its full intrinsic value, thereby offering the most protection to the dignity of the accused. It is submitted that only in cases on the examination of vulnerable witnesses and some covert agents, and on the right to call witnesses, is a restriction on the defence sometimes warranted, hence application of an actual prejudice proviso is appropriate.[2] In most cases, it would be feasible to apply a dignitarian approach to equality of arms and this should be preferred.

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[1] Ch 2 text to n 117.
[2] Ch 3 Pts F ss 2(c), 3(c), G–H.

SELECT BIBLIOGRAPHY

ADAMS CD (tr), *Aeschines: The Speeches* (Heinemann, London 1919)

ALEXANDER M, 'The Right to Counsel for the Politically Unpopular' (1962) 22 Law in Transition 19

ALLEN R, 'The Trial of Socrates: A Study in the Morality of the Criminal Process' in ML Friedland, *Courts and Trials: A Multidisciplinary Approach* (Toronto UP, Toronto 1975)

AMERICAN LAW INSTITUTE, *Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute, St Paul Minnesota 1987) vols 1 and 2

AMMAN DM, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context' (2000) 75 Ind LJ 809

AMNESTY INTERNATIONAL, 'International Criminal Tribunal for Rwanda: Trials and Tribulations' (Report) (31 March 1998) AI-Index IOR 40/003/1998

ANDREWS RM, *Law, Magistracy, and Crime in Old Regime Paris 1735–1789* (CUP, Cambridge 1994) vol 1

ASHWORTH AJ, 'Concepts of Criminal Justice' [1979] Crim LR 412

AULD LJ, 'Review of the Criminal Courts of England and Wales' (HMSO, London 2001)

AUSTRALIAN LAW REFORM COMMISSION, 'Manner of Giving Evidence' Research Paper No 8 (Sydney 1982)

BAKKEN T, 'International Law and Human Rights for Defendants in Criminal Trials' (1985) 25 Indian J Int'l L 411

BALDWIN J, 'Police Interrogation: What are the Rules of the Game?' in D Morgan and GM Stephenson (eds), *Suspicion and Silence: The Right to Silence in Criminal Investigations* (Blackstone, London 1994)

BARTLETT R, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon, Oxford 1986)

BASSIOUNI MC, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Mich J Int'l L 768

BASSIOUNI MC, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Int'l L 235

BAYLES MD, *Procedural Justice: Allocating to Individuals* (Kluwer, Dordrecht 1990)

BEATTIE JM, *Crime and the Courts in England 1660–1800* (Princeton UP, Princeton 1986)

BENTHAM J, 'Principles of Judicial Procedure' in J Bowring (ed), *The Works of Jeremy Bentham* (Tait, Edinburgh 1843) vol 2

BENTHAM J, 'An Introductory View of the Rationale of Evidence' in J Bowring (ed), *The Works of Jeremy Bentham* (Tait, Edinburgh 1843) vol 6

BENTHAM J, 'Rationale of Judicial Evidence' in J Bowring (ed), *The Works of Jeremy Bentham* (Tait, Edinburgh 1843) vol 6

BÉVENOT M, 'The Inquisition and its Antecedents' (1966) 7 Heythrop J 257 (Pt 1), 381 (Pt 2); (1967) 8 Heythrop J 52 (Pt 3), 152 (Pt 4)

BIRCH DJ, 'The Criminal Justice Act 1988—Part 2: Documentary Evidence' [1989] Crim LR 15

BLACKSTONE W and MORRISON W (ed), *Commentaries on the Laws of England* (Cavendish, London 2001) vol 4

BLUMENTHAL JA, 'A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility' (1993) 72 Neb L Rev 1157

BRANNON LC, 'The Trauma of Testifying in Court for Child Victims of Sexual Assault v The Accused's Right to Confrontation' (1994) 18 Law & Psychol Rev 439

BREMS E, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 HRQ 294

BURDICK WL, *The Principles of Roman Law and their Relation to Modern Law* (Lawbook Exchange, Clark New Jersey 2004)

BURTT JO (tr), *Minor Attic Orators* (Heinemann, London 1962)

BYFIELD B, 'The Right to a Fair Trial: Article 6 of the European Convention' in AD Byre and BY Byfield (eds), *International Human Rights Law in the Commonwealth Caribbean* (Martinus Nijhoff, Dordrecht 1991)

CAPPELLETTI M and JOLOWICZ JA, *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (Oceana, Dobbs Ferry NY 1975)

CASSESE A, *International Law* (OUP, Oxford 2001)

CASSESE A, 'The Influence of the European Court of Human Rights on International Criminal Tribunals—Some Methodological Remarks' in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijhoff, Leiden 2003)

CHENG B, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, Cambridge 1993)

CHEYETTE FL, 'Inquest, Canonical and French' in JR Strayer (ed), *Dictionary of the Middle Ages* (Scribner, New York 1985) vol 6

CLARK W, 'Magna Carta and Trial by Jury' (1924) 58 Am L Rev 24

CLAYTON R and TOMLINSON H, *Fair Trial Rights* (OUP, Oxford 2001)

COHN SA, 'International Adjudication of Human Rights: A Survey of its Procedural and Some of its Substantive Holdings' (1977) 7 Ga J Int'l & Comp L 315

COKE E, *The Third Part of the Institutes of the Laws of England* (6th edn W Rawlins, London 1680)

COKE E, *The Second Part of the Institutes of the Laws of England* (6th edn W Rawlins, London 1681)

COMMENTS, 'Human Rights—Equality of Arms—Presence of Attorney General at Deliberations of Belgian Court of Cassation Held Not Violative of Article 6(1) of the European Court of Human Rights: *Delcourt* Case' (1971) 4 NYU J Int'l L & Pol 124

CONSTITUTIONAL AFFAIRS SELECT COMMITTEE, 'The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates' HC (2004–2005) 323-I

COPPEL J, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (John Wiley & Sons, Chichester 1999)

CORDON IM, GOODMAN GS and ANDERSON SJ, 'Children in Court' in PJ van Koppen and SD Penrod (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/Plenum, New York 2003)

CORNISH WR, *The Jury* (Penguin, Harmondsworth 1971)

COSTIGAN R and THOMAS PA, 'Anonymous Witnesses' (2000) 51 NILQ 326

COUNCIL OF EUROPE, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff, The Hague 1977) vol 4

CROOK JA, *Legal Advocacy in the Roman World* (Duckworth, London 1995)

DECKER JF, 'The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after *Faretta*' (1996) 6 Seton Hall Const LJ 483

DE GLANVILL R and HALL GDG (ed) (tr), *The Treatise on the Laws and Customs of the Realm of England* (Nelson, London 1965)

DENNING A, *Freedom Under the Law* (Stevens & Sons, London 1949)

DEVLIN P, *The Criminal Prosecution in England* (OUP, London 1960)

DOAK J, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 Legal Stud 1

DODD CH (ed), *The New English Bible: New Testament* (OUP, Oxford 1961)

DODD CH (ed), *The New English Bible: Old Testament* (OUP, Oxford 1970)

DOSWALD-BECK L and KOLB R, *Judicial Process and Human Rights: United Nations, European, American and African Systems: Texts and Summaries of International Case Law* (NP Engel, Kehl 2004)

DUFF RA, *Trials and Punishments* (CUP, Cambridge 1986)

DUKE S, 'The Right to Appointed Counsel: *Argersinger* and Beyond' (1975) 12 Am Crim L Rev 601

DWORKIN R, *Taking Rights Seriously* (Duckworth, London 1977)

ELLISON L, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 Int'l J Evidence & Proof 29

ELLISON L, *The Adversarial Process and the Vulnerable Witness* (OUP, Oxford 2001)

EPP JA, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish, London 2007)

ESMEIN A, *A History of Continental Criminal Procedure* (J Murray, London 1914)

EVANS M and JACK RI, *Sources of English Legal and Constitutional History* (Butterworths, Sydney 1984)

FAWCETT JES, *The Application of the European Convention on Human Rights* (Clarendon, Oxford 1987)

FELDMAN D, 'Human Dignity as a Legal Value: Part 1' [1999] PL 682

FITZPATRICK B, 'Disclosure: Principles, Processes and Politics' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone, London 1999)

FORSYTH W, *History of Trial by Jury* (JW Parker, London 1852)

FRAHER RM, 'The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Crimina Remaneant Impunita"' [1984] U Ill L Rev 577

GALLIGAN DJ, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon, Oxford 1996)

GARNSEY P, *Social Status and Privilege in the Roman Empire* (Clarendon, Oxford 1970)

GEARTY C, *Principles of Human Rights Adjudication* (OUP, Oxford 2004)

GIVEN J, 'The Inquisitors of Languedoc and the Medieval Technology of Power' (1989) 94 Am Hist Rev 336

GOLDSTEIN AS, 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1960) 69 Yale LJ 1149

GOLDWASSER K, 'Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial' (1989) 102 Harv L Rev 808

GOODMAN GS and others, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57 Monogr Soc Res Child Dev 1

GREY TC, 'Procedural Fairness and Substantive Rights' in JR Pennock and JW Chapman (eds), *Due Process* (New York UP, New York 1977)

HALE M and EMLYN S (eds), *The History of the Pleas of the Crown* (Nutt and Gosling, London 1736) vol 2

HAMILTON B, *The Medieval Inquisition* (Edward Arnold, London 1981)

HANNUM H, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 Ga J Int'l & Comp L 287

HANSON JA (ed) (tr), *Apuleius: Metamorphoses Books 7–11* (Harvard UP, Cambridge 1989) vol 2

HARRIES J, *Law and Empire in Late Antiquity* (CUP, Cambridge 1999)

HARRIS D, 'The Right to Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 ICLQ 352

HARRIS D and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009)

HARRIS D, O'BOYLE M and WARBRICK C, *Law of the European Convention on Human Rights* (Butterworths, London 1995)

HASHIMOTO EJ, 'Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant' (2007) 85 NC L Rev 423

HATCHARD J, HUBER B and VOGLER R (eds), *Comparative Criminal Procedure* (BIICL, London 1996)

HAYEK FA, *The Road to Serfdom* (Routledge, London 1944)

HERRMANN FR and SPEER BM, 'Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause' (1994) 34 Va J Int'l L 481

HEUSTON RFV, *Essays in Constitutional Law* (2nd edn Stevens & Sons, London 1964)

HEVENER NK and MOSHER SA, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978) 27 ICLQ 596

HINE HM (tr), *Seneca: Medea* (Aris & Phillips, Warminster 2000)

HOLDSWORTH W, *A History of English Law* (7th edn Methuen, London 1956) vol 1

HOLT JC, *Magna Carta* (2nd edn CUP, Cambridge 1992)

HRUSCHKA J, 'Kant and Human Dignity' in BS Byrd and J Hruschka (eds), *Kant and Law* (Ashgate, Aldershot 2006)

HUMAN RIGHTS COMMITTEE, 'General Comment No 18: Non-discrimination' (1989) UN Doc A/45/40

HUMAN RIGHTS COMMITTE, 'General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial' (2007) UN Doc CCPR/C/GC/32

HUMPHREY JP, 'The International Bill of Rights: Scope and Implementation' (1976) 17 Wm & Mary L Rev 527

HUTTON M and PETERSON W (trs); OGILVIE RM, WARMINGTON EH and WINTERBOTTOM M (revised), *Tacitus: Agricola; Germania; Dialogus* (Harvard UP, Cambridge 1980) vol 1

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Report on the Situation of Human Rights in Paraguay' OEA/Ser.L/V/II.43 doc 13 corr 1 (1978)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Report on the Situation of Human Rights in Uruguay' OEA/Ser.L/V/II.43 doc 19 corr 1 (1978)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Sixth Report on the Situation of Political Prisoners in Cuba' OEA/Ser.L/V/II.48 doc 24 (1979)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Report on the Situation of Human Rights in Argentina' OEA/Ser.L/V/II.49 doc 19 corr 1 (1980)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Report on the Situation of Human Rights in the Republic of Guatemala' OEA/Ser.L/V/II.53 doc 21 rev 2 (1981)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Seventh Report on the Situation of Human Rights in Cuba' OEA/Ser.L/V/II.61 doc 29 rev 1 (1983)

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 'Second Report on the Human Rights Situation in Suriname' OEA/Ser.L/V/II.66 doc 21 rev 1 (1985)

IP J, 'The Rise and Spread of the Special Advocate' [2008] PL 717

JACKSON J (tr), *Tacitus: The Annals Books 4–6, 11–12* (Heinemann, London 1986) vol 4

JACKSON JD, 'The Effect of Human Rights in Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 MLR 737

JACKSON P, *Natural Justice* (Sweet & Maxwell, London 1979)

JENNINGS A, 'Fair Trial' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001)

JONES JW, *The Law and Legal Theory of the Greeks* (Clarendon, Oxford 1956)

KANT I and GREGOR M (ed) (tr), *The Metaphysics of Morals* (CUP, Cambridge 1996)

KELLY HA, *Inquisitions and Other Trial Procedures in the Medieval West* (Ashgate, Aldershot 2001)

KELLY JM, '*Audi Alteram Partem*' (1964) 9 Nat LF 103

KELLY JM, *Roman Litigation* (Clarendon, Oxford 1966)

KIDD CJF, 'Disciplinary Proceedings and the Right to a Fair Criminal Trial Under the European Convention on Human Rights' (1987) 36 ICLQ 856

KOMMERS DP, 'German Constitutionalism: A Prolegomenon' (1991) 40 Emory LJ 837

KOVACS D (ed) (tr), *Euripides* (Harvard UP, Cambridge 1995)

KUIJER M, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (EM Meijers Instituut, Leiden 2004)

LANGBEIN JH, 'The German Advantage in Civil Procedure' (1985) 52 U Chi L Rev 823

LANGBEIN JH, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1994) 92 Mich L Rev 1047

LAW COMMISSION, 'Evidence in Criminal Proceedings: Hearsay and Related Topics' Consultation Paper No 138 (HMSO, London 1995)

LEA HC, *A History of the Inquisition in the Middle Ages* (Macmillan, London 1908) vol 1

LILLICH RB, 'Civil Rights' in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon, Oxford 1984) vol 1

LILLICH RB and NEWMAN FC, *International Human Rights: Problems of Law and Policy* (Little, Brown and Co, Boston 1979)

LOCKE J, *Two Treatises of Government* (Dent, London 1986)

LOUCAIDES LG, 'Questions of Fair Trial Under the European Convention on Human Rights' (2003) 3 Hum Rts L Rev 27

LOWELL AL, 'The Judicial Use of Torture' (1897) 11 Harv L Rev 220

LUSTY D, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 Sydney L Rev 361

MACDONELL J, *Historical Trials* (Clarendon, Oxford 1927)

MACNAIR M, 'Vicinage and the Antecedents of the Jury' (1999) 17 LHR 537

MAFFE S, *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses* (Europa Law, Groningen 2006)

MAITLAND FW, *Justice and Police* (Macmillan, London 1885)

MALSCH M, 'Victims on View: Are Victims Served by the Principle of Open Justice?' in H Kaptein and M Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Aldershot, Ashgate 2004)

MARSHALL HH, *Natural Justice* (Sweet & Maxwell, London 1959)

MASHAW JL, *Due Process in the Administrative State* (Yale UP, New Haven 1985)

MASSARO TM, 'The Dignity Value of Face-to-Face Confrontations' (1988) 40 U Fla L Rev 863

MAYCOCK AL, *The Inquisition: From its Establishment to the Great Schism* (Constable, London 1926)

McCONVILLE M, SANDERS A and LENG R, *The Case for the Prosecution* (Routledge, London 1991)

McDOUGAL MS, LASSWELL HD and CHEN L-C, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale UP, New Haven 1980)

McEWAN J, *Evidence and the Adversarial Process*: *The Modern Law* (Blackwell, Oxford 1992)

McGOUGH LS, 'Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims' (2002) 65 Law & Contemp Probs 179

McILWAIN CH, 'Due Process of Law in Magna Carta' (1914) 14 Colum L Rev 27

McINTYRE G, 'Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia' (2003) 16 LJIL 269

McKECHNIE WS, *Magna Carta: A Commentary on the Great Charter of King John* (J Maclehose, Glasgow 1914)

MERON T, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, Oxford 1989)

MERRILLS JG and ROBERTSON AH, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn Manchester UP, Manchester 2001)

MICHELMAN FI, 'Formal and Associational Aims in Procedural Due Process' in JR Pennock and JW Chapman (eds), *Due Process* (New York UP, New York 1977)

MOORE CH (tr), *Tacitus: The Histories Books 1–3* (Heinemann, London 1980) vol 2

MORRISON CA, 'Some Features of the Roman and the English Law of Evidence' (1959) 33 Tul L Rev 577

MURRAY AT (tr), *Demosthenes: Private Orations* (Heinemann, London 1939)

NADELMANN KH, 'Due Process of Law before the European Court of Human Rights: The Secret Deliberation' (1972) 66 AJIL 509

NAYAR MGK, 'Human Rights: The United Nations and United States Foreign Policy' (1978) 19 Harv Int'l LJ 813

NEGRI S, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 Int CLR 513

NEGRI S, 'Equality of Arms—Guiding Light or Empty Shell?' in M Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, London 2007)

NEILSON G, *Trial by Combat* (Hodge, Glasgow 1890)

NEW SOUTH WALES LAW REFORM COMMISSION, 'Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials' Report 101 (Sydney 2003)

NIBLETT J, *Disclosure in Criminal Proceedings* (Blackstone, London 1997)

NOWAK M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl 1993)

OSBORNE C, 'Hearsay and the European Court of Human Rights' [1993] Crim LR 255

OWEN T, 'Disclosure' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001)

PACKER HL, *The Limits of Criminal Sanction* (Stanford UP, Stanford 1969)

PARK RC, 'Adversarial Influences on the Interrogation of Trial Witnesses' in PJ van Koppen and SD Penrod (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/Plenum, New York 2003)

PHARR C (tr), *The Theodosian Code and Novels and the Sirmondian Constitutions* (Greenwood, New York 1969)

PINCOFFS EL, 'Due Process, Fraternity, and a Kantian Injunction' in JR Pennock and JW Chapman (eds), *Due Process* (New York UP, New York 1977)

PLOWDEN P and KERRIGAN K, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish, London 2002)

PLUCKNETT TFT, *A Concise History of the Common Law* (5th edn Butterworth, London 1956)

POLLITT D, 'The Right of Confrontation: Its History and Modern Dress' (1959) 8 J Pub L 381

POLLOCK F and MAITLAND FW, *The History of English Law before the Time of Edward I* (2nd edn CUP, Cambridge 1968) vol 1

POUND R, 'What is a Profession? The Rise of the Legal Profession in Antiquity' (1944) 19 Notre Dame L 203

PRITCHARD MS, 'Human Dignity and Justice' (1972) 82 Ethics 299

RADICE B (tr), *Pliny: Letters and Panegyricus* (Harvard UP, Cambridge 1975) vol 2

RAWLS J, *A Theory of Justice* (OUP, Oxford 1999)

RAZ J, 'The Rule of Law and its Virtue' (1977) 93 LQR 195

ROBERTSON AH and MERRILLS JG, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (4th edn Manchester UP, Manchester 1996)

ROGERS S, 'The Ethics of Advocacy' (1899) 15 LQR 259

ROLFE JC (tr), *Suetonius* (Harvard UP, Cambridge 1998) vol 2

SAFFERLING CJM, *Towards an International Criminal Procedure* (OUP, Oxford 2001)

SAPHIRE RB, 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection' (1978) 127 U Pa L Rev 111

SCHACHTER O, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848

SCHAEFER WV, 'Federalism and State Criminal Procedure' (1956) 70 Harv L Rev 1

SCHWARTZ B, *The Roots of the Bill of Rights* (Chelsea House, New York 1980) vol 2

SCOTT SP (tr), *The Civil Law* (Central Trust, Cincinnati 1932) vol 16

SHACKLETON BAILEY DR (ed) (tr), *Cicero: Letters to Atticus* (Harvard UP, Cambridge 1999) vol 2

SHULTZINER D, 'Human Dignity: Functions and Meanings' in J Malpas and N Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer, Dordrecht 2007)

SILVER JS, 'Equality of Arms and the Adversarial Process: A New Constitutional Right' [1990] Wis L Rev 1007

SIMMA B and ALSTON P, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 Aust YBIL 82

SOHN LB, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am U L Rev 1

SOMMERSTEIN AH (ed) (tr), *Aristophanes: Wasps* (Aris & Phillips, Warminster 1983)

SPENCER JR, 'Children's Evidence in Legal Proceedings in England' in JR Spencer and others (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge University Law Faculty, Cambridge 1990)

SPENCER JR, 'Orality and the Evidence of Absent Witnesses' [1994] Crim LR 628

STAVROS S, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments* (Martinus Nijhoff, Dordrecht 1993)

STEPHEN JF, *A History of the Criminal Law of England* (Burt Franklin, New York 1964) vol 1

STONE M, 'Instant Lie Detection? Demeanour and Credibility in Criminal Trials' [1991] Crim LR 821

STRACHAN-DAVIDSON JL, *Problems of the Roman Criminal Law* (Clarendon, Oxford 1912) vol 2

STRANGE M, 'Evidence' in K Starmer and others, *Criminal Justice, Police Powers and Human Rights* (Blackstone, London 2001)

SUMMERS RS, 'Evaluating and Improving Legal Processes—A Plea for "Process Values"' (1974) 60 Cornell L Rev 1

SUMMERS SJ, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart, Oxford 2007)

THAYER JB, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown & Co, Boston 1898)

THIRLWAY H, 'The Sources of International Law' in MD Evans (ed), *International Law* (2nd edn OUP, Oxford 2006)

THOMPSON F, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629* (Minnesota UP, Minneapolis 1948)

THORNBERRY P, *International Law and the Rights of Minorities* (Clarendon, Oxford 1991)

TREBILCOCK MJ and DANIELS RJ, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, Cheltenham 2008)

TRECHSEL S, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005)

TRIBE LH, *American Constitutional Law* (2nd edn Foundation Press, Mineola New York 1988)

ULLMANN W, 'Medieval Principles of Evidence' (1946) LQR 77

ULLMANN W, 'Some Medieval Principles of Criminal Procedure' (1947) 59 Jur Rev 1

UN GENERAL ASSEMBLY, 'Report of the International Court of Justice: 1 August 2003–31 July 2004' 59th Session Supp No 4 UN Doc A/59/4 (2004)

VAN DIJK P, *The Rights of the Accused to a Fair Trial Under International Law* (SIM, Utrecht 1983) vol 1

VAN DIJK P, 'Universal Legal Principles of Fair Trial in Criminal Proceedings' in A Rosas and J Helgesen (eds), *Human Rights in a Changing East-West Perspective* (Pinter, London 1990)

VAN DIJK P and VAN HOOF GJH, *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International, The Hague 1998)

VAN DIJK P and VIERING M, 'Right to a Fair and Public Hearing (Article 6)' in P van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerpen 2006)

VINCE JH (tr), *Demosthenes: Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton* (Heinemann, London 1935)

VINCE CA and VINCE JH (trs), *Demosthenes: De Corona and De Falsa Legatione* (Heinemann, London 1926)

VOUIN R, 'The Protection of the Accused in French Criminal Procedure' (1956) 5 ICLQ 157

WALKER GQ, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne UP, Carlton 1988)

WĄSEK-WIADEREK M, *The Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View* (Leuven UP, Leuven 2000)

WATSON A (ed) (tr), *The Digest of Justinian* (Pennsylvania UP, Philadelphia 1998) vols 1 and 2

WEISSBRODT D, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, The Hague 2001)

WELLBORN OG, 'Demeanor' (1991) 76 Cornell L Rev 1075

WELLS CL, 'The Origin of the Petty Jury' (1911) 27 LQR 347

WELLS CL, 'Early Opposition to the Petty Jury in Criminal Cases' (1914) 30 LQR 97

WIGMORE JH, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn Little, Brown & Co, Boston 1940) vols 5 and 8

WINTERBOTTOM M (tr), *The Elder Seneca: Declamations: Controversiae Books 1–6* (Harvard UP, Cambridge 1974) vol 1

ZAPPALÀ S*, Human Rights in International Criminal Proceedings* (OUP, Oxford 2003)

ONLINE MATERIALS (accessible as at 17 January 2011)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 'Decisions on Communications brought before the African Commission' <http://www.achpr.org/english/_info/decisions_en.html>

ATTORNEY GENERAL'S OFFICE, 'Attorney General's Guidelines on Disclosure' (April 2005) <http://www.attorneygeneral.gov.uk/Publications/Documents/disclosure.doc.pdf>

BAR STANDARDS BOARD, 'Code of Conduct' (8th edn, 31 October 2004) <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section1codeofconduct/>

BAR STANDARDS BOARD, 'Written Standards for the Conduct of Professional Work' (8th edn, 31 October 2004) <http://www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct/writtenstandardsfortheconductofprofessionalwork/>

CROWN PROSECUTION SERVICE, 'Annual Report 2004–2005' (12 July 2005) <http://www.cps.gov.uk/publications/docs/annualreport05.pdf>

CROWN PROSECUTION SERVICE, 'The Code for Crown Prosecutors' (February 2010) <http://www.cps.gov.uk/publications/docs/code2010english.pdf>

DANNEMANN G (ed), FEDERAL MINISTRY OF JUSTICE (tr) and SCHÄFER L (ed), 'German Criminal Procedure Code 1987' (German Law Archive, 2001) <http://www.iuscomp.org/gla/statutes/StPO.htm>

DEPARTMENT OF JUSTICE CANADA, 'Criminal Code of Canada 1985' (24 August 2010) <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>

DOUCET J-P, '*Ordonnance Criminelle du Mois D'Août 1670*' (Le Droit Criminel) <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm>

DOUCET J-P, '*Code d'Instruction Criminelle de 1808*' (Le Droit Criminel) <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1929.htm>

EUROPEAN COURT OF HUMAN RIGHTS, 'Search Portal: HUDOC' <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

EUROPEAN COURT OF HUMAN RIGHTS, '50 Years of Activity: The European Court of Human Rights: Some Facts and Figures' (2010) <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf>

GERMAN BUNDESTAG, 'Basic Law for the Federal Republic of Germany 1949' (April 2010) <https://www.btg-bestellservice.de/pdf/80201000.pdf>

HALSALL P (ed), 'The Canons of the Fourth Lateran Council 1215' (Fordham University Internet Medieval Sourcebook 1996) <http://www.fordham.edu/halsall/basis/lateran4.html>

INTERNATIONAL COURT OF JUSTICE, 'Statute of the International Court of Justice' <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

INTERNATIONAL COURT OF JUSTICE, 'Rules of Court' <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

INTERNATIONAL CRIMINAL COURT, 'All Situations' <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>

INTERNATIONAL CRIMINAL COURT, 'Rules of Procedure and Evidence' <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm>

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 'Statute of the Tribunal' <http://www.icty.org/sid/135>

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 'The Cases' <http://www.icty.org/action/cases/4>

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 'Rules of Procedure and Evidence' <http://www.unictr.org/tabid/95/default.aspx>

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 'Status of Cases' <http://www.unictr.org/Cases/tabid/204/Default.aspx>

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 'Statute of the Tribunal' <http://www.unictr.org/tabid/94/default.aspx>

LEGIFRANCE and SPENCER JR (trs), 'French Code of Criminal Procedure 1958' (1 January 2006) <http://195.83.177.9/code/liste.phtml?lang=uk&c=34>

OFFICE OF THE LAW REVISION COUNSEL, 'US Code 2006' (US House of Representatives) <http://uscode.house.gov/pdf/2004/2004usc18.pdf>

SCOTTISH OFFICE HOME DEPARTMENT, 'A Literature Review of Public Defender or Staff Lawyer Schemes' (Legal Studies Research Findings No 19, 1998) <http://www.scotland.gov.uk/Publications/1998/12/39b894a7-b729-4715-901f-033fc34767a6>

SMITH R, 'Criminal Legal Aid: International Law and Practice' (JUSTICE 2003) <http://www.justice.org.uk/images/pdfs/crimlegalaid.pdf>

SPECIAL COURT FOR SIERRA LEONE, 'Cases' <http://www.sc-sl.org/CASES/tabid/71/Default.aspx>

THE AVALON PROJECT YALE LAW SCHOOL, 'Ancient, Medieval and Renaissance Documents' <http://avalon.law.yale.edu/subject_menus/medmenu.asp>

THE AVALON PROJECT YALE LAW SCHOOL, '18th Century Documents: 1700–1799' <http://avalon.law.yale.edu/subject_menus/18th.asp>

THE AVALON PROJECT YALE LAW SCHOOL, 'Charter of the International Military Tribunal' <http://avalon.law.yale.edu/imt/imtconst.asp>

UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, 'Case Law of the Inter-American Court of Human Rights Series C: Judgements and Decisions' (2009) <http://www1.umn.edu/humanrts/iachr/series_C.html>

UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, 'Decisions and Views of the Human Rights Committee' (2009) <http://www1.umn.edu/humanrts/undocs/undocs.htm>

US GOVERNMENT PRINTING OFFICE, 'US Constitution' (16 September 2009) <http://www.gpoaccess.gov/constitution/index.html>

WATSON AG, 'The Public Defence Solicitors' Office: The Background to its Introduction in Scotland' (Scottish Legal Aid Board) <http://www.slab.org.uk/pdso/pdso_background.htm#top>