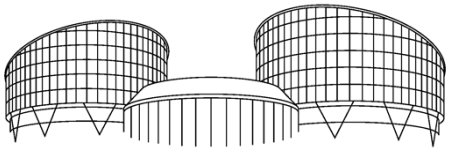

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MURTAZALIYEVA v. RUSSIA

(Application no. 36658/05)

JUDGMENT

STRASBOURG

18 December 2018

This judgment is final but it may be subject to editorial revision.

In the case of Murtazaliyeva v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Robert Spano,
Paulo Pinto de Albuquerque,
André Potocki,
Valeriu Griţco,
Faris Vehabović,
Dmitry Dedov,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Armen Harutyunyan,
Georges Ravarani,
Marko Bošnjak,
Tim Eicke,
Péter Paczolay, *judges,*
and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 14 February and 4 October 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36658/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Zara Khasanovna Murtazaliyeva ("the applicant"), on 16 September 2005.

2. The applicant was represented by Mr K.N. Koroteyev, a lawyer practising in Moscow. The Russian Government ("the Government") were represented initially by Mr G. Matyushkin, former Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged, in particular, that the domestic courts had failed to ensure the examination of witness A. and attesting witnesses B. and K., and that she had been unable to see and examine effectively a secret surveillance videotape shown in the courtroom.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 November 2010 the application was communicated to the Government.

5. On 28 March 2017 a Chamber of that Section, composed of Helena Jäderblom, President, Branko Lubarda, Luis López Guerra, Helen Keller, Dmitry Dedov, Alena Poláčková, and Georgios A. Serghides, judges, and Fatoş Aracı, Deputy Section Registrar, gave judgment. The Chamber unanimously declared the above complaints under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible. It held by four votes to three that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards the complaint concerning the absence of witness A. and by five votes to two that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards the complaint concerning the absence of attesting witnesses B. and K. The Chamber further held, unanimously, that there had been no violation of Article 6 §§ 1 and 3 (b) of the Convention as regards the complaint concerning the applicant's alleged inability to see and examine effectively a secret surveillance videotape shown in the courtroom. Three separate opinions were annexed to the judgment: (a) the partly concurring opinion of Judge Serghides; (b) the joint partly dissenting opinion of Judges López Guerra, Keller and Serghides; and (c) the joint dissenting opinion of Judges López Guerra and Serghides.

6. In a letter of 9 August 2017 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. The panel of the Grand Chamber granted the request on 18 September 2017.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Péter Paczolay, substitute judge, replaced Erik Møse, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 February 2018.

There appeared before the Court:

(a) *for the Government*

Mr M. GALPERIN, the Representative of the Russian Federation to the European Court of Human Rights,
Ms Y. BORISOVA,
Ms O. OCHERETYANAYA, *Counsels*,

(b) for the applicant
Mr K.N. KOROTEYEV, *Counsel.*

The applicant was also present at the hearing. The Court heard addresses by Mr Koroteyev and Mr Galperin, as well as their replies to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1983 and currently lives in Paris.

11. In September 2003 she arrived in Moscow from Chechnya and started working at an insurance company. In October 2003 she went to a mosque where she met V. and Ku., two young Russian women who had converted to Islam.

A. The secret surveillance operation

12. In December 2003 the applicant was stopped on the street by two policemen for an identity check. She was then taken to a police station to have her identity verified. According to the applicant, she was released from custody several days later following the intervention of a certain A., who was also an ethnic Chechen and was employed as a police officer attached to the organised crime division of the Moscow police department. In the meantime she was dismissed by her employer because of her unauthorised absence from work.

13. In February 2004 A. helped the applicant to be reinstated at work. He also found a flat for her, where he visited her on several occasions. The applicant shared the flat with V. and Ku. The flat was located in a dormitory block which belonged to the police department. It was equipped with concealed videotaping and audiotaping devices. The police placed the applicant under surveillance because she was suspected of affiliation with a terrorist group related to the Chechen insurgency movement. The Moscow City Court authorised the use of secret surveillance devices in the flat from 5 February until 4 March 2004.

B. The applicant's arrest, personal search and the pre-trial investigation

14. On the evening of 4 March 2004 the applicant was stopped by a police patrol for an identity check as her physical appearance allegedly

matched the profile of a suspect in a wanted persons notice. The applicant immediately telephoned A., who spoke briefly with the police officers who had stopped her. The applicant was then taken to a police station because the official registration of her stay in Moscow had expired, which constituted an administrative offence under Russian law.

15. At the police station, the applicant was informed that she had been apprehended (*задержана*). Her bag was searched by a female police officer I. in the presence of two attesting witnesses, B. and K., and her fingerprints were taken. The record of the personal search showed that the search of the applicant lasted from 8.35 p.m. until 9.03 p.m. During the personal search, I. discovered two square packages of an unknown substance wrapped in aluminium foil inside the applicant's bag. The substance, together with the inner lining of the applicant's bag and the pockets of her jacket, was taken for forensic examination. The forensic examination report stated that the applicant's fingerprints were taken at 9.30 p.m. The police did not test the applicant's hands for residue from the substance; nor did they check for her fingerprints on the packages found in her bag. Later the same day the applicant was arrested on charges of terrorism and questioned by the police. A criminal investigation was opened.

16. On 12 March 2004 an expert examination of the substance found in the applicant's bag was carried out. The examination report showed that the substance contained 196 grams of Plastit-4, an industrial explosive prepared using hexogen. In the course of the examination the explosives were destroyed. The examination of the applicant's bag and the lining of the pockets of her jacket revealed the presence of hexogen.

17. The police searched the flat where the applicant lived with V. and Ku. and seized a note that had been handwritten by the applicant. The note criticised Russian policy in Chechnya, spoke harshly of Russia and Russians, glorified suicide bombers, preached the way of jihad, vindicated acts of terrorism in Russia and included a statement about "...dreaming of falling [in a] martyr's death as a *shahid* on the path of Allah". The police also found several photographs of an escalator in the Okhotniy Ryad shopping centre in the centre of Moscow.

18. A transcript of the conversations on the video tapes recorded at the flat showed that the applicant had been proselytising Islam to V. and Ku., discussing her hatred for Russians and the need for a "holy war" against them, praising the leaders of the Chechen insurgency, and telling her flatmates about the insurgent camps in the Caucasus.

19. In the course of the investigation the applicant, represented by her defence lawyer, had pre-trial confrontations with witnesses V. and Ku. as well as with police officers S. and I., who had taken part in her arrest and personal search. The applicant had the opportunity to present her account of the events and to put relevant questions.

20. On 12 October 2004 the applicant submitted the following motion to the investigating authorities.

> "Today, 12 October 2004, I was charged with [preparing an act of terrorism]. I completely disagree with the charges. I consider that in my case evidence of my innocence and my lack of connection with this case have not been gathered.
>
> I request you to [provide] subpoena records of [my mobile phone calls] on 3 and 4 March 2004, since on those dates the police officers who took me from work and brought me to [the police station] where plastic explosives were planted had talked with A.
>
> I request you to question him [A.], and put the following questions to him:
>
> 1. When and under what circumstances did he meet me?
>
> 2. Did he provide me with the accommodation where I resided until my arrest?
>
> 3. In which police station was I unlawfully held for three days and did he or other officers question me?
>
> 4. During the arrest did he talk to me and with the officers who took me from work and brought [me] to [a police station]?
>
> 5. What was his relationship with V. and Ku.?"

21. The next day an investigator granted the motion in the part concerning the questioning of A., questioned him and informed the applicant about the decision on her motion.

22. When questioned A. testified that at the end of December 2003, on the order of his superiors, he had established a relationship of trust with the applicant, who had also introduced him to V. and Ku. He further stated that with the support of the police department he had helped the applicant to find accommodation. She had moved into a flat in the dormitory block belonging to the police department with V. and Ku. On 4 March 2004 the applicant had called him because she had been stopped by a police patrol. He had advised her to obey the orders of the police officers and to follow them to the police station.

23. The applicant and her defence lawyer, who had been duly informed about the contents of the record of A.'s questioning, did not attempt to put any further questions to him, nor did they request the investigator to conduct a pre-trial confrontation.

24. On 2 December 2004 the applicant received a copy of the case file for review. On 7 December 2004 the applicant was indicted with preparing an act of terrorism (an explosion) in the Okhotniy Ryad shopping centre and inciting V. and Ku. to commit an act of terrorism. The bill of indictment mentioned A. in the lists of both defence and prosecution witnesses to be summoned to the trial. However, A.'s testimony was merely mentioned by both the prosecution and the defence. The bill of indictment did not contain any information going beyond the statements made during the above-mentioned questioning, and which were neither cross-referenced with

any other evidence nor used to substantiate any specific factual or legal point.

C. The trial

25. On 17 December 2004 the Moscow City Court held a preliminary hearing. It granted the applicant's motion to consider her case in a single judge formation, scheduled the trial hearing and ordered that witnesses be called according to the lists presented by the parties and in the bill of indictment.

26. On 22 December 2004 the applicant's trial began before the city court. The applicant was represented by two lawyers of her own choosing, U. and S.

27. The trial proceeded in the following manner.

1. Witness testimony regarding the circumstances of the applicant's case

(a) Statements by V. and Ku.

28. V. testified at the trial that she and Ku. had first met the applicant at a mosque in October 2003. They had become friends and had started frequenting Islamist Internet chat-rooms and surfing pro-insurgency web-sites together. After a while, they had decided to form a religious community (*dzhamaat*) to study Islam and live together. In their conversations the applicant had glorified terrorism and had approved of suicide bombings and the methods and targets of the Chechen insurgents. The applicant had told them about a camp near Baku in Azerbaijan where Muslims received training to become suicide bombers, and that she knew someone from there. She had mentioned that she herself had participated in the Chechen war on the side of the insurgents. Together they had often visited an Internet café in the Okhotniy Ryad shopping centre. The applicant had also taken photos of an escalator in the shopping centre from different positions.

29. On 3 March 2004 the applicant had told V. and Ku. that if something were to happen to her, they would have to remove all Islamic literature and her diary from the flat, and that they were to call her mother in Chechnya. She had also told them that she had just received a call from a friend who had arrived in Moscow to "blow himself up", and that she (that is, the applicant) "was in danger" and "under suspicion" [by the authorities]. The applicant had not threatened them and had not incited them to commit a terrorist act but had asked them if they were capable of doing so. She had constantly preached "the way of jihad" to them and had given them Islamist books and audiocassettes. Some of those books had been given to her by her acquaintance, A.

30. V. denied having seen any explosives in the flat where they had lived.

31. At the request of the prosecutor, the trial judge allowed V.'s pre-trial testimony to be read out, as it partly contradicted statements she had made at the trial. In particular, during her pre-trial questioning V. had testified that the applicant had undergone terrorist training in a camp near Baku and that she had been indoctrinating V. and Ku. in order to prepare them to become suicide bombers. Asked by the prosecutor to explain her contradictory statements, V. stated that she was not sure whether the applicant had really attended a terrorist training camp. However, she stated that the applicant had been preparing her and Ku. to become suicide bombers.

32. During her cross-examination at trial, Ku. partly retracted her pre-trial statements, which were for the most part similar to the above statements by V. During the trial Ku. confirmed that she, V. and the applicant had taken photos in the Okhotniy Ryad shopping centre at the applicant's initiative, and that the applicant had "taken snapshots randomly". In particular, the applicant had taken photographs of the escalator and the people on it. Ku. submitted that the applicant had disapproved of the policy of the Russian federal forces in the Caucasus. However, she had not incited Ku. to become a suicide bomber. According to Ku., they had simply wanted to reside together to pray, read and live free from parental supervision.

33. Ku. further stated that the applicant's acquaintance, A., was a policeman and that he had paid for the flat where the three of them had lived. He had also occasionally given them money. The applicant had once told her that she liked A.

34. Ku. further stated that during the pre-trial questioning the investigator had misinterpreted her words concerning a suicide attack and that she had never planned to commit any such attack. She denied having given her pre-trial statements under pressure. In view of Ku.'s change of testimony her pre-trial statements were read out during the trial.

(b) Statements by police officers

35. Several police officers who had participated in the applicant's arrest and personal search (P., S., B., I. and Ke.) were questioned in court. They stated that the applicant's arrest had occurred during a regular patrol and they had not been aware that her bag contained explosives.

36. P. testified that on the day of the applicant's arrest he had decided to check the applicant's documents because "she had been walking idly in the direction of the Prospekt Vernadskogo metro station". She had shown them her passport and the registration stamp confirming her right to stay in Moscow, which had expired. The policemen took her to a police station. At the point of arrest she had been agitated and aggressive. They had decided to search her bag because such action "was compatible with the law".

P. further explained that he had stopped the applicant "because it had been unclear where she had been going to", because she had "resembled a girl from a wanted persons notice", and because she was "a person of Caucasian ethnicity [that is to say from the North Caucasus region]". P. also stated that the expiry of her registration had been sufficient reason to arrest the applicant. He further testified that they had been routinely searching all individuals whose registration had expired.

37. S.'s testimony was similar. He added that the applicant had been walking quickly and that she had started to threaten the police officers with disciplinary sanctions when they stopped her.

38. B. testified that they had decided to stop the applicant because she had been wearing black clothing and was of "Caucasian ethnic origin". He added that the applicant's appearance had matched the description of someone on their wanted persons notice. He also testified that the applicant had her bag with her up until the moment of her personal search at the police station.

39. The court also questioned the police officers who had been on duty at the Prospekt Vernadskogo police station on the day of the applicant's arrest.

40. I. testified that she had searched the applicant in the presence of two attesting witnesses and had found in her bag two square yellow objects wrapped in aluminium foil, which had later been confirmed to be explosives. The applicant's fingerprints had been taken only once – after the objects had been discovered in her bag.

41. Ke. testified that before the search the applicant had had all her personal belongings with her and that it had taken approximately twenty minutes before the start of the search to find attesting witnesses to observe the personal search.

42. The prosecution extensively questioned all of the police officers about the circumstances of the applicant's search and fingerprinting. All of them had consistently testified that the applicant had been in possession of her belongings, i.e. her handbag, at all times prior to the search and that she had been fingerprinted only once after the search. The defence only asked police officer B. whether the applicant had been in possession of her handbag prior to the search and police officer Ke. about the manner in which the attesting witnesses were chosen. Both of the questions were put to the above witnesses only once, and there was no relevant follow-up to their answers.

43. The prosecution finished presenting their evidence on 12 January 2005 without either attempting to call A. to testify at the trial or referring to his pre-trial statements.

2. The applicant's testimony during the trial

44. At the trial the applicant pleaded not guilty to the charges against her. She testified that on 4 March 2004, after the police patrol had driven her to the police station, she had first been taken to a room where a police officer, S., had been filling in some papers. He had told her that she had been arrested and that her fingerprints would be taken. She had left her jacket and bag in that room. Another police officer, B., had then taken her to another room, where another police officer, L., had taken her fingerprints using ink. Afterwards, she had gone to a bathroom to wash the ink off her hands. When she returned to the first room, she was informed that she would be searched in the presence of two attesting witnesses B. and K. The police officer had searched the applicant's bag and discovered two packages wrapped in aluminium foil, which did not belong to her. The applicant stated that her fingerprints had been taken before and after the search, and that only the second episode had been recorded.

45. The applicant further stated that the police had questioned her in the absence of a lawyer, and had then decided to detain her. Furthermore, the applicant testified that she had been told to sign a record of her questioning, on pain of ill-treatment. Over the following days she had been beaten by the policemen who were questioning her. However, she had continued to deny her involvement in any terrorist activity.

46. The applicant stated that the packages found in her bag had not belonged to her, that the police had planted them in her bag and that she had never incited V. and Ku. to commit a terrorist attack. When the prosecutor asked whether she had noticed that her rather small bag had become heavier than it was before the personal search, the applicant stated that she had not noticed anything conspicuous.

47. She further stated that the six photographs of the escalator that had been seized from her flat had been taken by her. However, she had been photographing people at random in the shopping centre, rather than the escalator, and she had done so for recreational purposes.

48. The applicant admitted writing the note that had been seized from the flat but stated that she had copied its text from the internet because she had liked it and had simply wanted to have a copy. The applicant's lawyer argued that her words had been misinterpreted and that there had been nothing in them demonstrating a link to any terrorist activity. She stated that the applicant's bitter perception of the situation in Chechnya was absolutely natural for someone who had been living in a war zone since childhood and that her words should have been analysed more carefully.

49. At certain points in her testimony the applicant mentioned A. in passing, stating that they had no personal relationship, that he had helped her with finding accommodation free of charge, that he had called her on the phone, given her two books by the American historian Paul Klebnikov, and

that he had told her to follow the policemen's orders at the time of her arrest.

3. Motion for examination of videotapes

50. On 13 January 2005, during the last day of the examination of evidence by the trial court, the applicant's lawyer U. submitted a motion to play videotapes during the hearing. The relevant part of the trial records reads as follows:

> "**Lawyer U.**: I request to start playing the videotape, since the accused claims that there are multiple discrepancies between the recording and the transcript. I also request to call an interpreter for the translation of the ethnic speech and to view one videotape 5-489c.
>
> **Accused and lawyers**: No objections.
>
> **Prosecutor**: I do not think an interpreter is necessary, since there are transcripts of conversations on the videotapes. In the other part, I agree.
>
> The court decided to grant the motion of the defence and to watch the videotape 5-489c, in respect of calling an interpreter – to refuse [the motion].
>
> [The videotape recording is viewed for 30 minutes]
>
> **Lawyer U. asking the accused**: Did these conversations take place?
>
> **Accused**: I see nothing illegal in them."

51. According to the trial records the defence submitted no requests or complaints concerning the quality of the video-recording or the manner in which the tape was played.

4. Motions for the questioning of witness A. and attesting witnesses B. and K.

52. Immediately after viewing the videotape the applicant's lawyer S. submitted oral motions to summon attesting witnesses B. and K. and police officer A. The relevant part of the trial records reads as follows:

> "**Lawyer S.**: I request to summon the attesting witnesses who were present during the personal search of Murtazaliyeva, that is, B. and K., in order to determine the relevant circumstances [and] whether or not plastic explosives were planted.
>
> **Lawyer U.**: I support [the motion].
>
> **Accused**: I do not dispute that plastic explosives were seized in the presence of these attesting witnesses, but I maintain that they were planted by police officers prior to the personal search. I do not insist on calling these attesting witnesses, but if [the lawyers] consider this necessary, then I agree with them.
>
> **Prosecutor**: I object, because the accused was questioned and stated that the record [of the search] had been drawn up without any violation of the law...
>
> The court decided that the motion for summoning the attesting witnesses would not be granted.
>
> **Lawyer S**.: I request to summon witness A.

[The presiding judge informs the parties that witness A. is on a work-related mission outside Moscow and cannot appear in court]

Prosecutor: I request to read out the statements made by witness A. during the pre-trial proceedings.

Lawyer U.: I do not object to the reading out of A.'s statements.

Lawyer S.: I agree to the reading out of his statements.

Accused: No objections.

The court decided under Article 281 of the Criminal Procedure Code and with the agreement of the parties to read out the statements of witness A., made during the pre-trial proceedings.

[The record of witness A.'s interrogation is read out]

Prosecutor asks the accused: Do you agree with the statements of witness A.'s read out?

Accused: I agree with these statements in part, but do not agree that he had no contacts with the girls without me and that we maintained contact only over the phone."

5. Completion of the examination of evidence

53. Immediately afterwards the defence proceeded to submit evidence in the form of character references about the accused and lodged motions to subpoena the applicant's phone records and conduct a forensic psychiatric examination of witnesses V. and Ku.; both motions were refused by the court. Subsequently the defence rested its case.

54. The presiding judge inquired as to whether the parties wished to continue with further examination of evidence. Using that opportunity, the prosecution motioned to read out the applicant's diary entries and the defence motioned to strike that evidence out.

55. After consideration of the above motions the presiding judge repeatedly asked whether the parties were prepared to rest their cases in the absence of those witnesses who had not appeared. There were no objections from either the prosecution or the defence. The trial court closed the examination of evidence and, upon a motion of the defence, adjourned the proceedings until closing arguments on 17 January 2005.

6. The parties' closing arguments and the applicant's conviction

56. The State prosecutor in his closing argument gave an overview of the entire body of evidence, pointing out inconsistencies in the applicant's allegations of her innocence and the absence of an act giving rise to a crime (both *actus reus* and *mens rea*). He asked the trial court to find the applicant guilty as charged and to sentence her to twelve years' imprisonment.

57. The applicant and her lawyers U. and S. in their closing arguments maintained that the applicant was innocent and that the prosecution had failed to prove her guilt. They provided their own account of the events,

alleging that the substance of the accusation was based on misinterpretation of the applicant's conversations and actions and that the explosives had been planted by the police. The speech by the lawyer U. included the following statement made in passing while describing the applicant's attitude to the military conflict in Chechnya and religion: "I think that this whole criminal case is a set-up against Murtazaliyeva by law-enforcement agents." For her part, the applicant's speech contained the following relevant part:

> "... As to conversations in the apartment, many things do not match. I stated that during the hearing. I submitted a motion for confrontation with A. [He] did not appear in court. I do not admit my guilt on any of the charges ..."

The defence's closing arguments contained one-off statements about the explosives having been planted by the police in the applicant's handbag, but did not refer to the alleged double fingerprinting or the applicant's lack of control over her possessions prior to the search, or to any matters concerning the choice and participation of the two attesting witnesses.

58. On 17 January 2005 the court convicted the applicant of preparing an act of terrorism (an explosion), inciting others to commit an act of terrorism and carrying explosives, and sentenced her to nine years' imprisonment. The court considered the following evidence:

i. the trial and pre-trial statements by V. and Ku., as well as records of their pre-trial confrontations with the applicant;

ii. the trial and pre-trial statements by police officers S., I., P., B., and Ke., as well as records of S.'s and I.'s pre-trial confrontations with the applicant;

iii. the records of the search of the applicant's residence and her personal search;

iv. a forensic explosives report;

v. six photographs depicting the escalator in the Okhotniy Ryad shopping centre, seized at the flat where the applicant lived, as well as a report on an inspection of the shopping centre premises;

vi. a note containing extremist statements written by the applicant and seized in the flat where she lived, and a forensic handwriting report on that note;

vii. the transcripts of the video tapes recorded in the apartment where the applicant lived;

viii. the pre-trial statement by A.;

ix. the testimony of further prosecution witnesses heard at the trial;

x. the testimony of defence witnesses heard at the trial, and character references about the applicant from her places of residence, study and employment.

59. The judgment referred to witness A.'s testimony only in one part, which read as follows:

> "Witness A. [a police officer] testified that at the end of December 2003 under instructions of his superiors he established relations of trust with Murtazaliyeva; [she] introduced him to her friends Ku. and V., who had voluntarily converted to Islam. In view of Murtazaliyeva's housing problems and with the assistance of [police authorities] she was provided with a room in a dormitory, where she moved with her friends at the beginning of February 2004; in the evening of 4 March 2004 Murtazaliyeva called [A.] and informed him that she had been stopped by a police patrol for an identity check and that she had been requested to go with them to the police station; he recommended that she follow the policemen's orders."

In contrast to its approach with regard to the testimony of other witnesses, the court did not cross-reference A.'s statements with those of other witnesses and did not refer to his testimony in support of any conclusions.

60. The judgment contained a detailed analysis of the trial and pre-trial testimony given by V. and Ku., the applicant's flatmates, as well as the records of their pre-trial confrontations with the applicant. The court accepted the pre-trial statements by V. and Ku. and the trial statements by V. as valid and persuasive, since they were coherent as well as consistent with the remaining body of evidence. As to the change in Ku.'s testimony at trial, the court considered this to be a strategy to assist the applicant and dismissed it. It noted in particular that Ku., assisted by a defence lawyer, had been repeatedly questioned during the pre-trial investigation and that she had never complained of being subjected to duress by the investigating authorities. When questioned at trial she did not dispute that her previous statements had been given voluntarily and without any psychological or physical influence. Ku. did not provide any reasons for making false pre-trial statements. Moreover, she stated in court that after a conversation with the applicant's lawyer she had formally complained about psychological duress during questioning, but had subsequently withdrawn that complaint as being untrue.

61. The court examined and dismissed the applicant's claim that the explosives had been planted in her bag. It referred to the testimony by the patrol officers and the officers at the police station, who had denied those allegations, and to the fact that, according to the official report, the personal search of the applicant had preceded the taking of her fingerprints, and there had been no evidence that the fingerprints had been taken twice, as the applicant had alleged.

62. The court further found that the applicant must have drafted the text of the handwritten note herself and that she had not copied it from Islamist websites on the internet, as she had claimed, since the note had contained modifications and corrections.

D. Appeal and supervisory review proceedings

63. The applicant and her lawyers appealed against her conviction. The statements of appeal submitted by the defence lawyer S. indicated the following:

> "... during the hearing 15 out of 16 videotapes containing records of the secret surveillance were not examined; they have significant evidentiary value, because their comparison with ... testimony of Murtazaliyeva and the key prosecution witnesses V. and Ku. could have had a considerable impact on [the conviction] ...
>
> Murtazaliyeva claimed and continues to claim in her appeal that there are discrepancies between these video recordings and the transcripts. During the selective viewing of one videotape she was deprived for 'technical reasons' of the possibility to point out the inconsistencies ...
>
> The judge did not consider my motion to examine police officer A. as a witness and did not decide on that motion. He limited himself to saying that witness A. [was] on a work-related mission outside Moscow and [could] not appear in court. At the time this appeal is submitted [the case-file] has no documentary proof of that information.
>
> The court's refusal to call and examine attesting witnesses B. and K., who were present during Murtazaliyeva's personal search, appears unreasonable. [Murtazaliyeva insists that the plastic explosives were planted in her bag by police officers]. No one can recall who invited the attesting witnesses and how, and when ...
>
> According to the testimony by witness A., read out during the hearing and relied upon by the court in the judgment, he talked on the phone not only with Murtazaliyeva, but also with arresting police officers; [these were not the police officers questioned during the hearing, since they did not mention talking to A. in their multiple statements at the pre-trial and trial stages of proceedings]. [Accordingly] the testimony of A. refutes the testimony [of these police officers] and confirms Murtazaliyeva's claim that she was arrested by other officers when she was leaving her workplace ..."

64. The lawyer U. in her statement of appeal stated in particular that the defence had requested witness A.'s attendance as both a defence and a prosecution witness. However, that motion had been denied by the trial court with reference to his absence, which was not supported by any documentary evidence.

65. On 17 March 2005 the Supreme Court of Russia upheld the judgment, reducing the applicant's sentence to eight years and six months.

66. The Supreme Court held that the videotape had been shown at the request of the defence and that no objections or complaints, including that not all of the videotapes had been shown, had been lodged with the court after the videotape had been played.

67. The Supreme Court further considered that the questioning of A. had not been possible due to his absence on a work-related mission and that his pre-trial statement had been read out with the consent of the defence in accordance with Article 281 of the Code of Criminal Procedure. As for the

two attesting witnesses B. and K., their personal appearance had not been necessary since the applicant had claimed that the explosives had been planted in her bag before their arrival. In any event, the defence had agreed to proceed to the closing arguments and had not submitted any objections or additional requests about the examination of the applicant's case.

68. In June 2005 the applicant's lawyer S. lodged a supervisory review complaint, referring, *inter alia*, to the trial court's failure to summon and question witness A. and attesting witnesses B. and K. The complaint in the relevant part labelled A. as "a key witness", who, following the instructions of his superiors, had "covered" the applicant for more than two months, provided her with a job and accommodation and controlled her actions and movements, including her arrest. In respect of the attesting witnesses the complaint stated that "the examination of the attesting witnesses could have resolved the significant contradictions in the statements [and] could have served as the basis to corroborate or disprove the circumstances immediately prior to the search."

69. On 13 September 2005 the Supreme Court rejected the supervisory review complaint.

II. RELEVANT DOMESTIC LAW

A. Russian Criminal Code

70. The Criminal Code of the Russian Federation of 13 June 1996, which entered into force on 1 January 1997, provides an exhaustive list of criminally punishable actions and regulates all substantive aspects of the criminal law in Russia.

Article 30. Preparation for crime and a criminal attempt

"1. Preparation for crime is considered [to comprise] the gathering, making or implementing by a person of the means or weapons [with which] to commit a crime, soliciting co-offenders, and conspiring to commit crime or any other wilful act aimed at [facilitating the commission of] a crime, [even] if the crime was not completed due to circumstances outside that person's control..."

Article 205. Terrorism

"1. [Terrorism, that is to say] the commission of an explosion, arson or other action, creating a danger for people's lives, or causing considerable pecuniary damage or other socially dangerous consequences, if such actions were committed with the aim of undermining public safety, threatening the population or influencing decision-making by the authorities, or the threat of committing such actions with the same aims, shall be punishable by deprivation of liberty for a term of eight to twelve years..."

Article 205.1. Inciting or otherwise abetting the commission of a terrorist criminal act

"1. Inciting a person to commit a crime stipulated by Articles 205, 206, 208, 211, 277 and 360 of the present Code, or seeking to engage a person in the activities of a terrorist organisation, supplying weapons or instructing a person with a view to committing specified crimes, as well as financing terrorism or a terrorist organisation, shall be punishable by deprivation of liberty for a term of four to eight years..."

Article 222. Illegal acquisition, transfer, sale, storage, transportation and carrying of firearms, its main components, ammunition, explosives and explosive devices

"1. The illegal acquisition, transfer, sale, storage, transportation and carrying of firearms [or the] main components [thereof], ammunition... explosives and explosive devices shall be punishable by the limitation of liberty for a term of up to three years, or detention for a term of up to six months, or deprivation of liberty for a term of up to four years with or without a fine of up to 80,000 roubles or three months' salary (or other income) of the convicted person."

B. Russian Code of Criminal Procedure ("CCrP")

71. The Code of Criminal Procedure of the Russian Federation of 18 December 2001, which entered into force on 1 July 2002, regulates all procedural aspects of criminal trials in Russia.

Article 53. The powers of a defence lawyer

"1. From the moment a defence lawyer joins the case he or she shall have the right...

...

(5) to take part in interrogations of the accused, as well as other investigative actions with the participation of the accused, either upon the motion of the accused or on his own motion...

(7) to familiarise himself with the materials of the criminal case upon completion of the pre-trial investigation...

(8) to lodge procedural petitions [motions] and motions for recusal...

2. The defence lawyer taking part in an investigative action shall have the right to provide legal advice to the accused in the presence of an investigator, to put questions to interrogated persons with the permission of an investigator, to make written remarks on the accuracy and completeness of the records of investigative actions. An investigator may refuse to [put to the accused the defence lawyer's questions], but should mention these questions in the records [of that investigative action]."

Article 56. Witnesses

"1. A witness is a person who may have knowledge of facts relevant to the investigation and resolution of a criminal case and who is subpoenaed to testify...

...

7. If a witness fails to appear for no valid reason, his or her appearance may be enforced."

Article 60. Attesting witnesses

"1. An attesting witness is a person disinterested in the outcome of the criminal case who is invited by an investigator ... to attest to an investigative measure having been carried out and also to its substance, progress and results.

2. A person shall not be an attesting witness if that person is:

1) a minor;

2) a participant of the criminal case, his close relatives and relatives;

3) [a law enforcement agent entrusted with investigative powers]..."

Article 119. Persons who have a right to bring procedural petitions

"1. A suspect, accused, his defence lawyer, victim, his legal representative and representative, private prosecutor, expert, as well as civil plaintiff, civil defendant and their representatives can lodge a petition for procedural acts to be carried out and for procedural decisions to be taken in order to establish the circumstances relevant to the criminal case, to secure the rights and legitimate interests of the petitioner..."

Article 120. Bringing a procedural petition

"1. A procedural petition may be lodged at any moment during criminal proceedings. A written petition is placed in the case file, [and] an oral petition is reflected in the transcript of an investigative act or of a trial hearing.

2. Refusal of the procedural petition does not restrict the right of the petitioner to lodge the same petition again."

Article 192. Confrontation

"1. If testimony of previously questioned persons contains significant contradictions, an investigator shall have the right to conduct a confrontation ...

2. An investigator asks the persons taking part in the confrontation whether they know each other and what their relationship is. The questioned persons are asked in turn to give testimony on the circumstances which are to be established by the confrontation. After the statements are made an investigator may put questions to each of the questioned persons. The persons taking part in the confrontation may, with the permission of an investigator, put questions to each other."

Article 235. Request to exclude evidence

"1. Parties to a criminal case may request a court to exclude any evidence presented in court.

...

4. Where a defendant seeks to exclude evidence obtained in violation of the provisions of the CCP, the prosecution will have to furnish evidence to the contrary. In other cases, the burden of proof will be on the party which submitted a motion to exclude evidence..."

Article 240. Direct and open [examination of evidence]

"1. All the evidence should normally be presented at a court hearing ... The court should hear statements by the defendant, the victim, witnesses ... and examine physical evidence ...

2. The reading of pre-trial statements is only permitted under [Article 281 of the Code]..."

Article 260. Objections to [the content of] the trial records

"1. The parties may submit their objections to [the content of] the trial records within three days of receiving these records.

2. The objections are to be considered by the presiding judge immediately. If the presiding judge considers it necessary he or she may summon the persons submitting the objections in order to clarify their content.

3. Having considered the objection the presiding judge adopts a decision either certifying the correctness of the objections or dismissing them. The objections and the decision of the presiding judge shall be attached to the trial records."

Article 271. Submission of requests and decisions on them

"1. The presiding judge inquires whether the parties have requested that new witnesses, experts or specialists be summoned, evidence or documents be presented or evidence excluded that has been obtained in a manner that was in breach of the provisions of the Code. A person who has submitted [such] a request must substantiate it.

...

3. A person whose request has been denied has a right to submit it again in the course of the proceedings."

Article 281. Reading out of testimony of a victim and a witness

"1. Reading out of statements of a victim and a witness previously given during pre-trial investigation or trial ... is permitted only with the consent of the parties in the event of a victim's or a witness' absence (*неявка*) [in court], except under circumstances prescribed by paragraph 2 of this Article.

2. In case of failure by a victim or a witness to appear at the court hearing, the court may upon the motion of a party or upon its own motion decide to read out previously given statements, in the case of:

(1) the death of a victim or a witness;

(2) grave illness precluding appearance in court;

(3) the refusal of a victim or a witness who is a foreign citizen to appear pursuant to the summons of the court;

(4) a natural disaster or other exceptional circumstances precluding appearance in court..."

Article 291. End of judicial examination [of evidence]

"1. At the end of the judicial examination of evidence presented by the parties the presiding judge inquires whether the parties wish to make any additional submissions

in the proceedings. If such a request is submitted, the court shall examine it and issue a ruling thereon...”

Article 294. Reopening of judicial examination [of evidence]

“If participants of the closing arguments or the accused in his or her final statement notify [the court] of new circumstances relevant to the criminal case or if they lodge a motion for examination of new evidence, the court may reopen the examination of evidence. At the end of the examination of evidence the court reopens the closing arguments and gives the accused an opportunity to provide his final statement.”

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations International Criminal Tribunals

72. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) in deciding as either Trial or Appeal Chambers on individual criminal cases produced extensive case-law and developed general principles related to various aspects of criminal proceedings, including examination of witnesses.

73. In *Prosecutor v. Krstić* (Decision on application for subpoenas, Case no. IT-98-33-A, 1 July 2003) the ICTY Appeals Chamber dealt with the request to examine additional witnesses in the appeal proceedings. It stated the following in relation to the general principles governing the relevance of witness testimony and the issuing of witness subpoenas:

“10. Rule 54 [of the Rules of Procedure and Evidence] permits a judge or a Trial Chamber to make such orders or to issue such subpoenas as may be “necessary [...] for the preparation or conduct of the trial”. Such a power clearly includes the possibility of a subpoena being issued ... where that attendance is necessary for the preparation or conduct of the trial. ... [A] subpoena pursuant to Rule 54 would become “necessary” for the purposes of that Rule where a legitimate forensic purpose for having the interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.

11. The assessment of the chance that the prospective witness will be able to give information which will materially assist the defence in its case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the prosecution or to others in relation to those events. The test would have to be applied in a reasonably liberal way but, just as in relation to such applications for access to confidential material, the defence will not be permitted to undertake a fishing expedition – where it is unaware whether the particular person has any relevant information, and it seeks to interview that person merely in order to discover whether he has any information which may assist the defence.”

74. In *Prosecutor v. Halilović* (Decision on the issuance of subpoenas, Case no. IT-01-48-AR73, 21 June 2004) the ICTY Appeals Chamber affirmed that an applicant must demonstrate a reasonable basis that a witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. It further stressed with reference to prior case-law that "[t]he Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused" and that "subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction" (ibid. § 6). It further provided the following guidance on the judicial decision-making in these matters:

> "7. In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial." The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.
>
> ...
>
> 10. ... Being a mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly. While a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics. ... A subpoena involves the use of judicial power to compel, and as such, it must be used where it would serve the overall interests of the criminal process, not where it would merely facilitate a party's task in litigation. If this were the Trial Chamber's analysis, its rejection of the subpoena request would be proper."

75. In *Prosecutor v. Martić* (Decision on appeal against the Trial Chamber's decision on the evidence of witness Milan Babić, Case no. IT-95-11-AR73.2, 14 September 2006) the ICTY Appeal Chamber discussed at length the principles applicable to examination of witnesses at trial. Referring to its own, as well as to this Court's case-law, it recognised the Trial Chambers' discretion in relation to the admissibility of evidence, as well as in defining the modalities of cross-examination and the exercise of this right by the defence. It stressed that such deference is based on the recognition of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case". The Appeals Chamber highlighted that the right of an accused to cross-examine a witness is not absolute, that the fairness of a trial must not be uniquely predicated on

the fairness accorded to the accused and that while the proceedings must be conducted with full respect for the procedural rights, the restrictions on the right to cross-examination will not necessarily entail a violation or be inconsistent with a fair trial (ibid. §§ 6, 12).

76. In respect of this Court's principles pertinent to cross-examinations of witnesses the Appeal Chamber stated the following:

> "20. The Appeals Chamber observes in any event that the two principles that the Trial Chamber derived from the jurisprudence of the ECHR, namely that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence, and (2) evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction, are consistent with the jurisprudence of the International Tribunal as well as that of national jurisdictions."

77. In *Prosecutor v. Edouard Karemera and Matthieu Ngirumpatse* (Decision on Matthieu Ngirumpatse's motion to subpoena witness YLH, Case no. ICTR-98-44-T, 29 December 2010) the ICTR Trial Chamber deciding on whether written statements of a certain witness ought to be admitted into evidence and whether that witness needed to be subpoenaed, restated the following principles:

> "12. In order for a written statement to be admitted ... it must be ascertained that the statement does not contain references to the acts and conduct of the Accused as pleaded in the Indictment and that it satisfies the criteria laid down in Rule 89(C), namely that it is relevant and has probative value ... Even where a statement satisfies all these conditions, a Chamber must exercise its discretion to admit such statement bearing in mind the overarching need to ensure a fair trial. ... [E]ven where a Chamber finds a statement admissible, it shall also determine whether to admit it in whole or in part and whether to require the witness to appear for cross-examination. In addition to factors related to fair trial, another relevant factor consists in determining whether the evidence relates to a live and important issue between the parties as opposed to a peripheral or marginally relevant one."

78. In *Prosecutor v. Orić* (Interlocutory decision on length of defence case, Case no. IT-03-68-AR73.2, 20 July 2005) the ICTY Appeals Chamber stated the following in respect of equality of arms in calling and examining witnesses:

> "7. ...The Appeals Chamber has long recognized that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee." At a minimum, "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case", certainly in terms of procedural equity. This is not to say, however, that an [a]ccused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of

mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides."

This position was also confirmed by the ICTR Appeal Chamber in *Prosecutor v. Nyiramasuhuko et al. (Butare)* (Decision on witness list, Case no. ICTR-98-42-AR73, 21 August 2007, § 26).

B. Inter-American Court of Human Rights

79. The Inter-American Court of Human Rights decides on individual complaints lodged under the American Convention of Human Rights of 1969. That Convention states the following in respect of the right to examine witnesses:

Article 8. Right to a Fair Trial

"1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him ...

2. ... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

...

f. the 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..."

80. In *Canese v. Paraguay* (Judgment of 31 August 2004, Series C. no. 111, §§ 164-65) the Inter-American Court found a violation of the applicant's right to a fair trial, because "through judicial negligence, no testimonial evidence was provided [at the trial], eliminating the possibility of Mr Canese presenting probative material in his defence that could "throw light on the facts." This conclusion had been reached with regard to the fact that the accused was not allowed to obtain a hearing for other persons who, as witnesses and expert witnesses, could "throw light on the facts" and that during the proceedings in the first instance, after having issued an order summoning the witnesses proposed by the defendant, the judge revoked this decision and ordered the evidentiary stage to be closed.

81. In *Norín Catrimán et al. v. Chile* (Judgment of 29 May 2014, Series C no. 279, § 249) the Inter-American Court – confronted with several applications concerning the exclusive and untested use of anonymous witnesses' statements at trials – indicated, *inter alia* referring to the case-law of this Court, that the use of anonymous witness statements must be subjected to judicial control and offset by counterbalancing measures, cautious treatment of that testimony, and availability of supporting and corroborative evidence. In respect of one of the applicants it concluded that he "had no available means of proof" for his case, because his reasoned and

specific request to summon two defence witnesses had been initially granted by the investigating judge, but not enforced due to refusal of the witnesses to appear. Since no statements were taken from the defence witnesses and the applicant was convicted on the basis of testimony of three anonymous witnesses absent from trial, the Inter-American Court considered the right under Article 8 (2) (f) of the American Convention to be violated (§§ 258-59).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (b) OF THE CONVENTION AS REGARDS THE VIEWING OF A VIDEOTAPE

82. The applicant complained under Article 6 §§ 1 and 3 (b) of the Convention that the overall fairness of the criminal proceedings against her had been undermined because she had not been able to see effectively a secret surveillance videotape shown in the courtroom. Article 6 of the Convention in the relevant part reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (b) to have adequate time and facilities for the preparation of his defence..."

83. The Government contested that argument.

A. The Chamber judgment

84. The Chamber noted that the case materials contained no evidence that the applicant, either during the trial or on appeal, had complained that she had been unable to see the recording when it was being played. However, it concluded that there was no need to rule on the issue, since in any event the applicant had been able to follow the proceedings (see paragraphs 71-72 of the Chamber judgment). It further found that it had not been "strictly necessary" to see the recording, given that the applicant's purpose in having the video tape played at the trial was to verify the accuracy of the transcripts. Listening to the tape was sufficient for that purpose.

85. Unanimously, the Chamber held that there had been no violation of Article 6 §§ 1 and 3 (b) of the Convention given that the defence had not

alleged that there had been difficulties in hearing the audio track and had not disputed the authenticity of the recording itself (see paragraphs 73-74 of the Chamber judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

86. The applicant did not mention in her referral request the finding of no violation as regards her ability to see the surveillance videotape shown during the hearing. However, in her submissions before the Grand Chamber, she invited the Court to draw inferences from the Government's failure to produce the plans of the courtroom and the arrangements for viewing the video recording. She noted that only one tape had been played and she had been prevented from effectively participating in the viewing of it due to the absence of adequate arrangements. She alleged that there had been a violation of Article 6 §§ 1 and 3 (b) of the Convention.

2. The Government

87. The Government maintained that the Chamber's findings on this issue had not been contested in the applicant's referral request and should therefore be confirmed. They endorsed the conclusions of the Chamber. The Government noted that the applicant had been able to follow the content of the videotape and that she had not raised any relevant objections or complaints during the trial. Her statement of appeal merely referred to technical difficulties in seeing the recording. Moreover, she had disputed neither the lawfulness nor the authenticity of the recording, nor had she claimed that the quality of the playback was poor. Since she had requested that the tape be played to verify the authenticity of the transcript, seeing the playback, apart from the fact of being able to hear the audio track, had not been necessary.

C. Scope of the case before the Grand Chamber

88. The Court observes at the outset that the content and scope of the case referred to the Grand Chamber are delimited by the Chamber's decision on admissibility. This means that the Grand Chamber may examine the case only in so far as it has been declared admissible; it cannot examine those parts of the application which have been declared inadmissible (see, for example, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 78, 21 June 2016). The instant complaint was declared admissible, even if it did not form part of the applicant's referral request.

89. The Grand Chamber's jurisdiction therefore extends to ascertaining whether the applicant had been prevented from effectively participating in

the viewing of the videotape shown during the hearing as alleged, and, if so, whether this undermined the overall fairness of the criminal proceedings against her contrary to Article 6 §§ 1 and 3 (b) of the Convention.

D. The Court's assessment

90. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention, the Court will examine the complaint from the point of view of these two provisions taken together (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 113, 12 May 2017; see also *Lüdi v. Switzerland*, 15 June 1992, § 43, Series A no. 238; and *Vacher v. France*, 17 December 1996, § 22, *Reports of Judgments and Decisions* 1996-VI).

91. The Court reiterates that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings (see *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A). The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see *Zahirović v. Croatia*, no. 58590/11, § 42, 25 April 2013, with further references). The facilities which should be enjoyed by everyone charged with a criminal offence include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (see *C.G.P. v. the Netherlands* (dec.), no. 29835/96, 15 January 1997; *Galstyan v. Armenia*, no. 26986/03, § 84, 15 November 2007; and *Ibrahimov and Others v. Azerbaijan*, nos. 69234/11 and 2 others, § 95, 11 February 2016, with further references).

92. Having regard to the available material, the arguments presented by the parties, and the principles cited above, the Court sees no reason to depart from the Chamber's conclusions.

93. It observes that only one surveillance videotape was viewed during the hearing. It was shown upon a motion by the defence to view that specific tape in order to verify the accuracy of the transcript (see paragraph 50 above). No motion to view other videotapes was lodged by the defence, and it is not disputed that they were available for examination in court had either of the parties submitted a motion to that effect. Moreover, the transcripts of the conversations recorded on these tapes had been included in the criminal case file and were available for examination.

94. Regarding the alleged technical difficulties when viewing the tape mentioned in her statement of appeal (see paragraph 63 above), the applicant did not explain either to the domestic courts or to this Court what those difficulties were. Furthermore, the record of the trial and other documents in the case file contain no indication of any complaints having been made by the applicant about the quality of the audio track of the recording. The failure of the Government to provide the plans of the courtroom and the arrangements for viewing the video-recording highlighted by the applicant cannot in itself serve as a ground for the drawing of any "inferences" of unfairness in the proceedings.

95. The Court is satisfied that the applicant was able to participate effectively in the viewing of the videotape in a way which satisfied her procedural needs, namely verifying the accuracy of the transcript by comparing it to the audio track of the recording. It follows that there has been no violation of Article 6 §§ 1 and 3 (b) of the Convention in this regard.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION AS REGARDS WITNESS A.

96. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that the overall fairness of the criminal proceedings against her had been undermined because she had not been able to call and examine witness A. at the trial. The relevant part of Article 6 of the Convention reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

97. The Government contested that argument.

A. The Chamber judgment

98. The Chamber, having reaffirmed that it is primarily for the domestic courts to decide on the relevance of evidence the defence seeks to adduce and that it was the Court's task to ascertain whether the proceedings, considered as a whole, had been fair, decided the case on the basis of the test derived from the judgment in the case of *Perna v. Italy* ([GC],

no. 48898/99, § 29, ECHR 2003-V) and the subsequent case-law (see paragraph 84 of the Chamber judgment). It examined (a) whether the applicant's request was sufficiently reasoned and relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or have even led to the applicant's acquittal; and (b) whether the trial court, by not securing the attendance of a particular witness to testify on behalf of the applicant, had breached her right under Article 6 § 3 (d) of the Convention.

99. In the first place, the Chamber observed that the testimony given by A. during the pre-trial stage had not been disputed by the applicant. While acknowledging that A.'s testimony might have had at least some relevance to the charges, the Chamber answered the first part of the test in the negative. It considered that the defence had failed to explain, even briefly, why the attendance of A. was important for their line of defence, whether his actions had amounted to entrapment or whether he had exerted any pressure on the applicant and, finally, whether his testimony would have served to exonerate the applicant or, at the very least, strengthened her position in any way (see paragraph 87 of the Chamber judgment). As regards the applicant's allegations of entrapment, the Chamber specifically observed that they had been raised for the first time in the applicant's observations before the Court. Accordingly, it concluded that the applicant had failed to support her request to question A. with sufficient reasons (ibid.). Further, the Chamber examined the overall fairness of the proceedings and concluded that the applicant's conviction had been based on a range of evidence. Despite A.'s absence from the trial his pre-trial statements had been read out at trial and the applicant was able to comment on them as well as on the other evidence.

100. Accordingly, the Chamber concluded, by a majority, that there had been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards the absence of witness A. (see paragraphs 88-89 of the Chamber judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

101. The applicant contended that A. was a "key witness" and his activities had led to the creation of the body of evidence against her. Accordingly, his activities could be likened to those of an *agent provocateur*. She maintained that she had consistently and explicitly referred to possible entrapment in her submissions before the domestic courts. She had underlined A.'s central role to the investigating authorities and the courts and insisted that he be questioned directly.

102. While admitting that her lawyer S. had requested the questioning of A. at trial without putting forward specific reasons, she argued that the

importance and relevance of A.'s testimony could have been inferred from references to him during her own examination and her flatmates' earlier questioning.

103. As regards the applicable Convention standard, the applicant invited the Grand Chamber to revise the *Perna* approach, at least for cases where the defence requests the examination of a witness whose attendance it has been unable to secure, for example law-enforcement officials, and whom the prosecution does not call for questioning. In her opinion, the *Perna* approach was "mechanical" and devoid of substantive criteria and placed an unduly high burden on the defence, which was required to justify calling a witness over whom the prosecution could have control.

104. In support of the above argument the applicant referred to the evolution of the applicable standard for prosecution witnesses in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, and *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015, as well as the current trends in entrapment and peaceful assembly case-law (she referred to *Bannikova v. Russia*, no. 18757/06, § 73, 4 November 2010, and *Navalnyy and Yashin v. Russia*, no. 76204/11, § 83, 4 December 2014). In her opinion, these developments indicated that domestic courts were required to employ a heightened standard of review in verifying incriminating evidence. Referring to the practice of the Inter-American Court (*Canese v. Paraguay* and *Norín Catrimán et al. v. Chile*, paragraphs 80-81 above), the ICTY Appeals Chamber (*Prosecutor v. Martić*; *Prosecutor v. Halilović;* and *Prosecutor v. Krstić*, paragraphs 73-75 above) and the United States Supreme Court (*Cruz v. New York*, 481 US 186 (1987), and *Lilly v. Virginia* 527 US 116 (1999)), she argued that international law concerning the examination of witnesses had advanced beyond the *Perna* standard and that it was necessary to call not only witnesses who could give evidence capable of leading to acquittal, but "generally witnesses of fact".

105. The applicant submitted that the domestic courts had failed to ensure the presence of witness A., despite his role as a covert agent. It had been convincingly shown that he was the key witness and the domestic courts had relied on his testimony for her conviction. In her opinion, A. was both a defence and a prosecution witness and the courts should have compelled his attendance.

2. The Government

106. The Government addressed two preliminary points of disagreement with the applicant regarding the manner in which the examination of A. at trial had been requested.

107. First, they stated that the trial records accurately and adequately reflected the progress of the proceedings. In support of that argument they referred to the fact that the defence had not challenged the trial records

pertaining to the request to question A., whereas they had filed detailed and elaborate objections to the content of the trial records on various other points. Furthermore, one of the applicant's lawyers had expressly agreed to the unchallenged parts of the records.

108. Second, the applicant's contention that she had consistently raised an entrapment defence at the domestic level contradicted the case material. They stated that the applicant did not advance an *agent provocateur* issue until the submission of her observations before the Court, and no such allegation had been made by the defence when requesting the attendance of A. The Government claimed that any entrapment complaint was in any event manifestly ill-founded, since the applicant had refuted her involvement in the crime she had been charged with. In support of their position they referred to the Court's decision in *Koromchakova v. Russia* (dec.) (no. 19185/05, § 19, 13 December 2016).

109. Turning to the subject-matter of the present complaint, the Government suggested that the fairness of the proceedings in terms of the examination of defence witnesses should be assessed using the following test:

- Did the applicant clearly and explicitly inform the authorities of her wish to question a certain witness by lodging the relevant request?

- Was that request sufficiently reasoned, relevant to the accusation and capable of strengthening the position of the defence?

- Did the domestic courts breach Article 6 § 3 (d) by failing to secure the attendance of a witness?

110. The Government concluded that the applicant failed already at the first step of the test. They highlighted that the defence had only once submitted a motion to examine A., had not objected to the reading out of his pre-trial testimony, although the procedural legislation afforded such an opportunity and, in fact, had largely concurred with the contents of the statements read out. Given the parties' consent to the reading out of A.'s statements and in the absence of any motion to adjourn the proceedings, the trial court had continued with the case as the parties had seen fit. Accordingly, in the Government's opinion, the applicant had failed to take the minimal procedural actions necessary for the exercise of her right to examine A; she had limited herself to A.'s pre-trial questioning and had clearly and explicitly waived her right to examine him at trial.

111. Despite the above assertion the Government nevertheless proceeded to the second step of their test and argued that the applicant had not adduced sufficient reasons for the questioning of A. On the factual side they highlighted that during the pre-trial proceedings the applicant had lodged a request to question A. seven months after her arrest and the start of the investigation. She had put only factual questions to him, which were not related to the charges against her, and the defence had failed to put further questions to A. after receiving the answers to the initial questions.

112. They further stated that in any event the applicant's questions could have been answered by other witnesses examined at the trial. Moreover, the prosecution did not refer to A.'s testimony and the courts did not rely on A.'s testimony in convicting her.

113. Given the negative answers to the first two limbs of the test, they concluded that it was not necessary to examine the third limb.

C. The Court's assessment

114. The Court takes note of the Government's argument that the applicant had waived her right to examine witness A. at the trial. It considers that this argument must be examined as a preliminary objection to the admissibility of this complaint (see, in this connection, *Palchik v. Ukraine*, no. 16980/06, §§ 36-38, 2 March 2017, and *Giurgiu v. Romania* (dec.), no. 26239/09, § 99, 3 October 2017).

115. It reiterates that under Article 35 § 4 *in fine* of the Convention it can "reject any application which it considers inadmissible ... at any stage of the proceedings". Thus, even at the merits stage and subject to Rule 55 of the Rules of Court, the Grand Chamber may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 97, 19 September 2017, referring to *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 56, 25 March 2014, with further references).

116. In their submissions before the Chamber and the Grand Chamber the Government argued that the applicant and her counsel had clearly and explicitly waived the right to obtain the attendance and examination of witness A. by consenting to the reading out of his pre-trial statements at trial.

117. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. A waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Moreover, the waiver must not run counter to any important public interest (see *Simeonovi*, cited above, § 115 with further references).

118. It follows that a waiver of the right to examine a witness, a fundamental right among those listed in Article 6 § 3 which constitute the notion of a fair trial, must be strictly compliant with the above requirements.

119. Turning to the present case, the Court observes that the applicant, assisted by her defence lawyers, consented to the reading out of witness A.'s pre-trial statements at the hearing of 13 January 2005 (see paragraph 52 above). Significantly, the applicant neither disputed the accuracy of the relevant trial records nor alleged that she had not had the benefit of appropriate legal advice on the matter.

120. It further notes that in several previous cases dealing with analogous situations the Court had regard to various factual and legal circumstances in reaching the conclusion that the applicants had either waived (see, for example, *Khametshin v. Russia*, no. 18487/03, § 41, 4 March 2010; *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, § 87, 12 May 2016; and *Palchik*, cited above, § 36) or not waived the right to examine a witness (see, for example, *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 66, 10 November 2005; *Makeyev v. Russia*, no. 13769/04, § 37, 5 February 2009; and *Gabrielyan v. Armenia*, no. 8088/05, § 85, 10 April 2012).

121. The Court must now determine whether in the circumstances of the present case the applicant had waived her right to examine witness A. It notes at the outset that nothing in the available material suggests that her actions had not been voluntary or had run counter to any important public interest.

122. Having regard to the trial records, it is to be noted that the defence had agreed in an unequivocal manner to the reading out of A.'s pre-trial statements. On the last day of the examination of evidence, lawyer S. requested the court to summon witness A. The presiding judge then informed the parties that this witness was not available, whereupon the prosecutor requested that witness A.'s pre-trial statements be read out. Lawyer U. did not object to the reading out, and lawyer S. explicitly agreed to this (see paragraph 52 above).

123. Subsequently, the presiding judge, before closing the examination of the evidence, inquired as to whether the parties were prepared to rest their cases in the absence of those witnesses who had not appeared. The applicant did not raise any objections and, in particular, she did not repeat her request to hear witness A. at the trial (see paragraphs 52-55 above).

124. However, Russian criminal procedure law had afforded the applicant an opportunity to object, even without invoking any reasons, to the reading out of these statements. Had she done so and had she insisted on A. being summoned, the trial court could have read out A.'s pre-trial statements only in the specific circumstances prescribed in Article 281 § 2 CCrP (see paragraph 71 above). If these requirements were not met,

adjourning the hearing and re-summoning of witness A. would have been a possible way to proceed.

125. The applicant, at the trial court, was represented by two professional lawyers of her own choosing. Nothing suggests that they were not aware of the consequences of their having agreed to the reading out of A.'s statements, namely that they would lose the possibility to have the witness heard before the trial court and that his statements would be taken into consideration by the court when deciding on the charges against the applicant.

126. Furthermore, nothing in the applicable legislation or in judicial practice prevented the defence from lodging subsequent motions to examine A. in the appeal proceedings. However, the applicant, again assisted by two lawyers, chose not to use that possibility either. Regard must also be had to the fact that at no point in the proceedings, either before the domestic courts or this Court, has the applicant alleged that the services of her lawyers were inadequate.

127. The above considerations are sufficient to enable the Court to conclude that the applicant, by agreeing to the reading out of witness A.'s pre-trial statements and by not insisting on her request that he be heard in court, waived her right to examine that particular witness (see *Palchik*, cited above, § 36). This waiver was attended by minimum safeguards commensurate with its importance. In this respect, the Court reiterates that the applicant was assisted by two lawyers and was explicitly asked by the presiding judge whether she was prepared to rest her case in the absence of the witness, a course of action she did not object to. It also observes that the applicant had the possibility to comment on A.'s statements, but did not advance any substantive objections to their content (see paragraph 52 above). Furthermore, the Court does not consider that the case raised any questions of public interest preventing the specific procedural guarantees from being waived (see *Hermi v. Italy* [GC], no. 18114/02, § 79, ECHR 2006-XII). No reason can be discerned to doubt that the applicant's waiver constituted a knowing and intelligent relinquishment of a right and that she could, with the assistance of her two lawyers, reasonably have foreseen the consequences of her conduct (see, *Khametshin*, cited above, § 41, and, *Palchik*, cited above, § 36; *a contrario*, *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 91-92, 2 November 2010).

128. Consequently, the Court upholds the Government's preliminary objection and dismisses the applicant's complaint about the absence of witness A. at her trial as manifestly ill-founded according to Article 35 § 3 (a) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION AS REGARDS WITNESSES B. AND K.

129. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that the overall fairness of the criminal proceedings against her had been undermined because she had not been able to call and examine at the trial the two attesting witnesses B. and K.

130. The Government contested that argument.

A. The Chamber judgment

131. The Chamber observed that under Russian law, attesting witnesses are invited by the investigator to act as neutral observers of an investigative measure. Unlike material witnesses, they are not expected to have any knowledge of the case and they do not testify as regards the circumstances of the case or an accused's guilt or innocence (see *Shumeyev and Others v. Russia* (dec.), no. 29474/07 and 3 others, § 31, 22 September 2015).

132. Having established that the trial court did not rely on any statements that B. and K. had made during the proceedings either in favour of the applicant or against her and that they could have testified only about the manner in which the search had been carried out and its results, the Chamber considered that their testimony was incapable of influencing the outcome of the applicant's trial (see paragraphs 96-97 of the Chamber judgment).

133. The Chamber found, by a majority, that there had been no violation of Article 6 §§ 1 and 3 (d) (paragraph 98 of the Chamber judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

134. The applicant maintained that even if she had not insisted on the questioning of the attesting witnesses, her lawyers had done so. They considered their testimony to have been relevant to establishing the circumstances of her personal search at the police station and to clarifying how the attesting witnesses had come to be chosen. Accordingly, in her opinion, there had been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

2. The Government

135. The Government supported the Chamber's conclusions on this point. They stated that summoning the attesting witnesses was not necessary given that their testimony had not been used by the domestic courts. These two persons were unable to give evidence about the alleged planting of

explosives in the applicant's bag since this had purportedly taken place before her search in their presence. The motion to summon them was lodged only once. The motion was denied by the domestic courts, and the defence did not insist on it any further. Referring to *Shumeyev and Others*, cited above, the Government further maintained that nothing indicated that the attesting witnesses would have been able to provide any evidence beyond that already available to the courts.

C. The Court's assessment

136. The Court observes that Russian criminal procedure contains separate provisions on material witnesses (*свидетели*) and attesting witnesses (*понятые*) and uses different terms to distinguish between them. Attesting witnesses are invited by an investigator to act as neutral observers of an investigative measure. They are not considered to be witnesses for the prosecution or the defence, since, unlike material witnesses, they have no knowledge of the case and they do not testify about the circumstances of the case or a defendant's guilt or innocence. The absence of attesting witnesses from criminal trials does not infringe the guarantees of Article 6 §§ 1 and 3 (d) of the Convention insofar as their testimony is limited to the manner of conducting investigative measures and is, in essence, redundant evidence (see *Shumeyev and Others,* cited above, § 37).

137. However, it is to be noted that the above principles were developed in a context where the testimony of the attesting witnesses had been adduced by the prosecution.

138. In the present case it was the defence who intended to rely on the testimony of the attesting witnesses B. and K. in order to support their claim that the explosives had been planted in the applicant's handbag prior to her personal search. Viewed in that light, B. and K.'s testimony would have ranged beyond the mere modalities of the search and the information subsequently entered in the police records. Therefore, B. and K. are to be considered as "witnesses on behalf" of the applicant within the meaning of Article 6 § 3 (d) of the Convention.

1. General principles established in the case-law regarding the examination of defence witnesses

139. The Court reiterates that under Article 6 of the Convention the admissibility of evidence is primarily a matter for regulation by national law and the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports* 1997-III, and *Perna*, cited above, § 29). Article 6 § 3 (d) of the Convention does not

require the attendance and examination of every witness on the accused's behalf, the essential aim of that provision, as indicated by the words "under the same conditions" is to ensure a full "equality of arms" in the matter (see *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22, and *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B).

140. In its judgment in the *Perna* case (cited above, § 29), extensively referred to by the parties and the Chamber, the Court summarised the principles applicable to the calling and examining of defence witnesses. First of all, as a general rule, it is for the domestic courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce and Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call a particular witness. Second, it is not sufficient for a defendant to complain that he or she has not been allowed to question certain witnesses; he or she must, in addition, support the 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.

141. The test as formulated in *Perna* essentially consists of two questions: firstly, whether the applicant substantiated his or her request to call a particular witness by referring to the relevance of that individual's testimony for "the establishment of the truth" and secondly, whether the domestic courts' refusal to call that witness undermined the overall fairness of the proceedings (see *Perna*, cited above, §§ 29, 32).

142. It is instructive to examine the development of the approach established in *Perna* in the subsequent case-law and the difficulties to which its practical application has given rise.

143. It has been repeatedly clarified by the Court that when a defence witness' testimony is capable of reasonably establishing an accused's alibi such a witness is considered *prima facie* relevant (see, for example, *Polyakov v. Russia*, no. 77018/01, § 34, 29 January 2009). On the contrary, in a case where the examination of a defence witness had been requested in order to establish an issue beyond the scope of a charge or the testimony had been incapable of proving the accused's innocence, the absence of the witness had not compromised the fairness of the criminal proceedings (see *Tymchenko v. Ukraine*, no. 47351/06, § 92, 13 October 2016). The Court has also stressed that a domestic court is not required to answer clearly vexatious requests to call defence witnesses (see *Dorokhov v. Russia*, no. 66802/01, § 72, 14 February 2008).

144. An applicant satisfies Article 6 § 3 (d) requirements if he or she submits a request which is sufficiently reasoned, relevant to the subject matter of the accusation and can arguably strengthen the position of the defence or lead to his or her acquittal (see *Dorokhov,* cited above, §§ 67-72, and *Polyakov*, cited above, § 34). Applicants are required to explain to the domestic courts with sufficient clarity why the examination of a particular

witness is necessary (see *Miminoshvili v. Russia*, no. 20197/03, § 122, 28 June 2011).

145. The significance of a defence witness' testimony needs to be weighed against its ability to influence the outcome of a trial. For example, calling a witness who, it is claimed, might have supported an accused's allegation that he was ill-treated in order to make him confess to an offence, might not be necessary if the impugned confession did not play a crucial role in establishing the applicant's guilt (see *Tarasov v. Ukraine*, no. 17416/03, § 105, 31 October 2013). Once the national authorities themselves recognise the relevance of a defence witness' statement, for example, by referring to his statements in a bill of indictment and repeatedly granting requests to call that witness, then if in the further course of the proceedings that witness is not summoned it might not be necessary for the defence to provide the domestic courts with further detailed reasons for his examination (see *Pello v. Estonia*, no. 11423/03, § 33, 12 April 2007).

146. When the defence requests the examination of a witness who could have arguably strengthened the position of the defence or whose testimony could even have given rise to an acquittal, the domestic authorities must provide relevant reasons for dismissing such a request (see *Topić v. Croatia*, no. 51355/10, § 42, 10 October 2013). In this context a reference by the courts to other facts of the case, which indicate why a witness could not have supplied new or important information, might be sufficient (see *Sergey Afanasyev v. Ukraine*, no. 48057/06, § 70, 15 November 2012, and *Janyr v. the Czech Republic*, no. 42937/08, §§ 81-82, 31 October 2013).

147. The Court has noted that a decision to call a defence witness at a certain point during the investigation or trial and the subsequent absence of that witness from trial is significant, but not in itself conclusive (compare *Popov v. Russia*, no. 26853/04, § 188, 13 July 2006, where the absence of the witness led to a violation of Article 6 of the Convention, and *Andrey Zakharov v. Ukraine*, no. 26581/06, §§ 61-62, 7 January 2016, where it did not). However, once the domestic courts have accepted, at least in principle, that the examination of a witness for the defence was relevant, they have an obligation to take "effective" measures to ensure the witness' presence at the hearing by way of, at the very least, issuing a summons (see *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 207, 25 September 2008) or by ordering the police to compel a witness to appear in court (see *Pello,* cited above, § 34).

148. It is only in exceptional circumstances that the Court will be led to conclude that the failure to hear a witness was incompatible with Article 6 of the Convention (see *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158). The dismissal of a request without giving reasons or the "silence" of the domestic courts in respect of a sufficiently reasoned and relevant request to call a defence witness does not necessarily lead to a finding of a violation of Article 6 (see *Dorokhov*, cited above, §§ 74-75). Since the

overall fairness of the proceedings is an overriding criterion under Article 6 an applicant has to demonstrate not only that a particular defence witness was not examined, but also that the examination of that witness was necessary *and* that the refusal to call the witness prejudiced the rights of the defence (see *Guilloury v. France*, no. 62236/00, § 55, 22 June 2006, with further reference).

149. It must be reiterated that it is not the function of this Court to deal with errors of fact or of law allegedly committed by a domestic court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010). In the determination of whether the proceedings were fair this Court does not act as a court of fourth instance deciding on whether the evidence had been obtained unlawfully in terms of domestic law, its admissibility or on the guilt of an applicant (see, *mutatis mutandis*, *Gäfgen*, cited above, § 162; *Tseber v. the Czech Republic*, no. 46203/08, § 42, 22 November 2012; and *Nikolitsas v. Greece*, no. 63117/09, § 30, 3 July 2014). These matters, in line with the principle of subsidiarity, are the province of the domestic courts. It is not appropriate for this Court to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court's only concern is to examine whether the proceedings have been conducted fairly and that in a given case they were compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case (see *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, and *Al-Khawaja and Tahery*, cited above, § 118).

2. Clarification of the general principles

150. Before the Grand Chamber the applicant urged the Court to revise the existing *Perna* standard since, in her opinion, the existing principles were "mechanical" in their application and devoid of substantive criteria, and placed an unduly high burden on the defence. She argued that the rules of international law concerning the examination of witnesses had evolved considerably beyond the *Perna* standard in that the burden on the defence to show the need to call a particular witness for questioning had decreased and the trial court's review of the reasons for the failure to appear and of the consequences of that failure for the overall fairness of the proceedings had assumed greater significance. The applicant referred *inter alia* to the practice of the ICTY Appeals Chamber and the Inter-American Court of Human Rights (see paragraph 104 above).

151. Having carefully considered the practice of other international tribunals referred to in the submissions, the Court does not discern any elements capable of supporting the applicant's claim. On the contrary, the case-law of the ICTY Appeals Chamber and the Inter-American Court of

Human Rights demonstrates that the general principles employed by these tribunals for the evaluation of the overall fairness of criminal proceedings are comparable, if not identical, to the principles developed by this Court. The Court also observes that the international tribunals mentioned above have extensively referred to this Court's case-law in formulating their own principles (see paragraphs 75 and 81 above).

152. That being said, the Court considers it useful in the present case to clarify the general principles concerning the examination of defence witnesses as formulated in its case-law under Article 6 §§ 1 and 3 (d) of the Convention.

153. The applicable *Perna* test consists of two questions: firstly, whether the applicant has substantiated his or her request to call a particular witness by referring to the relevance of that individual's testimony for "the establishment of the truth" and, secondly, whether the domestic courts' refusal to call that witness undermined the overall fairness of the proceedings (see paragraph 141 above).

154. However, a careful study of the case-law reveals that despite generally following the above approach the Court has also consistently examined the manner in which the domestic courts decided on a request to call a certain witness. The conduct and decision-making of the domestic courts have attracted independent scrutiny and were weighty factors in the Court's analysis in the great majority of pre- and post-*Perna* cases (see, among many other examples, *Bricmont*, cited above, § 89; *Destrehem v. France*, no. 56651/00, §§ 41-45, 18 May 2004; *Asci v. Austria* (dec.), no. 4483/02, 19 October 2006; *Popov*, cited above, § 188; *Polyakov*, cited above, § 35; *Tarău v. Romania*, no. 3584/02, §§ 74-76, 24 February 2009; and *Topić*, cited above, § 42). The Court's careful and deferential examination of the domestic courts' reasoning is in line with the established principles that, firstly, those courts are best placed to assess the relevance and admissibility of evidence and, secondly, that only exceptional circumstances will prompt the Court to conclude that the failure to hear a particular person as a witness was incompatible with Article 6 of the Convention.

155. Therefore the question whether the domestic courts considered the relevance of that individual's testimony and provided sufficient reasons for their decision not to examine a witness at trial must be recognised as an independent and integral component of the test under Article 6 § 3 (d) of the Convention.

156. It appears that the judicial assessment of the relevance of a witness' testimony and the reasoning of the domestic courts in their response to the defence's request to examine a witness provide the logical link between the two elements of the *Perna* test and have operated as an implicit substantive element of that test. The Court considers it desirable in the interests of

clarity and consistency of practice to make this element explicit (see, similarly, *Perez v. France* [GC], no. 47287/99, § 54-56, ECHR 2004-I).

157. This development appears to be in line with the recent case-law under Article 6 of the Convention stressing the decisive importance of the domestic courts' duty to engage in a careful scrutiny of the relevant issues if the defence advances a sufficiently reasoned claim. For example, the Court in the Grand Chamber judgment in the case of *Dvorski v. Croatia* ([GC], no. 25703/11, § 109, ECHR 2015) maintained that when the domestic authorities are presented with a legal challenge which might influence the overall fairness of the proceedings they must engage in a careful scrutiny of the issues, take steps to establish the relevant circumstances, and provide reasons adequate for their decisions. In a similar way, in *agent provocateur* cases the Court has stated that when "confronted with a plausible – and even arguable – allegation" of entrapment the courts "should have had regard to whether the results of the test purchases were admissible as evidence, in particular verifying that they were not tainted by incitement" (see *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, § 118, 24 April 2014).

158. Where a request for the examination of a witness on behalf of the accused has been made in accordance with domestic law, the Court, having regard to the above considerations, formulates the following three-pronged test:

1. Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation?

2. Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?

3. Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

159. The Court considers that the existing case-law already provides a solid basis for the application of all three steps of the test, but finds it appropriate to provide the following guidance for the examination of future cases.

(a) Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation

160. In respect of the first element the Court notes that under the *Perna* test the issue of whether an accused substantiated his or her request to call a witness on his or her behalf is decided by reference to the relevance of that individual's testimony for "the establishment of the truth". While certain post-*Perna* cases examined whether a witness' testimony was relevant for the "establishment of the truth", others relied on its ability to influence the outcome of a trial (see *Tarasov*, cited above, § 105), reasonably establish an accused's alibi (see *Polyakov*, cited above, § 34), arguably lead to an acquittal (see *Dorokhov*, cited above, § 72) or arguably strengthen the

position of the defence or even lead to the applicant's acquittal (see *Topić*, cited above, § 42). What appears to unite all of the above standards is the relevance of a witness's testimony to the subject matter of the accusation and its ability to influence the outcome of the proceedings. In the light of the evolution of its case-law under Article 6 of the Convention the Court considers it necessary to clarify the standard by bringing within its scope not only motions of the defence to call witnesses capable of influencing the outcome of a trial, but also other witnesses who can reasonably be expected to strengthen the position of the defence.

161. The relevance of testimony is thus also determinative of the assessment of whether an applicant has advanced "sufficient reasons" for his or her request to call a witness, since the strength of reasoning considered "sufficient" depends on the role of that testimony in the circumstances of any given case (see *Pello*, cited above, § 33, largely reflecting this approach). It is impossible to evaluate in the abstract whether certain reasons for the examination of a witness could be considered sufficient and relevant to the subject matter of the accusation. This assessment necessarily entails consideration of the circumstances of a given case, including the applicable provisions of the domestic law, the stage and progress of the proceedings, the lines of reasoning and strategies pursued by the parties and their procedural conduct. Admittedly, the relevance of a defence witness' testimony might be so apparent in certain cases that even scant reasoning given by the defence would be sufficient to answer the first question of the test in the affirmative (compare *Pello*, cited above, § 33).

(b) Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial

162. The second element of the test requires the domestic courts to consider the relevance of the testimony sought by the defence and obliges them to provide sufficient reasons for their decisions. These requirements are well-established in the Court's case-law (see, for example, *Popov*, cited above, § 188, and *Topić*, cited above, § 42).

163. The Court reiterates that, on the one hand, under Article 6 of the Convention the admissibility of evidence is primarily a matter for regulation by national law and the domestic courts are best placed to decide on the issue and, on the other hand, Article 6 § 3 (d) of the Convention does not require the attendance and examination of every witness on the accused's behalf, but aims to ensure equality of arms in the matter. Within this framework it is primarily for the domestic courts to scrutinise carefully the relevant issues if the defence advances a sufficiently reasoned request to examine a certain witness.

164. Any such assessment would necessarily entail consideration of the circumstances of a given case and the reasoning of the courts must be

commensurate, i.e. adequate in terms of scope and level of detail, with the reasons advanced by the defence.

165. Since the Convention does not require the attendance and examination of every witness on behalf of the accused, the courts cannot be expected to give a detailed answer to every motion of the defence but must provide adequate reasons (for a similar logic in the context of the courts' obligation to address appeal arguments, see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288, and *Boldea v. Romania*, no. 19997/02, § 30, 15 February 2007).

166. Generally the relevance of testimony and the sufficiency of the reasons advanced by the defence in the circumstances of the case will determine the scope and level of detail of the domestic courts' assessment of the need to ensure a witness' presence and examination. Accordingly, the stronger and weightier the arguments advanced by the defence, the closer must be the scrutiny and the more convincing must be the reasoning of the domestic courts if they refuse the defence's request to examine a witness.

(c) Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings

167. The Court considers that the examination of the impact which a decision refusing to examine a defence witness at the trial has on the overall fairness of the proceedings is indispensable in every case (see, in different contexts, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, §§ 250-52, 13 September 2016; *Dvorski*, cited above, § 82; and *Schatschaschwili*, cited above, § 101). Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (see *Ibrahim and Others*, cited above, § 251).

168. In the Court's opinion, the preservation of overall fairness as the final benchmark for the assessment of the proceedings ensures that the above three-pronged test does not become excessively rigid or mechanical in its application. While the conclusions under the first two steps of that test would generally be strongly indicative as to whether the proceedings were fair, it cannot be excluded that in certain, admittedly exceptional, cases considerations of fairness might warrant the opposite conclusion.

3. Application of these principles to the present case

(a) Whether the request to examine witnesses B. and K. was sufficiently reasoned and relevant to the subject matter of the accusation

169. As the trial records indicate, the applicant's lawyers requested the court to summon B. and K. in order to determine the exact circumstances of the search with a view to establishing whether the explosives had been

planted on the applicant. The applicant in turn stated that she did "not insist" on their presence, since in her opinion the explosives had been planted by police officers already before she was searched. However, she had supported the motion because her lawyers considered B. and K.'s presence to be necessary (see paragraph 52 above).

170. It is of significance that during the trial it was the prosecution which extensively questioned the police officers who had been involved in the applicant's arrest, personal search and fingerprinting (see paragraph 42 above). All of the police officers testified that the applicant had been in possession of her handbag at all times prior to the search and that she had been fingerprinted only once after the search. For its part, the defence remained generally passive during the cross-examination of these witnesses and only put two questions to them aimed at exploring further the details of the above events.

171. The Court notes that the defence gave little more than a brief indication of the relevance of B. and K.'s potential testimony. However it did not provide any particular factual or legal arguments and did not elaborate in concrete terms on how their testimony could reasonably be expected to strengthen the case for the defence. Nor did the defence elaborate on this in their appeal (see paragraph 63 above). Given that the applicant herself had stated that the explosives were planted prior to the arrival of the attesting witnesses (see paragraph 52 above), further reasons for the examination of these witnesses would have been required.

(b) Whether the domestic courts considered the relevance of any testimony on the part of B. and K. and provided sufficient reasons for their decision not to examine them at trial

172. The Court notes that the trial records do not mention the reasons given by the trial court for dismissing the defence's motion to summon the attesting witnesses (see paragraph 52 above). However, the Supreme Court, sitting as an appeal court with the competence to review both facts and points of law, reasoned that the personal appearance of B. and K. had not been necessary since the applicant herself had claimed that the explosives had been planted in her bag before she was searched. It further noted that the defence had agreed to proceed to the closing arguments and had not raised any objections nor made any additional requests for the hearing of evidence (see paragraph 67 above).

173. While the domestic courts did not dismiss the applicant's motion as unsubstantiated or unreasoned, it is clear that the significance of the attesting witnesses' possible testimony, as claimed by the defence, and from the perspective of the trial court, was only remotely relevant to the subject matter of the accusation.

174. Having regard to the general passivity of the defence during the examination of the police officers about the events surrounding the alleged

planting of explosives, and the absence of any specific legal or factual arguments as to the necessity of examining the attesting witnesses, the Court concludes that the Supreme Court provided sufficient reasons for the decision not to examine them at the trial. The reasons given were appropriate in the circumstances of the case and were commensurate, namely adequate in terms of their scope and level of detail, with the reasons advanced by the defence.

(c) Whether the domestic courts' decision not to examine B. and K. undermined the overall fairness of the proceedings

175. The Court would stress that the applicant, assisted by two professional lawyers, was able to conduct her defence effectively, confront and examine witnesses testifying against her, comment without hindrance on the incriminating evidence, adduce evidence she considered relevant and to present her account of the events to the domestic courts. Her conviction for preparing an act of terrorism and inciting others to commit such an act was based on a considerable body of evidence against her including the statements of several prosecution witnesses, the material (an extremist note and photographs) seized from the applicant's flat, forensic examination reports and the transcripts of the police surveillance videotapes.

176. Having regard to these considerations, the Court concludes that the domestic courts' decision not to examine B. and K. at trial did not undermine the overall fairness of the proceedings.

(d) Conclusion

177. Accordingly, the Court, being mindful of its role as explained above (see paragraph 149 above), finds that there has been no violation of the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention as regards witnesses B. and K.

FOR THESE REASONS, THE COURT

1. *Upholds*, by a majority, the Government's preliminary objection that the applicant waived her right to examine witness A. and declares the complaint about the absence of witness A. at the applicant's trial inadmissible;

2. *Holds*, unanimously, that there has been no violation of Article 6 §§ 1 and 3 (b) of the Convention as regards the viewing of the secret surveillance videotape;

3. *Holds*, by fifteen votes to two, that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards witnesses B. and K.

Done in English and in French, and delivered at a public hearing in the Human Rights Building on 18 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Jurisconsult	Guido Raimondi President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Bošnjak
(b) dissenting opinion of Judge Pinto de Albuquerque.

G.R.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE BOŠNJAK

1. Although I agree with the majority in their formulation of the three-pronged test applicable to the assessment of situations where the trial court refused to examine a witness on the defendant's behalf (see paragraph 158 of the present judgment), I regret that I cannot join their conclusion that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards the domestic courts' refusal to hear witnesses B. and K. (hereinafter also referred to as the attesting witnesses). In this separate opinion, I wish (a) to clarify my position in respect of the elements of the three-pronged test and (b) to provide reasons as to why the application of these elements to the present case should lead to the finding of a violation.

I. The three-pronged test

2. The right to call witnesses on the defendant's behalf is one of the core elements of the fair trial requirements enshrined by Article 6 as a whole. In its case-law, our Court has emphasised that 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 of the Convention restrictively.[1] This is even truer in respect of the rights guaranteed by Article 6 § 3, since they are expressly qualified as 'minimum rights'. In addition to these rights, the Court has read into Article 6 § 1 several other rights that are considered to be fundamental to the concept of a fair trial, notably the right to present one's case to the court and to participate effectively at the hearing,[2] equality of arms and the privilege against self-incrimination[3]. Consequently, the right under Article 6 § 3 (d) should neither be interpreted in a restrictive way nor detached from the other guarantees of a fair trial.

(a) The defence request to examine a witness

3. The three-pronged test as formulated by the Court in this case first asks whether the defence request to examine a witness was sufficiently reasoned and relevant to the subject matter of accusation. As described in paragraph 160 of the judgment, the concept of relevance covers not only defence motions to call witnesses capable of influencing the outcome of the trial, but also other witnesses who can reasonably be expected to strengthen the position of the defence. I warmly welcome this broader definition of relevance. Specifically, the defendant may benefit from certain decisions

1. See *Perez v. France* [GC], no. 47287/99, ECHR 2004-I.
2. See, for example, *Stanford v. the United Kingdom*, 23 February 1994, Series A no. 282-A.
3. See, for example, *Saunders v. the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-VI, where the Court stated that the right to silence lay at the heart of the notion of a fair procedure under Article 6.

affecting the course of the proceedings, although their potential influence upon the outcome of the trial or their relation to the content of the charge is inconclusive (for example the issue of the defendant's capacity to stand trial, the admissibility of evidence).

4. While the trial court should not be expected to hear all of the evidence requested by the defence, its decision making in respect of the defence requests should take into account, *inter alia*, the requirements of equality of arms, effective participation and the right to remain silent. In presenting a request to hear evidence, the defence should be on an equal footing with the prosecution. This requirement must also be derived from the provision of Article 6 § 3 (d) itself, stipulating that the attendance of witnesses on a defendant's behalf is to be assured in the same conditions as that of witnesses against him. The domestic legislation and domestic courts' practice should certainly not place a burden on the defence to argue the relevance of its motion and to provide reasons to a greater extent than is required of the prosecution. It should be noted that in some, even many, legal systems the prosecution is not required to substantiate its evidence motions (at least not before the commencement of the main hearing), which in turn should call for a similar approach in dealing with defence requests.

5. While it is understandable that the trial court should only hear evidence that is relevant and that the defence may be expected, subject to the caveat in the point 4 of this dissenting opinion, to provide sufficient reasons for its motions in this respect, one should not limit the concept of relevance to those items of evidence which, taken alone, could overturn the course or the outcome of the proceedings. At this point, I wish to turn the reader's attention to Rule 401 of the United States Federal Rules of Evidence, stipulating that evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. This may serve as a comparative source of inspiration in the matter.

6. In principle, when submitting a motion for evidence, the defence should specify the fact it wishes to prove (for example, an alibi, lack of a constituent element of the offence with which the defendant is charged, lack of credibility of a prosecution witness, justification or excuse for the defendant's act, inadmissibility of prosecution evidence). This fact, as in the examples above, will frequently be of apparent possible consequence for the further course or outcome of the proceedings. Admittedly, there may be situations where this potential causal link is not apparent enough (for example, the fact that witness A. knows witness B.). In such situations, the defence may be expected to make an additional effort to substantiate this link.

7. While a motion to hear evidence should also demonstrate the tendency to make a fact more or less probable than it would be without that evidence, there are several caveats that should be signalled in this respect:

(a) Firstly, it is to be repeated that – in line with the principle of equality of arms –, the defence should bear no heavier a burden in this respect than the prosecution.

(b) What needs to be demonstrated here is a simple tendency in probability and not the definite establishment of a fact. To give an example: a witness is sufficiently relevant if her[4] questioning may increase the probability that the defendant acted in self-defence, and not only when that questioning is expected to prove that the defendant acted in self-defence. When assessing whether a testimony of a specific witness may increase the likelihood of a particular outcome or at least a turn in the proceedings which would be favourable for the defence, one should bear in mind that it is often impossible to speculate in advance as to how a witness will testify and how that testimony may affect the court's assessment of a relevant fact. This is all the more so when the witness in question has neither been heard before (for example, at the investigation stage) nor has produced any written statement in respect of the content of her envisaged testimony.

(c) The defendant's right to call witnesses on his behalf is an expression of his right to present his case before the court. In deciding on a defence motion to hear a certain person as a witness, the court should assess whether the defence has already had sufficient opportunities to argue the fact in question before it[5] and/or whether there exist other equivalent, or even more convenient, options to do so.[6] In this respect, it is particularly important that the trial court does not petrify its findings on the relevant facts solely on the basis of the prosecution evidence, that is, before hearing any evidence that the defence wishes to put forward for a given purpose. It is unreasonable to expect that the mind of the trial court (be it a judge or a jury) will remain blank and without any conclusions as to the relevant facts in the course of the main hearing. Nonetheless, however strong and convincing the prosecution evidence may be, these mental conclusions should remain only preliminary and must not prevent the defence from arguing the same or other relevant facts and from being in a position to overturn the course and/or outcome of the proceedings.

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4. In this dissenting opinion, I refer to the witness in female form and consequently speak of "her" questioning or hearing, while, in referring to a defendant, I regularly use the male form and consequently speak of "his" rights. This choice is made purely for the sake of the legibility of the dissenting opinion, since a constant reference to "his or her" rights or "her or his" rights would make it less readable.

5. For example, if the defence asserts that 10 people were present who can confirm the defendant's alibi and three have already been heard, upon its motion, in this respect, it will not be necessary to hear the other seven.

6. For example, hearing a person who was allegedly present at an event will be more convenient in order to establish the course of events than hearing a person who is allegedly familiar only with some of its remote consequences.

(d) In presenting its case before the court, the defence must be granted a considerable amount of autonomy in determining its tactics[7], which includes the choice of facts that it wishes to argue and the manner in which it wishes to argue them. While the intention of the defence in some situations is clear and straightforward, this is not necessarily always the case. In the latter situations, it is to be emphasised that the defence should not be required to disclose the full background of its motion.[8] Furthermore, any requirement that the defence motion to hear evidence be substantiated must be balanced against the right to remain silent. If the defendant needs to explain thoroughly why the evidence in question could increase the likelihood of his acquittal, this will in certain situations entail a waiver of the above-mentioned right. In particular, this can occur at earlier stages of the proceedings, before the defendant himself is heard. Therefore, any excessive requirement in this respect should be avoided.

The judgment in the present case does not address these specific issues pertaining to criminal procedure. This is understandable, at least to a certain extent, as the rules on evidence are primarily a matter of domestic law. However, as the collection and hearing of evidence often touch on the human rights and fundamental freedoms guaranteed by the Convention, I have considered it beneficial both for the future development of the Court's case-law and for legal practitioners applying the principles of this judgment in the domestic legal systems to turn their attention to these considerations. Be that as it may, they illustrate that, overall, the first element of the three-pronged test should be applied in a reasonably liberal way.[9]

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7. In respect of arguments for the autonomy of the defence, I refer to my dissenting opinion in *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.

8. Any expectation that the defence motion to hear witnesses on the defendant's behalf be thoroughly substantiated is closely linked to the issue of defence disclosure, namely the duty of the defence to reveal background and any other information it might be in possession of in respect of the evidence to be heard in court. Any such duty is highly controversial and considered to be problematic, both in the theory and practice of international criminal tribunals, from the point of view of basic principles of criminal law, notably the right to remain silent and the presumption of innocence. See, for example, A. L.-T. Choo, '"*Give Us What You Have"—Information, Compulsion and the Privilege against Self-incrimination as a Human Right*' in P. Roberts and J. Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012); also Masha Fedorova, *Disclosure of Information as an Instrument Ensuring Equality of Arms in International Criminal Proceedings*, in: Mayeul Hiéramente, Patricia Schneider (ed.) *The Defense in International Criminal Trials: Observations on the Role of the Defense at the ICTY, ICTR and ICC* (1st edition 2016). For international jurisprudence, see, for example, the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*, (decision on Prosecution Motion for Production of Defence Witness Statements, IT-94-I-T, 27 November 1996).

9. Compare the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Krstić* (decision on application of subpoenas, Case no. IT-98-33-A, 1 July 2003, § 11).

(b) The assessment and reasoning of the domestic courts

8. The second element of the three-pronged test requires the domestic courts to assess the relevance of the testimony sought by the defence and to provide sufficient reasons for their decisions. Not much is to be added to the majority's clarification of this element in §§ 162-66 of the present judgment. Nevertheless, I would wish to emphasise one particular issue: since the right under Article 6 § 3 (d) of the Convention is one of the minimum guarantees of the fair trial, the domestic courts' reasoning when rejecting the defence's motion should be commensurate to its importance.

(c) Overall fairness of the proceedings

9. The third element of the three-pronged test assesses the overall fairness of the proceedings, this being the overarching criterion in the recent Court's case-law on complaints under Article 6 § 3.[10] While this is a logical and welcome development, given that the key principle governing the interpretation of Article 6 is the notion of fairness,[11] the Court's case-law remains somehow unsettled on whether fairness is to be considered only in procedural or also in substantive terms. To put it otherwise: is it the fairness of the proceedings or the fairness of the outcome that matters – or possibly both?

10. The assessment of overall fairness was developed in respect of situations where it was reasonable to overlook minor infringements provided that the proceedings as a whole were fair.[12] In such an assessment, the Court must examine the extent to which a reduction in the guarantees provided in one stage may have been offset by other guarantees.[13] In its case-law, the Court has developed several constituent elements of the notion of the fairness of proceedings, namely: (a) equality of arms;[14] (b) the adversarial nature of the proceedings;[15] (c) effective participation in the

10. See, among other authorities, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016; *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015; *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017.

11. See, for example, Kamasinski v. Austria, 19 December 1989, Series A no. 168; *Hadjianastassiou v. Greece*, 16 December 1992, Series A no. 252; and *Vacher v. France*, 17 December 1996, Reports 1996-VI.

12. See, for example, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, Series A no. 146.

13. See, for example, *Pullicino v. Malta*, (dec.), no. 45441/99, ECHR 2000-II.

14. See, for example, *Bulut v. Austria*, 22 February 1996, Reports 1996-II; *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; and also Omkar Sidhu, The Concept of *Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights*, Intersentia, 2017.

15. This principle is closely connected to the principle of equality of arms. It entails that each party must have in principle the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view of influencing a court's decision – see *Meftah and Others v. France* [GC], nos. 32911/96 and 2 others, ECHR 2002-VII.

proceedings;[16] (d) the requirement that a decision be reasoned;[17] (e) the principle of immediacy;[18] (f) the appearance of a fair and proper administration of justice;[19] (g) the principle of legal certainty[20].These elements complement the non-exhaustive list of requirements that are expressly stipulated by the provisions of Article 6 of the Convention. I have included and discussed some of them above, in the framework of the first two elements of the three-pronged test.

11. Certain judgments, which are admittedly of a landmark nature and which, *inter alia*, examined alleged failures related to the collection of evidence, conceded important weight to the probative value of such evidence. This would conflict with the "procedural approach" to the fairness assessment, rendering the examination closer to a substantive one. For example, in *Ibrahim and Others*[21], when examining the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the Court stated that consideration should be given, *inter alia*, to the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of the compulsion, and also of the use to which the evidence was put, in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case. Nonetheless, these substantive elements of the overall fairness assessment remained in the shadow of a large number of solely procedural elements. This cannot be said for examination of complaints concerning the use of evidence obtained in violation of Convention rights. In *Bykov*[22], the Court emphasized that it was necessary to examine whether there existed any doubt regarding the quality of the evidence, including whether the circumstances in which it had been obtained cast any doubt on its reliability or its accuracy, and whether there existed supporting evidence for the defendant's conviction. This approach was criticised before and after the above-mentioned judgment.[23]

12. The fact remains that the Court's case-law on this point is inconsistent and that the Grand Chamber has not seized the opportunity in the present judgment to clarify its position in this respect. While it is

16. See, for example, *Stanford v. the United Kingdom*, cited above.
17. See, for example, *Ruiz Torija v. Spain*, 9 December 1994, Series A no. 303-A.
18. See, for example, *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, 7 March 2017.
19. See, for example, *Borgers v. Belgium*, 30 October 1991, Series A no. 214 B.
20. See, for example, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20 October 2011
21. *Ibrahim and Others v. the United Kingdom*, cited above.
22. *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009.
23. For an overview, see my joint concurring opinion with Judge Pinto de Albuquerque in *Dragoş Ioan Rusu v. Romania*, no. 22767/08, 31 October 2017.

perfectly understandable that the Court cannot side with any particular legal theory of justice and fairness, I would wish to argue that the approach should remain procedural and should, as far as possible, avoid any assessment of the fairness of the outcome. The reasons for this are manifold. Firstly, the overarching element in adjudication of complaints under Article 6 § 3 of the Convention is the (overall) fairness of the proceedings – and not of the outcome. Secondly, this is a logical consequence of the fact that Article 6 guarantees fundamental procedural rights. On the other hand, there is no right under the Convention or its Protocols guaranteeing any particular outcome in criminal proceedings. Thirdly, as the Court constantly emphasises, it is not a tribunal of fourth instance and may not, as a matter of principle, adjudicate on the matters of errors of fact.[24] Consequently, it cannot and may not weigh up whether the evidence produced against the defendant in a given set of domestic criminal proceedings was sufficient, reliable or accurate, and whether his conviction was fair. What it can do instead is to verify whether the criminal proceedings as such were fair. The constituent elements of the notion of fairness as described in point 10 of this dissenting opinion may serve as a useful source of inspiration.

II. Application of the three-pronged test to the present case

(a) The background to the applicant's motion

13. Turning to the circumstances of the present case, we see that, at least from her written motion submitted during the investigation on 12 October 2004, the applicant asserted that the plastic explosives found in her bag during the search at the police station had been planted there by the police. At the trial, she pleaded not guilty to the charges against her and insisted that the explosives had been planted. She has described the course of events at the police station in detail. Her account differed considerably from that offered by the police officers, particularly on the point whether, before the search commenced, she left her bag and jacket unattended in a different room.

14. On 13 January 2005, four days before completion of the proceedings before the court of first instance, one of the applicant's lawyers, supported by the other, submitted a request to have summoned the attesting witnesses who were present during the search of the applicant's bag, in order to determine whether the plastic explosives were planted. The applicant herself, apparently not at ease with taking a back seat in conducting her defence, decided to stress that the explosives were planted by the police officers prior to the search and that she did not insist on calling the attesting witnesses. Nevertheless, she agreed to their being questioned if her lawyers insisted.

24. See, for example, *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010.

(b) The first element: the applicant's motion

15. When submitting this procedural situation to the first element of the three-pronged test (namely whether the request to examine the attesting witnesses was sufficiently reasoned and relevant to the subject matter of the accusation), one observes *ab initio* that her allegation that the explosives had been planted constituted the crux of her defence in the criminal proceedings against her. If she succeeded in casting doubt upon the manner in which the search was conducted, this could arguably influence admissibility of this decisive evidence and undermine the credibility of the charges against her. The motion by the applicant's lawyers clearly specified the fact they wished to establish (namely, the planting of the explosives), which, in turn, could be of consequence for the further course or outcome of the case.

16. The applicant's version of events cannot be dismissed as prima facie incredible. She was stopped in circumstances and for reasons that remain largely unclear and controversial. The police officers' testimonies on this point varied considerably and were hardly compatible with the criteria on "stop and search" situations governed by the rule of law. According to the police officers, the applicant was stopped "because she walked idly" (police officer P.) or "because she has been walking quickly" (police officer S.). Some police officers stated that she was stopped "because it was unclear where she was going to go", "because she was a person of Caucasian ethnicity" and "because she was wearing black clothing". In my opinion, the only reason that is possibly acceptable would be that she "resembled a girl from a wanted persons notice", as stated by only one of the five police officers who took part in her arrest and search. However, it was subsequently established by the police themselves that the applicant was not the wanted person. Although the applicant does not complain before the Court about the arrest, these circumstances cast some doubt on whether the police acted in good faith in this case. This doubt is not dispelled by the police version, which in itself does not seem particularly credible. In their version, they incidentally stopped a woman in the street of Moscow for no compelling reason, brought her to the police station, and performed a search of her bag (again for no compelling reason pertaining to the situation in hand), where they found two packages of explosives. This course of events is either a fantastic coincidence or an indication that serious police misconduct is to be suspected.

17. The contrast between the applicant's account and that given by the police officers should, in my opinion, be coupled with some parallel facts. It is undisputed that, after the bag search, the applicant was not examined for residue from explosives, although this is a routine test. Likewise, the foil containing the explosives was never examined for fingerprints or DNA, whether that of the applicant or any other person. No explanation was given for these omissions, though one could reasonably expect a good-faith

investigation to take these steps in order to elucidate the exact role of the applicant (if any) and to search for possible accomplices, as it is highly unlikely that a 21-year-old woman would organise a terrorist attack on her own. Instead, the police examined her jacket and bag for residues, which in the applicant's version were left unattended for some time. While the police admittedly deny that the applicant was taken to a different room to be photographed and fingerprinted prior to the search of her bag, claiming that the applicant had her jacket and bag with her at all times, the applicant's account on this point is not necessarily prima facie incredible: since, in the police version, she was taken to the station for an identity check, fingerprinting and photographing would have been the most logical first step. Police photographing is usually done without the suspect wearing a jacket or carrying a bag.

18. In describing these circumstances, my intention is not to demonstrate that the plastic explosives were indeed planted by the police (this would in any event not be compatible with our Court's role), but to show that the fact asserted by the applicant's defence was relevant and had some credible ground for further investigation. In considering whether questioning of the attesting witnesses could have made the assertion of planted evidence more probable, one can observe that the defence failed to elaborate on this particular point, not only at the main hearing, but also in their appeal, in the supervisory review complaint and also in the proceedings before the Court. Furthermore, the applicant herself cast doubt on the relevance of the motion with her intervention. This is admittedly the weak point in the applicant's case before our Court. However, one must bear in mind the particularities of her procedural situation.[25] The defence did not have any alternative evidence at hand to prove the applicant's assertion. Whilst it is true that the domestic court heard the police officers involved in the arrest and search, and that the prosecution questioned them at the main hearing regarding the relevant circumstances, they were not merely witnesses against the defendant within the meaning of Article 6 § 3 (d) of the Convention, but also, prima facie, hostile towards the defence on this particular point. Assuming the hypothesis that the applicant was correct in her allegations, what was the likelihood that the police officers would admit to having planted the evidence? It is unreasonable to verify assertions of planted evidence only by hearing those who are possibly responsible for such misconduct. No court would ever acquit a defendant on the sole basis that he denied his guilt. If equal treatment is the key maxim in consideration of defence motions, these cannot be dismissed simply because the police deny the defence assertions. Thus, I find it surprising that the majority highlight the questioning of the police officers as a significant element in rejecting the

25. On the issue of examination of assertions of police misconduct, see, for example, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 Am.J.Crim.L. 455 (1999), http://digitalcommons.pace.edu/lawfaculty/533/.

relevance of the defence motion to have the attesting witnesses heard (see paragraph 170 of the judgment).

19. In examining whether the defence motion was sufficiently reasoned, one has to take into account that the attesting witnesses were neither questioned during the investigation nor did they give any written statement that the defence could submit or rely upon. In these circumstances, it was impossible to speculate on the exact content of their potential testimony. However, it was reasonable to assume that they were familiar with the circumstances of the search of the applicant's bag and with the course of events that immediately preceded the search. Whether any of these circumstances would increase the probability of the applicant's version was a matter for the assessment of facts, which in turn could be performed only after their testimony had been heard.

(c) The second element: the assessment and reasoning of the domestic courts

20. The domestic first-instance court dismissed the motion to hear the attesting witnesses. Under the second element of the three-pronged test, it was obliged to provide sufficient reasons for that decision. However, it provided none, either at the hearing or in the subsequent judgment. While it is true that the Supreme Court provided some reasoning in this respect, I unfortunately cannot agree with the majority that those reasons were appropriate and adequate.

21. As is apparent from paragraph 67 of the present judgment, the Supreme Court considered that the personal appearance of the attesting witnesses had not been necessary, since (a) the applicant herself had claimed that the explosives had been planted in her bag before their arrival; (b) the defence had not raised any objections after the refusal to hear the attesting witnesses, nor; (c) made any additional requests for the hearing of evidence. Although the applicant's reaction to her lawyers' motion was indeed far from helpful to her cause, the Supreme Court's account of her statement does not correspond to its actual content. In particular, the applicant did not assert that the explosives had been planted prior to the arrival of the attesting witnesses, but prior to the beginning of the search. This difference is important. Furthermore, for the reasons outlined in points 18 and 19 above, there existed sufficient grounds to consider the motion relevant, in spite of the applicant's intervention.

22. Whereas the first reason advanced by the Supreme Court does not reflect the actual course of events in the courtroom, the other two are hardly any more convincing. While parties to judicial proceedings can be expected to object to the motions of the opposite party or to a measure envisaged by the court, it is hard to imagine an objection against a procedural decision of the court in the course of the proceedings themselves: such decisions are generally "objected to" in legal remedies against such decisions. The Court has not been familiarised with any such remedy in this particular situation.

Finally, in view of the fact that no alternative evidence was available to the applicant's defence to substantiate the allegation of planted evidence, the Supreme Court's expectation that the defence should have made additional requests to hear evidence bears no persuasive power. In sum, I believe that the reasoning provided by the Supreme Court was inadequate and that, in consequence, the domestic courts' decision making in the present case does not pass the second element of the three-pronged test.

(d) The third element: The overall fairness of the proceedings

23. In my opinion, the majority's assessment of the overall fairness is rather lapidary. Furthermore, it focuses its attention to an important extent on the strength and quantity of the evidence on which the applicant's conviction was based. For the reasons I have outlined in point 12 of this separate opinion, I believe that such an approach should have been avoided. As is rightly highlighted in paragraph 149 of the present judgment, it is not appropriate for the Court to rule on whether the available evidence was sufficient for an applicant's conviction.

24. In their assessment of fairness, the majority also highlight several procedural elements which, in their view, render the proceedings as a whole fair. While I agree with some of their arguments in this respect, for all the reasons above, I retain my belief that in respect of the crucial point, namely whether the decisive evidence in this case was planted, the applicant was prevented from presenting all relevant arguments and evidence to the domestic court and that, for their part, the domestic courts examined this particular assertion in an inadequate manner. Taking into account the importance of the applicant's allegations, coupled with the circumstances of her arrest and search, this deficiency could not be remedied or counterbalanced by the correct conduct of the proceedings in respect of other issues. Therefore, I believe that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. *Murtazaliyeva* was a golden occasion for the principle of immediacy to regain ground in the Court's case-law. Unfortunately the contrary has occurred. I reject the Government's preliminary objection as to the applicant's complaint about the absence of witness A. After discarding the preliminary objection, this opinion will focus on the initial meaning of the so-called two-tier *Perna* test[1] and on the revisited three-tier *Murtazaliyeva* version, by analysing each of these tiers separately. A logical, philosophical and legal critique of this test and, most importantly, of its "overall fairness" assessment lays the foundation for my findings in the present case with regard to the absent defence witnesses. On this basis, I conclude that there has been a violation of Article 6 § 3 (d) of the Convention with regard to the absent witnesses A., B. and K.

The Government's preliminary objection

2. The Government argue that the defence waived their right to have witness A. questioned at the trial. It is true that the applicant and one of her lawyers stated that they had no objection to the reading out of A.'s testimony, and the second defence lawyer agreed to this. However, they did so after having been informed by the presiding judge that A. was on a work-related mission and could not therefore appear in court. No source for this information, provided to the trial court, has been adduced before this Court. On the day that the trial court decided not to hear witness A. in person, the court adjourned the hearing to allow the parties to prepare their closing submissions. Consequently, the need to ensure the expeditiousness of the proceedings did not serve as a justification for refusing to allow witness A. to be examined at the trial. In these circumstances and in the absence of any direct reference to a renouncement of the right to examine witness A., the manner in which the defence expressed their position could not be construed as an unequivocal waiver of the right under Article 6 § 3 (d) of the Convention.[2]

3. Indeed, the applicant's arguments on appeal that the trial judge had not decided on the motion to examine A. and had provided no evidence of A.'s absence on a work-related mission clearly indicate that the defence had not in fact waived their right to examine A.[3] Nor did the Supreme Court, sitting as an appeal court, explicitly consider the right to have been waived.

1. *Perna v. Italy* [GC], no. 48898/99, ECHR 2003-V.
2. Compare *Makeyev v. Russia*, no. 13769/04, § 37, 5 February 2009, and *Khametshin v. Russia*, no. 18487/03, § 41, 4 March 2010.
3. See paragraph 63 of the judgment.

The Supreme Court referred in its judgment not only to the defence's consent to the reading out of A.'s statements, but also to the reasons for his absence from the trial.[4]

4. Furthermore, the majority do not consider that the case raised any questions of public interest which would have prevented the relevant procedural guarantees from being waived.[5] I observe that one of the major points of contention between the parties is whether the applicant had advanced an entrapment plea in the domestic proceedings. This point weighs heavily in the Court's examination of the applicant's complaint concerning the failure to summon and hear witness A. In fact, the applicant's lawyer U. clearly stated during the exchange of closing arguments that "this whole criminal case is a set-up against Murtazaliyeva by law-enforcement agents".[6] This statement must be construed as a properly raised entrapment plea when viewed against the background of all the available case material, which demonstrates that the applicant's strategy and line of defence before the domestic courts was essentially to protest her innocence and to insist in particular on her claim that the police had planted the plastic explosives in her handbag. In this respect it should be emphasised that, contrary to the Government's argument,[7] the denial of guilt does not logically preclude reliance on police incitement. Furthermore, according to the *nemo tenetur* principle, a defendant must not be forced to choose between a defence of being innocent and an entrapment defence. An accused may simultaneously argue that he or she did not commit the imputed offence (because the offence was never consummated or because it was committed by another person) and that he or she was entrapped into committing it.[8]

5. Since a plea of entrapment was made and there was certain prima facie evidence of entrapment, the judicial authorities should have examined the related facts and take the necessary steps to uncover the truth, in order to determine whether there was any incitement. Taking into account the clear indicia of police entrapment and the pivotal role of witness A. in the police strategy, the trial court was under an obligation to question him. In view of the above, I cannot follow the majority in finding the Government's objection founded.

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4. See paragraph 67 of the judgment and compare *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 66, 10 November 2005.
5. *Hermi v. Italy* [GC], no. 18114/02, § 79, ECHR 2006-XII.
6. Paragraph 57 of the judgment.
7. Paragraph 108 of the judgment.
8. Contra, *Bagaryan and Others v. Russia (dec.)*, no. 3343/06, § 5, 12 November 2013, and *Koromchakova v. Russia*, no. 19185/05, 13 December 2016, §§ 17-20.

Double standards for prosecution and defence witnesses

6. The Grand Chamber majority essentially rely on an allegedly two-tiered test derived from *Perna*[9], requiring, firstly, a substantiated request by the defendant indicating the relevance of the testimony for "the establishment of the truth" and, secondly, evidence that the refusal to call the given witness undermined the overall fairness of the proceedings. As a result, the legal standards developed by the Court in *Al-Khawaja and Tahery [GC]*[10] and *Schatschaschwili [GC]*[11] for the non-examination of prosecution witnesses during a trial are not applicable to the case at hand.[12]

7. Although Article 6 § 3 (d) sets out the right of everyone charged with a criminal offence to examine "witnesses on his behalf under the same conditions as witnesses against him", the classification of an individual as a witness for the defence or the prosecution leads to a different set of legal standards in the practice of the Court. Such double standards are very problematic in view of the clear stipulation in the Convention that both kinds of witnesses are to be examined "under the same conditions".[13]

8. In addition, it is highly questionable whether these double standards can be maintained in view of the multiple sets of circumstances in which a witness may testify or be asked to testify during trial. First, the classification of a witness as being presented "on behalf of" or "against" a defendant is not a straightforward exercise when a witness put forward by the prosecution provides testimony favourable to the defendant and, vice versa, when a witness requested by the defendant provides testimony against him or her. Second, the attendance of a witness may be requested by both the defendant and the prosecutor, in which case neither the *Al-Khawaja and*

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9. *Perna v. Italy*, cited above.
10. *Al-Khawaja and Tahery v. the United Kingdom [GC]*, nos. 26766/05 and 22228/06, ECHR 2011.
11. *Schatschaschwili v. Germany [GC]* no. 9154/10, ECHR 2015.
12. The Court is not always consistent with this division. In *Pello v. Estonia* (no. 11423/03, §§ 26 and 30, 12 April 2007), the *Perna* criteria were applied to prosecution witnesses.
13. They are also not in line with international criminal law. See *Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case (Appeals Chamber), 20 July 2005, paragraphs 7-8; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15*bis* (D) (Appeals Chamber), 20 April 2007, paragraph 27; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary His Witness List (Appeals Chamber), 21 August 2007, paragraph 26; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (Appeals Chamber), 30 January 2009, paragraph 29; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (Trial Chamber II), 26 August 2011, paragraph 56.

Tahery and *Schatschaschwili* criteria, nor the *Perna* criteria, would strictly speaking apply. Third, a witness called upon *ex officio* by the court itself would not fit into this dual classification. Fourth, a witness who has been questioned by the prosecution during the pre-trial stage and whose testimony at the trial is requested by the defence may refuse or may be unable to testify at trial.[14] Fifth, a forensic witness is normally an independent witness, called upon to produce testimony that is neither "on behalf of" nor against the defendant.

9. In view of this variety of circumstances, it has been the Court's case-law that the term "witness" has an autonomous meaning in the Convention system, regardless of classifications under national law,[15] and that a witness is considered to be a prosecution witness if his or her depositions serve "to a material degree" as the basis for a conviction.[16] In any individual case, it is the question whether it was the prosecution or the defence which sought the attendance and examination of a certain witness which provides a starting point for the Court's assessment. However, this is not decisive for the Court. The Court's assessment will depend on the high probative value ("to a material degree") of a witness's statements in the establishment of the accused's guilt by the domestic courts. This criterion for the qualification of witnesses, which takes into account the findings on the merits of the case, raises significant problems for domestic courts, in view of its *ex post facto* and imprecise nature. For these courts, the test to assess whether a witness should be summoned to trial and heard and cross-examined must be a precise, *ex ante* test, grounded in the chronological point at which the relevant court is called to assess the request that it take such evidence.[17]

10. The circumstances of the present case are telling in this regard. I note that, despite A. having initially been listed in the bill of indictment as one of thirteen prosecution witnesses as well as a defence witness, he was not called by the prosecution; nonetheless, his testimony served as the basis for the applicant's conviction, along with other evidence. A.'s pre-trial statements as read out at the trial and referred to in the domestic courts' judgments contained factual assertions, but the courts did not cross-reference A.'s statements with those of other witnesses. In spite of this, A.

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14. This is the situation of *Cardot v. France*, no. 11069/84, Series A no. 200.

15. *Kostovski v. the Netherlands*, 20 November 1989, § 40, Series A no. 166, and *Damir Sibgatullin v. Russia*, no. 1413/05, § 45, 24 April 2012.

16. *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001 II, and *Kaste and Mathisen v. Norway*, nos. 18885/04 and 21166/04, § 53, ECHR 2006 XIII. The applicant ignored this case-law while calling for a "more flexible approach having regard to the substance of a given witness's depositions …" (the applicant's observations of 20 November 2017, paragraph 24).

17. This is also the standard of international criminal courts. See *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (Trial Chamber II), 26 August 2011, paragraph 47.

was treated as a defence witness by the domestic courts, since it was the defence which had requested that he be questioned, at both the pre-trial and trial stages of the proceedings.

11. In addition, witnesses B. and K. were adduced by the prosecution, but it was the defence which wished to rely on their testimony.[18]

12. To sum up this introductory point, the Court's double standards for the treatment of witnesses on behalf of and against a defendant, and the *ex post facto* and imprecise concept of prosecution witness on which they are based, contradict the letter and the spirit of the Convention, create unnecessary practical difficulties for the domestic courts and cause unneeded uncertainty in a field of law where clarity and precision are of the utmost importance.

The original *Perna* test

13. The *Perna* approach was based on a clear-cut distinction between defence and prosecution witnesses, made on the sole basis of which party had requested that they be examined before the trial court and irrespective of the substance of the testimony to be given by each individual witness.

14. The original *Perna* test established a strict substantive criterion for assessing a defence request to produce testimonial evidence, based on the obligation to "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".[19] Contrary to what the majority claim,[20] the *Perna* judgment did not require an overriding assessment of "overall fairness", since fairness was only assessed from the point of view of Article 6 § 1 (e) of the Convention and on account of the way the evidence was taken. It is important to recall the relevant passage of the *Perna* judgment:

> "the Court considers that the decisions in which the national authorities refused the applicant's requests are not open to criticism under Article 6, as he had not established that his requests to produce documentary evidence and for evidence to be taken from the complainant and witnesses would have been helpful in proving that the specific conduct imputed to Mr Caselli had actually occurred. From that point of view, it cannot therefore be considered that the defamation proceedings brought by Mr Caselli against the applicant were unfair on account of the way the evidence was taken."[21]

15. Hence, the overall fairness of the proceedings is not, in the light of both the letter and the spirit of the *Perna* judgment, an overriding criterion under which the applicant has to demonstrate that the refusal to call the witness prejudiced the overall fairness of the proceedings.[22] Nevertheless,

18. Paragraph 137-138 of the judgment.
19. *Perna*, cited above, § 29.
20. Paragraph 141 of the judgment.
21. *Perna*, cited above, § 32.

the *Perna* test was too strict and therefore unfair for the defence. It needed to be revisited from a human-rights-friendly perspective, namely a revisiting that would bring it closer to the Convention principles on evidence-taking in criminal procedure, but this has not been done by the majority, as will be demonstrated below.

The first *Murtazaliyeva* criterion

16. The original *Perna* test was formulated in strict terms: the criterion established for the admission of defence witnesses was that of evidence "necessary" for the establishment of the truth. The Court's practice loosened such strictness, turning to the more liberal criterion of "prima facie relevance" of the evidence, with multiple formulations being given over the years.[23] Between the two diverging criteria, the majority have now chosen that of witnesses "capable of influencing the outcome of a trial" or "who can reasonably be expected to strengthen the position of the defence".[24] At first sight, it seems that the majority have chosen the more relaxed, liberal, criterion. This is also indicated by the majority's further position to the effect that scant reasoning by the defence may be sufficient to answer the first question of the test in the affirmative.[25] This choice would also be in line with the case-law of the ICTY Appeals Chamber, according to which an applicant must demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.[26]

17. The apparently liberal majority perspective is not limited to the degree of relevance or necessity of the evidence, but also to its scope, which includes evidence that is both pertinent to the outcome of the trial and to the "position of the defence" in general. This has an obvious consequence. Any defence-witness testimony related to the lawfulness, reliability and credibility of the remaining evidence, as well as to the lawfulness of the public authorities' conduct in the case, including that of the judges, prosecutors and law-enforcement authorities who acted or should have acted in the defendant's case, may strengthen the position of the defence, even if it does not ultimately influence the outcome of the trial. For example, it is mandatory to call a witness who, it is claimed, might have supported an

22. Contrast *Guilloury v. France*, no. 62236/00, § 55, 22 June 2006, and *Erich Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001.
23. Paragraph 143 of the judgment. However, this has not prevented the Court from using, from time to time, the old formula of "necessary" (see *Miminoshvili v. Russia*, no. 20197/03, § 122, 28 June 2011).
24. Paragraph 160 of the judgment.
25. Paragraph 161 of the judgment.
26. Paragraphs 73 and 74 of the judgment.

accused's allegation that he was ill-treated in order to make him confess to an offence, even if the impugned confession did not play a crucial role in establishing the applicant's guilt.[27] This is for two reasons: first, because the evidence of torture or ill-treatment may impact on the position of the defence, since an issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive or crucial in securing the conviction;[28] and second, because the applicable criterion for the assessment of the request for calling defence witnesses, as well as prosecution witnesses, should be an *ex ante* criterion, independent of the findings of the trial court.

18. In effect, the majority apply the first criterion in a very illiberal way, since they criticise the defence's motion for the attendance of witnesses B. and K. on the basis that "it did not contain any particular factual or legal arguments and did not elaborate in concrete terms on how their testimony could reasonably be expected to strengthen the case for the defence".[29] I will return to this point later.

The second *Murtazaliyeva* criterion

19. The issue of whether the domestic courts considered the relevance of a given individual's testimony and provided sufficient reasons for their decision not to examine a witness at trial is not new.[30] In fact, it was already a constituent part of the original *Perna* test, since the Court in that case did assess the motivation of the domestic courts and concluded that "the decisions in which the national authorities refused the applicant's requests are not open to criticism under Article 6".[31] In *Perna*, the reason for rejection of the witness was the trial court's legal finding that, even if proven to be true, the facts were irrelevant from a legal perspective.

20. In the present judgment, the majority add that the reasoning of the domestic courts must be "commensurate", i.e. adequate in terms of scope and level of detail, with the reasons advanced by the defence.[32] This deceptively simple idea does not suffice in a criminal procedure subject to the principle of legality and in a State governed by the rule of law.

21. As a matter of principle, the trial court cannot refuse a defence witness without good or sufficient reason,[33] which is also the minimum

27. Thus, I find that the passage in § 105 of *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, is problematic.
28. See *Jalloh v. Germany [GC]*, no. 54810/00, §§ 99 and 108, 11 July 2006.
29. Paragraph 171 of the judgment. In paragraph 174 of the judgment the majority refer to "specific legal or factual arguments". It is not clear if the words "particular" in paragraph 171 and "specific" in paragraph 174 are intended to have the same meaning.
30. *Topić v. Croatia*, no. 51355/10, § 42, 10 October 2013.
31. *Perna*, cited above, § 32.
32. Paragraph 164 of the judgment.
33. *Vidal v. Belgium*, 22 April 1992, §§ 34 and 35, Series A no. 235-B.

criterion for refusal to call or to cross-examine prosecution witnesses, as set out in *Al-Khawaja and Tahery* and *Schatschaschwili*.[34] Defence witnesses cannot be treated differently from prosecution witnesses, as established by the paramount principle of equality of arms.[35] A good or sufficient reason must exist for the non-attendance of defence witness.[36]

22. Hence, the dismissal of a request without giving reasons or silence by the domestic courts in respect of a sufficiently reasoned and relevant request to call a defence witness necessarily leads to a finding of a violation of Article 6.[37] The reasons should relate to the specific circumstances of each witness's situation.[38] The fact that a defence witness is incapable of proving the accused's innocence is not a good reason to refuse his or her examination[39], for the simple reason that the defendant does not have to prove his or her innocence. It suffices that the defendant argues that the witness is in a position to raise doubts about the facts of the accusation.[40] When requesting the attendance of a defence witness, the defence may have

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34. *Al-Khawaja and Tahery*, cited above, §§ 120-125, and *Schatschaschwili*, cited above, §§ 119-122.

35. On this principle in the light of the Convention, see Omkar Sidhu, *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights*, Cambridge, Intersentia, 2017; Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights*, Oxford, Hart, 2007; Trechsel, *Human Rights in Criminal Procedure*, Oxford, Oxford University Press, 2005; and Wasek-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, Leuven University Press, 2000.

36. This is also the case-law of the international criminal courts. See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary His Witness List (Appeals Chamber), 21 August 2007, paragraphs 18-19; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (Appeals Chamber), 30 January 2009, paragraphs 19-21.

37. *Vidal*, cited above, §§ 34 and 35, *Popov v. Russia*, no. 26853/04, § 188, 13 July 2006, and *Pello*, cited above, § 35. Thus, the passage in §§ 74-75 of *Dorokhov v. Russia*, no. 66802/01, 14 February 2008, is unacceptable. It is incomprehensible that the Court considered "regrettable" the failure of the trial court to duly examine the defence request to call two witnesses who were "clearly relevant" and yet found no violation. Wrongly, the Court examined the probative value of the unexamined witnesses' statements against the body of evidence against the applicant, and concluded that the absent witnesses' statements would not have led to the applicant's acquittal.

38. *Nechto v. Russia*, no. 24893/05, § 127, 24 January 2012.

39. Hence, the passage in § 92 of *Tymchenko v. Ukraine*, no. 47351/06, 13 October 2016, is wrong.

40. *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber Decision of 3 February 2010" rendered on 26 March 2010 (Trial Chamber III), 7 May 2010, paragraph 32.

other interests than acquittal, such as obtaining a conviction for a lighter offence than that with which the defendant was initially charged, establishing mitigating circumstances, casting doubt on the credibility of the prosecution case, etc.

23. Most importantly, the trial court must not only give good or sufficient reasons for its decision to refuse a defence witness, but it is not allowed to anticipate the result of the examination of the evidence under question (*Verbot der Beweisantizipation*) – except in favour of the defendant. When deciding on whether or not to obtain the evidence requested by the defence, the court has to presume that the examination of this evidence will turn out in the defendant's favour. From this perspective, the court may decide not to call the defence witness if (i) it assumes that the fact that would be proven by such evidence is already proven in favour of the defendant or (ii) it can show that the fact that would be proven by such evidence is insignificant[41] for the determination of the case.

24. In the latter case the trial court is doubly limited. A trial court cannot invoke other evidence to argue that the attendance of a defence witness is not significant for its determination of the case. A reference by the trial court to other evidence, to the effect that a witness could not have supplied new, important or significant information, is never a good reason for not calling him or her.[42] This would be a gross violation of the prohibition on anticipation of the outcome of examination of evidence. Furthermore, after refusing to allow a defence witness to attend and be examined on the basis that the fact that would be proven by such evidence is insignificant for determination of the case, the trial court must subsequently stick to this undertaking in its decision on the merits and may not base any argument on this particular fact. [43]

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41. *Jorgic v. Germany*, no. 74613/01, §§ 86 and 88, 12 July 2007.

42. In this regard, I find that the passages in § 70 of *Sergey Afanasyev v. Ukraine*, no. 48057/06, 15 November 2012, and §§ 81-82 of *Janyr v. the Czech Republic*, no. 42937/08, 31 October 2013, are simply wrong.

43. International criminal tribunals can conclude that hearing the testimony of a witness called by the defence is "excessive" or "irrelevant" on the basis of their examination of the will-says/written statements of the said witness, normally attached to the brief submitted by the defence between the end of the prosecution case and the start of the defence case. See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006 (Trial Chamber II), 21 March 2007, paragraph 35; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary His Witness List (Appeals Chamber), 21 August 2007, paragraph 16; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (Trial Chamber II), 26 August 2011, paragraph 47.

25. In sum, the second *Murtazaliyeva* criterion is still very far from being complete, and offers a standard of protection lower than that accorded to the right to present prosecution witnesses. Indeed, the majority wrongly insist that only in exceptional circumstances will it conclude that a refusal to hear a defence witness is in contravention of Article 6.[44] There is no reason for such disparate treatment. Article 6 §§ 1 and 3 (d) of the Convention contain a prohibition on the use of hearsay evidence against a defendant in criminal proceedings, but exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence.[45] In other words, Article 6 §§ 1 and 3 (d) not only enshrine the defendant's right to confront prosecution witnesses and question defence witnesses, but guarantees the principle of immediacy,[46] which requires that the trial court be able to observe the witnesses' demeanour and thus form its own impression of their reliability.[47]

The third *Murtazaliyeva* criterion

26. According to the majority, the Court has to assess whether the trial court implemented safeguards to secure that, even in the event of an obvious deviation from the regulations set out by Article 6 § 3 of the Convention, overall fairness was maintained, and they suggest that such a safeguard would prevent the *Perna* test from becoming mechanical.[48] Let me be clear: this is where the core and the novelty of the present case lie, and not in the alleged second criterion, as the majority claim.[49]

27. If the overall fairness of the proceedings under Article 6 § 1 is accepted as a corrective to evaluation of compliance with the provisions of Article 6 § 3, then it necessarily has to be understood as an additional guarantee to the individual guarantees set out in Article 6 § 3. These are connected to and derive from the fairness principle in Article 6 § 1.[50] However, the overall fairness test should not be understood as an

44. Paragraph 148 of the judgment.
45. *Thomas v. the United Kingdom* (dec.), no. 19354/02, 10 May 2005, and the Commission's decision in *Blastland v. the United Kingdom*, no. 12045/86, 7 May 1987.
46. *Škaro v. Croatia*, no. 6962/13, § 24, 6 December 2016; *Tolmachev v. Estonia*, no. 73748/13, § 52, 9 July 2015; *Matytsina v. Russia*, no. 58428/10, § 153, 27 March 2014; *Beraru v. Romania*, no. 40107/04, § 64, 18 March 2014; *Cutean v. Romania*, no. 53150/12, § 60, 2 December 2014; *Pichugin v. Russia*, no. 38623/03, § 199, 23 October 2012; *Graviano v. Italy*, no. 10075/02, § 39, 10 February 2005; and P.*K. v. Finland* (dec.), no. 37442/97, 9 July 2002.
47. *Damir Sibgatullin v. Russia*, no. 1413/05, § 57, 24 April 2012.
48. Paragraph 168 of the judgment.
49. Paragraph 141 of the judgment.
50. International criminal courts use a holistic assessment of the trial court's management of the proceedings only in order to determine whether it accorded adequate time and facilities for the preparation of the defence (*Prosecutor v. Šainović et al*., Case No. IT-05-87-A, Judgement (Appeals Chamber), 23 January 2014, paragraphs 122, 135-137).

unconnected but overriding substitute for the guarantees set out in Article 6 § 3, capable of correcting violations of the rights described in that paragraph.[51]

28. The wishy-washiness that accompanies the majority's ambiguous approach towards an overriding test of overall fairness fully divests Article 6 § 3 (d) of its meaning. The majority's revisited *Perna* test is intentionally constructed to allow the Court, even if the answers to the first two questions are considered as strong indication for a violation, to rule otherwise. The clear provision of minimum rights as an expression of the fairness principle is sacrificed for the sake of preserving a margin of appreciation for domestic courts. Although the majority note the possibility of reaching conclusions that differ, in either direction, from the indications provided by the two prior steps, the undermining of a minimum right for the defence will, in consequence, more frequently lead to an undue burden for the defence.

29. It is true that the Court, like the European Commission of Human Rights before it, has regularly assessed the overall fairness of the procedure or the fairness of the proceedings taken as a whole when judging compliance with Article 6 § 1 of the Convention. However, until *Dvorski*,[52] this exercise was conducted in order to assess the fairness of procedures which otherwise did comply with the minimum rights set forth in Article 6 § 3 (c) of the Convention. Under the Court's traditional approach, a procedure could be unfair overall even though it had complied with Article 6 § 3. To derive, *a contrario sensu*, that a procedure can be fair overall even though it does not comply with Article 6 § 3 – or, to put it otherwise, that the overall fairness of the procedure can allow Article 6 § 3 violations to be disregarded – is not only logically erroneous, it also denaturalises the very essence of Article 6 § 3. A thorough review of the Court's case-law will make this point crystal clear.

30. *Nielsen v. Denmark* was the first time in Strasbourg history that the test was used. This was a case in which the Commission dealt with a claim concerning the allegedly erroneous admission of medical evidence in a criminal trial. In it, the Commission stated:

> "Article 6 of the Convention does not define the notion of 'fair trial' in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion... The words 'minimum rights', however,

51. The brief history of this trend in the Court's case-law can be followed in the dissenting opinion of Judges Sajó and Karakaş in *Al-Khawaja and Tahery*, cited above; the joint concurring opinion of Judges Spielmann, Karakaş, Sajó and Keller in *Schatschaschwili*, cited above; the joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque in *Ibrahim and Others v. the United Kingdom [GC]*, nos. 50541/08 and 3 others, ECHR 2016; and the partly dissenting opinion of Judges Sajó, Lazarova-Trajkovska and Vučinić, joined by Judge Turković, and the partly dissenting opinion of Judge Serghides in *Simeonovi v. Bulgaria [GC]*, no. 21980/04, 12 May 2017.

52. *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015.

clearly indicate that the six rights enumerated in paragraph 3 are not exhaustive, and that a trial may not conform to the general standard of a 'fair trial', even if the minimum rights guaranteed by paragraph 3 - and also the rights set forth in paragraph 2 - have been respected".[53]

31. As if this were not clear enough, the Commission considered it helpful to clarify that:

"[t]he relationship between the general provision of paragraph 1 and the specific provisions of paragraph 3, seem to be as follows: In a case where no violation of paragraph 3 is found to have taken place, the question whether the trial conforms to the standard laid down by paragraph 1 must be decided on the basis of the consideration of the trial as a whole ...".[54]

32. This asymmetry between Articles 6 § 1 and 6 § 3 was reiterated by the Court in *Deweer v. Belgium*, where the Court deemed that, while "the various rights of which a non-exhaustive list appears in [Article 6 § 3] are constituent elements, amongst others, of the notion of a fair trial in criminal proceedings", since the applicant in that case "was totally deprived of such a trial... the question whether [Articles 6 § 2 and 6 § 3] were observed has no real significance in this regard: it is entirely absorbed by the question of whether [Article 6 § 1] was complied with".[55] Again: a process can be unfair even if it complies perfectly with Article 6 § 3, but nothing here suggests that a process can be fair if those minimum rights are disrespected.

33. Since then, the Court has applied the overall fairness of the proceeding for a multiplicity of purposes, but the relationship between paragraph 1 and paragraph 3 of Article 6 as expressed in *Nielsen* seems to have formed the bottom-line of the Court's reasoning – until *Dvorski*. A milestone in this jurisprudence is the oft-cited judgment in *Barberà, Messegué and Jabardo*,[56] in which the Court concluded that an accumulation of procedural defects (none of which in itself amounted to a violation of one of the rights explicitly enumerated in Articles 6 § 2 and 6 § 3) meant that "the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing".[57]

34. In this light, the overall fairness analysis gradually became ubiquitous, even when dealing with claims under Article 6 § 3. In some instances, for example, the Court analysed cases concerning Article 6 § 3 in the context of the overall assessment of the proceedings. In *Goddi*,[58] for example, the Court stated that the guarantees of Article 6 § 3 are "constituent elements" of "the general notion of a fair trial stated in paragraph 1" and that therefore "the Court has examined separately each

53. *Nielsen v. Denmark*, no. 343/57, Report of the Commission, 1960, § 52.
54. Ibid.
55. *Deweer v. Belgium*, no. 6903/75, § 56, 27 February 1980.
56. *Barberà, Messegué and Jabardo v. Spain* (plenary), no.10590/83, 6 December 1988.
57. Ibid., § 89.
58. *Goddi v. Italy,* no. 8966/80, § 28, 9 April 1984.

limb of the complaint and then made an overall assessment".[59] In other cases, the Court has stressed the need to interpret paragraph 3 of Article 6 in the light of the overall purpose of the norm – that is, to secure a fair procedure. This is revealed by a quote the Court has often used:

> "The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain aspects of the notion of a fair trial in criminal proceedings... When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots".[60]

35. However, as a reading of the case in which these sentences were formulated reveals, this reasoning had quite the opposite intention to that of the majority in the present judgment. The Court in *Artico v. Italy*, when drafting these sentences,[61] seems to have meant the exact opposite. In *Artico*, the Court was ensuring that the legal assistance that the Government claimed to have provided to the applicant was indeed effective for the purposes of Article 6, and not an "illusory" right. Indeed, the Court concluded in that judgment that it was not effective: despite the appointment of counsel, the applicant had not received any substantive legal aid.[62]

36. As a matter of tradition, the most prominent area in which the overall fairness test has been conducted is the realm of legal assistance. Under the guise of assessing the overall fairness of the proceedings, the Court has distanced itself from its previous defendant-friendly standards in favour of a more prosecution-leaning stance. Until *Dvorski*, the Court always dealt with Article 6 § 3(c) of the Convention in a manner consistent with the principles described above. It is true that in certain cases the Court engaged in a sort of balancing exercise between the reasons that justified certain restrictions to freely chosen legal assistance and their implications for the overall fairness of the procedure viewed in its entirety, but the Court did so only after acknowledging that such reasons existed. A milestone in this line of jurisprudence is *John Murray*,[63] in which the Court stated:

> "[the right] to benefit from the assistance of a lawyer already at the initial stages of police interrogation ... which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."[64]

37. A central difference comes immediately to mind: since the right to legal counsel can only be restricted "for good cause", the Court's holistic assessment in *John Murray* comes only after such reasons have been demonstrated, since "even a lawfully exercised power of restriction is

59. Ibid., § 28.
60. *Correia de Matos v. Portugal [GC]*, no. 56402/12, §119, 4 April 2018.
61. *Artico v. Italy*, no. 6694/74, § 32, 13 May 1980.
62. Ibid., § 33.
63. *John Murray v. United Kingdom*, no. 18731/91, § 63, 8 February 1996.
64. Ibid., § 63.

capable of depriving an accused, in certain circumstances, of a fair procedure"[65]. The Court, moreover, proved extremely cautious in its assessment of the overall fairness in this case, ultimately finding a violation: "it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period".[66]

38. The Court refined and developed its stance on the invalidity of unmotivated restrictions to the right to a legal counsel in *Salduz [GC]*.[67] The applicant in this memorable Grand Chamber case had been denied legal assistance during police custody, during which time he made statements when interrogated which he subsequently retracted before the investigating judge and the prosecutor. The Court reiterated its reasoning from *John Murray*, stating:

> "this right [to benefit from legal assistance from the initial stages of police interrogation] has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing".[68]

39. It is undeniable from the underlined clause that the overall fairness assessment can only proceed once the restriction has been found to be justified. The Court itself has made clear, over and over, that any restriction to the right of legal counsel must be justified in order for it to analyse its impact on the overall fairness of the proceedings:

> "Article 6 §1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6".[69]

40. Consistent with this reasoning, when applying the general principles to the case at hand, the Court observed:

> "... no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect".[70]

41. *John Murray* and *Salduz*, therefore, make it clear that States cannot legitimately restrict access to legal assistance without valid reasons. As the above quotations show, it is indeed difficult to think of any other

65. Ibid., § 65.
66. Ibid., § 68.
67. *Salduz v. Turkey [GC]*, no. 36391/02, §§ 12-17, 27 November 2008.
68. Ibid., § 52.
69. Ibid., § 55.
70. Ibid., § 56.

interpretation of the *ratio decidendi* of those cases. As late as 2010, the Court applied this reasoning, concluding that the absence of valid reasons for restricting an applicant's access to a lawyer was enough to find an Article 6 violation:

> "In any event, no further findings are required in that respect in the present case since having found that the pre-trial restriction on the applicant's right to counsel had no justification the Court does not need to consider further what effect that restriction had on the overall fairness of the criminal proceedings against the applicant".[71]

42. An equally straightforward statement was made by the Court in *Pishchalnikov v. Russia*, a case concerning confessions made during pre-trial proceedings after assistance of counsel had been denied.[72] In this case, the Court analysed first whether "the applicant's access to counsel was restricted" and whether this "restriction of defence rights was justified". Immediately after conducting this dual assessment, the Court noted:

> "[h]aving found that the restriction on the applicant's right to counsel had no justification the Court, in principle, does not need to consider further what effect that restriction had on the overall fairness of the criminal proceedings, as the very concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation, unless the restriction to the right to counsel is exceptionally imposed for good cause".[73]

43. *Dvorski v. Croatia* concerned a "denial of choice" of legal counsel, rather than an outright denial of access to it. Without citing any Court precedent in support of its finding, the majority stated:

> "... the first step should be to assess whether ... there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal procedure".[74]

44. This was the first time that the Court reversed the reasoning of *John Murray* and *Salduz*. However, two qualifications are in order. First, unlike the preceding cases, which dealt with "denial of access" to a lawyer, *Dvorski* dealt with a "denial of choice", which the Court considered a "less serious" matter.[75] Second, and more importantly, the assessment of the overall fairness of the procedure seems to have been conducted on the basis of a serious presumption that the applicant's initial confession, made in the absence of a freely chosen lawyer, had a "significant likely impact" on the development of the criminal proceedings.[76] The nature of this "likelihood" is not clear, but, without doing any violence to the text, it could be read as an acknowledgement that every denial of choice of a lawyer at the critical

71. *Pavlenko v. Russia*, no. 42371/02, § 118, 1 April 2010.
72. *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009.
73. Ibid., § 81.
74. *Dvorski*, cited above, § 82.
75. Ibid., § 81.
76. Ibid., § 111.

stages of criminal proceedings could have an impact that jeopardises the fairness of the proceedings as a whole.[77] This reading of *Dvorski* would be consistent with *Salduz*, although uncomfortably so.

45. It is only in *Ibrahim and Others v. the United Kingdom* that, while claiming to be "clarifying" *Salduz*,[78] the Grand Chamber in fact bluntly departs from the previous case-law on Article 6 § 3 (c) of the Convention. The Court states that the "absence of compelling reasons (for restricting an accused's right to counsel) does not ... lead in itself to a finding of a violation of Article 6".[79] Indeed, as in *John Murray* and *Salduz*, when "compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were 'fair' for the purposes of Article 6 § 1".[80] However, when "there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment".[81] Interestingly, the Court does not present this as an innovation, but as a correct reading of *Salduz*.[82] As the separate opinion of Judges Sajó and Laffranque in *Ibrahim and Others*[83] abundantly demonstrates, this is hard to maintain.

46. The preceding paragraphs show that, contrary to the Court's assertions, the reasoning in *Ibrahim and Others* contradicts a well-established case-law that ended in *Dvorski*. Although claiming that *Ibrahim and Others* was "clarifying" or "fleshing out" the *Salduz* criteria, it was in fact abandoning that case-law and, with it, the rationale held by the Court throughout the five decades that separate *Nielsen v. Denmark* and *Ibrahim and Others*. Worse still, this U-turn in the Court's case-law was not limited to Article 6 § 3 (c), but also extended to (d).

47. In the case-law concerning the admission of evidence obtained through Article 3 violations, the Court has consistently applied a bright red-line rule, invalidating procedures that rely on such evidence.[84] Less clear is the Court's stance regarding the admission of evidence in violation of Article 8 of the Convention.[85] In cases concerning examination of witnesses under Article 6 § 3 (d), however, the Court has sometimes applied an overall fairness assessment.[86] Admittedly, in order to save the Criminal

77. Such a reading of *Dvorski* is made in the concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković, *Dvorski*, §19.
78. *Ibrahim and Others*, cited above, § 257.
79. Ibid., § 262.
80. Ibid., § 264.
81. Ibid., § 265.
82. Ibid., §§ 260 and 262.
83. Ibid., joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque.
84. *Jalloh v. Germany [GC]*, cited above, § 99.
85. I have already argued in my partially concurring opinion in *Dragoş Ioan Rusu v. Romania*, no. 22767/08, 31 October 2017, together with Judge Bošnjak, for a stricter approach to the admissibility of evidence obtained in breach of Article 8 of the Convention.

Justice Act 2003 and satisfy the "provocative" criticism from the Supreme Court of the United Kingdom in *Horncastle*,[87] *Al-Khawaja and Tahery* departed from the "sole or decisive" rule, according to which a trial was unfair if a conviction was based solely or to a decisive extent on evidence provided by a witness whom the defendant had been unable to question at any stage of the proceedings. In fact, the Grand Chamber was contradicting a solid case-law on the absolute nature of the "sole and decisive" rule, in place since the judgment in *Doorson*.[88] Such an "inflexible" approach involving the non-attendance of prosecution witnesses at trial and the subsequent admission of the absent witness's untested statement as evidence would, the Court argued, run counter to its traditional stance on the need to assess the fairness of the proceedings as a whole.[89] Since everything is now negotiable, the Court is not establishing a clear threshold beyond which a conviction becomes impermissibly based on non-tested pre-trial testimonial evidence. Even evidence banned in the Middle Ages, such as the statement of a dying person, can still be used.[90]

48. Less than four years after the delivery of the Grand Chamber judgment in the case of *Al-Khawaja and Tahery*, it had to intervene again in the case of *Schatschaschwili v. Germany*, since it remained unclear whether a trial would be considered unfair if there were not good reasons for a prosecution witness's non-attendance alone, even if the untested evidence was neither sole nor decisive. The cure was worse than the disease. In a profoundly divided judgment, the Grand Chamber decided that the absence of good reasons for the non-attendance of a prosecution witness could not in itself be conclusive for the unfairness of a trial.[91] As Judges Spielmann, Karakaş, Sajó and Keller denounced, such application of the three-step examination would imply its redundancy so long as the overall fairness test was fulfilled, which would not only fail to provide any guidance to the national authorities as to the appropriate application of the *Al-Khawaja and Tahery* test, but indeed would give them too much leeway.[92] To complicate

86. Al-*Khawaja and Tahery* [GC], cited above, § 143, referring to *Salduz v. Turkey* [GC], cited above, § 50.
87. Mike Redmayne, "Hearsay and Human Rights: Al-Khawaja in the Grand Chamber" (2012) 75(5) *Modern Law Review* 865, 869.
88. *Doorson v. the Netherlands*, no. 20524/92, ECHR 1996-II, § 76, followed among others by *Van Mechelen and Others v. the Netherlands*, no. 21363/93 and others, ECHR 1997-III, § 55; *AM v. Italy*, no. 37019/97, ECHR 1999-IX; *Lucà*, cited above, § 40; *P.S. v. Germany*, no. 33900/96, § 24, 20 December 2001; and *Vladimir Romanov v. Russia*, no. 41461/02, § 100, 24 July 2008.
89. *Al-Khawaja and Tahery*, cited above, § 146, and *Schatschaschwili*, cited above, §§ 106 and 112.
90. As Ulrich Sommer points out in "Das Konfrontationsrecht …", cited above, p. 28, referring to *Al-Khawaja and Tahery*, cited above, § 160.
91. Ibid., § 113.
92. See the joint concurring opinion of Judges Spielmann, Karakaş, Sajó and Keller in *Schatschaschwili v. Germany [GC]*, cited above, §§ 17-18.

matters, the then majority added that sufficient counterbalancing factors were still needed if the untested pre-trial testimonial evidence carried significant weight.[93] The present judgment closes the circle, in so far as it takes an overall approach to the examination of the fairness of the proceedings in the event of non-attendance of defence witnesses.

49. Even if, for the sake of argument, one were to agree with the majority regarding the need for flexibility in the Court's case-law on Article 6 of the Convention, the whole enterprise risks logical inconsistency. The fairness of a procedure can only be a procedural assessment: a procedure is not fair because the guilty were convicted or the innocent acquitted, for the simple reason that there is no way to ascertain legally whether the guilty were guilty apart from the procedure itself. Criminal justice is not about ontological justice and judges in criminal trials are not Gods. A procedure is fair when fundamental procedural rules are respected. In this sense, it is difficult to know what the assessment of whether a procedure is fair overall may mean in practice. It could mean that the Court is supposed to examine whether or not the restriction to the right at hand impaired the establishment of the material truth, but this would necessarily imply that the Court has an extra-procedural account of the material truth, which is legally impossible.

50. A more modest account of overall fairness fails in a similar way. One might say that the violation is "cured" when it did not change the final result of the procedure – when the applicant would have been convicted and sentenced in the same manner had the procedure been flawless. But this is logically impossible, even if one concedes that this assessment can be conducted without an illegitimate extra-procedural account of the material truth. In performing this test, the Court is asked to examine the fairness of a procedure that should not have existed the way it did: for example, had the defendant had counsel of his or her choice, or had the defendant represented him or herself, then the procedure would probably have taken a different path, the defendant would have made different statements, different items of evidence would have been admitted... Ultimately, as the United States Supreme Court has put it, "[h]armless-error [or, in the Court's jargon, "overall fairness"] analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe".[94]

51. Indeed, the Court itself has long recognised the logical obstacles to this kind of assessment. As early as 1980, the Court was examining the case of a convicted person who had received no effective assistance from the lawyer provided by the State. The Government in the case argued that the

93. Ibid., § 116. In his dissenting opinion joined to *Schatschaschwili*, cited above, Judge Kjølbro criticised the majority for introducing a third category (that of evidence carrying significant weight) in addition to the previous categories (sole and decisive evidence).

94. Supreme Court of the United States, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

lack of legal assistance was irrelevant, since it would not have changed the applicant's fate. As argued by the respondent State, "for there to be a violation of Article 6 § 3 (c) ... the lack of assistance must have actually prejudiced the person charged with a criminal offence".[95] The Court expressed its disagreement in principled terms: "nothing in Article 6 paragraph 3 (c) indicate[s] that such proof [that effective assistance from a lawyer would have benefitted the applicant] is necessary; an interpretation that introduced this requirement into the subparagraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice".[96] Even more explicitly, in *John Murray*, the Court replied to a similar argument by the Government, making clear that "it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period".[97] The Grand Chamber replicated this reasoning almost literally in *Salduz*.[98]

52. Even ignoring these fatal logical flaws in the majority's reasoning in the present judgment, the overall fairness test is inherently subjective and therefore extremely malleable. This feature renders it a very ill-suited standard for the Court to use in an even minimally predictable fashion. For the same reason, this standard is especially ill-suited to guiding domestic courts when assessing compliance with the Convention: telling a domestic court that procedures should be conducted in an "overall fair" manner does not add much to the goodwill of domestic judges. Reasonable disagreements may exist among the domestic courts, among those which conduct the procedure and those which revise it, and between these courts and the Court, as to what "fair" means in any given context, or in general. Disqualifying domestic assessments of "fairness" seems less compatible with the subsidiarity principle than simply ascertaining discrete violations of specific procedural rights as these are set out in the Convention that Member States ratified. Allowing States to breach strict norms such as those of Article 6 § 3 in favour of such a fuzzy concept invites, rather than prevents, violations to Article 6.

53. If any evidence of the malleability of the "overall fairness" concept is needed, one may look at *Ibrahim and Others*, where the Court fleshed out a "non-exhaustive list of factors"[99] relevant for the fairness analysis. These factors include, among "[o]ther relevant procedural safeguards afforded by domestic law and practice", specific considerations (such as defendants' age

95. *Artico v. Italy*, cited above, § 35.
96. Ibid.
97. *John Murray*, cited above, § 68.
98. *Salduz*, cited above, § 58 ("[I]t is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings".)
99. *Ibrahim and Others*, cited above, § 274.

and mental capacity) but also other "factors" which are as broad as the fairness assessment itself. The Court states, for example, that it will have regard to "the legal framework governing the pre-trial proceedings" and "the quality of the evidence... taking into account the degree and nature of any compulsion". This is a map of the size of the territory: apparently accurate, but in reality useless in terms of providing any guidance. This is shown by the fact that not even the Court itself reviewed all these elements when conducting the fairness assessment a year later in *Simeonovi v. Bulgaria.*[100] The lack of legal certitude is compounded in the case of a refusal by defence witnesses to attend, because the *Ibrahim and Others* list of the ten relevant factors for the assessment of the overall fairness of the proceedings[101] was totally ignored in the present case, and no effort was made to replace it by an alternative list.

54. If the lack of clarity already makes the overall fairness test a dangerous blank cheque for domestic courts, there is, however, one particularly dangerous factor that deserves especial attention: "[t]he weight of the public interest in the investigation and punishment of the particular offence in issue".[102] One need not take an extremely deontological stand to understand why this kind of reasoning should be prohibited in a court of law. The gravity and nature of offences may prompt States to adopt particular procedural provisions, and, specifically, nothing in the Convention should be understood to prevent countries from fighting terrorism, organised crime and other serious forms of crime. However, listing this factor among those relevant to assessing the fairness of proceedings is very troubling. I note that the *Ibrahim and Others* judgment did not refer to the public interest in the investigation and punishment of "the kind of offence in issue", but of "the particular offence in issue". This could be read as implying that defendants are entitled to different degrees of fairness in the procedures against them not only because of the kind of offence they are indicted for, but also because of the "public interest" their case happened to arouse. This would be the ultimate paradigm of "street justice", more akin to vigilante punishment than to a lawful trial. Even if I think that the Court could not possibly have intended such a meaning, it is telling that in a paragraph which is envisioned as pedagogical this kind of ambiguity can be found. However, it is unclear what else the Court could have meant. It could have meant that States are granted some discretion in imposing more restrictive procedural rules to crimes that involve especially sensitive issues. If that were the case, however, this issue should have been assessed in the previous stage, that is, when evaluating the reasons the Government provided for the restriction. Taking the public interest into

100. *Simeonovi*, cited above, §§ 132-144.
101. *Ibrahim and Others*, cited above, § 274.
102. Ibid., § 274.

consideration twice entails a double-counting – or, in other words, "half-counting" the importance of the fairness of the trial.

55. Relatedly, assessing the overall fairness of a procedure implies, in the *Ibrahim and Others* logic, that the Court should analyse the materials in the criminal file,[103] notably the evidence used for conviction, and make a twofold assessment. First, whether the evidence in the file would have been there had the applicant's right to a lawyer not been infringed. And second, whether that evidence would reasonably have led to conviction, even if the defendant had had legal assistance of his or her own choice. These hypothetical assessments cannot be conducted without meaningful engagement with the domestic procedural law, such as that governing standards of proof and admissibility of evidence. This seems a task that the Court is not best-equipped to carry out while simultaneously respecting Member States' authority in designing their own procedural systems.

56. Lastly, if the Court's decisions are to provide any guidance to domestic authorities, it is unhelpful to ask domestic courts to conduct proceedings on the basis of overall fairness. This is not only because of the fuzziness of the concept but, more fundamentally, because courts cannot know at any given point of time how a given set of proceedings will continue in the future, since different bodies are charged with different tasks at different moments. For example, a judge or public prosecutor who does not allow the defendant to have access to a lawyer of his or her choice while conducting a preliminary investigation cannot possibly know in advance whether the rest of the proceedings, carried out in part by different bodies, will be conducted "sufficiently fairly" to compensate for a putative violation of the Convention. The impossibility of assessing the overall fairness of a procedure from inside the procedure itself should be a strong indicator that this is a poor standard for the Court to uphold.

The Convention principle of immediacy

57. All of the above applies to the rights laid down in Article 6 § 3 (d).[104] Systematically, these rights are manifestations of the fairness principle, not just mere recommendations. They are also rooted in a European consensus on the principle of the immediacy of the evidence

103. Ibid., § 274. See also *Al-Khawaja and Tahery*, cited above, § 143.

104. Ulrich Sommer, "Das Konfrontationsrecht des Art. 6 Abs. 3 lit. d MRK – "to examine the witness", cited above, pp. 4-32; Ian Dennis, "The right to confront witnesses: meanings, myths and human rights" (2010) *Criminal Law Review* 255-274; Kweku Vanderpuye, "Traditions in Conflict: The Internationalization of Confrontation" (2010) 43 *Cornell International Law Journal* 513-583; John Spence, "The European Right to Confrontation in Criminal Proceedings - Absent, Anonymous and Vulnerable Witnesses" (2007) 32 *European Law Review* 275-278; Maffei, *The European Right to Confrontation in Criminal proceedings: Absent, Anonymous and Vulnerable Witnesses*, Groningen, Europa Law, 2006.

(*Unmittelbarkeitsgrundsatz*), from which the rule against hearsay is derived. In the light of the principle of immediacy, the close connection between the testimonial evidence and the court is philosophically perceived to provide the best possible approximation towards the truth. These principles are accepted in Europe and beyond, throughout different types of criminal-law systems, irrespective of whether and to what extent they are adversarial or inquisitorial. Although the manner in which the principle of immediacy is implemented in each national system differs, the acceptance of the principle as such is not denied.[105] In the light of this consensus and the Court's long standing case-law on the subject, the principle of immediacy imposes the following guidelines for trial courts, giving them not only a retrospective standard of review, but also a standard for the admissibility of prospective evidence at trial:

Guideline 1: The principle of immediacy requires that testimonial evidence be produced in the proceedings before the competent trial court, and therefore all viable measures, and if necessary, forceful measures, should be taken to bring absent witnesses to the trial hearing.[106]

Guideline 2: The test for assessing any request for the attendance or cross-examination of witnesses, which is identical for the defence and the prosecution, relies on the individual witness's prima facie relevance to the outcome of the trial and to the position of the requesting party. This is an exclusively *ex ante* test. Hence, in assessing any request for attendance or cross-examination of witnesses, the trial court is not allowed to anticipate the result of the examination of the evidence – except in favour of the defence.

Guideline 3: Only exceptionally may testimonial evidence produced at the pre-trial stage in criminal proceedings be read out in court and used as a ground in the judgment. The principle of legality in criminal procedure requires an exhaustive legal catalogue of good reasons for not calling or cross-examining a witness during the trial and for reading-out an absent witness's testimony at the trial. This catalogue of good reasons includes two categories of witnesses: unavailable witnesses, and witnesses in need of protection. The category of unavailable witnesses has the following sub-categories: (1) a deceased witness[107]; (2) the physical or mental incapability or illness of the witness[108]; (3) the

105. See Sebastian Bürger, "Unmittelbarkeitsgrundsatz und kontradiktorische Beweisaufnahme" (2016) 128 (2) *Zeitschfrift für die gesamte Strafrechtswissenschaft* 518-546; and Daniela Dembo, *Menschenrecht auf Verteidigng und Fairness des Strafverfahrens auf nationaler, europäischer und internationaler Ebene*, Berlin, Duncker Humboldt, 2014.
106. With regard to prosecution witnesses, *Delta v. France*, no. 11444/85, Series 1 No. 191-A, § 37, and *Pello v. Estonia*, no. 11423/03, §§ 34 and 35, 12 April 2007; with regard to witnesses on behalf of the defence, *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 207, 25 September 2008.
107. *Ferrantelli and Santangelo v. Italy*, no. 19874/92, ECHR 1996-III.
108. *Bricmont v. Belgium*, no. 10857/84, Series A, no. 158.

witness's disappearance[109]; (4) residence or travel abroad of the witness[110]; (5) the statutory right to remain silence as a co-accused[111]; (6) the privilege against self-incrimination[112]; and (7) the statutory exemption relating to a witness's family relationships.[113] The category of witnesses in need of protection has the following two sub-categories: (1) need to protect the life or limb of a witness[114]; or (2) the health of a vulnerable witness.[115] The catalogue of these grounds must distinguish between testimonial evidence produced before a judge, public prosecutor or the police, since the evidence produced before the police or a prosecutor at the pre-trial stage cannot be equated, in its reliability and accuracy, with the evidence produced before the judge at the pre-trial stage. The catalogue of good reasons for reading out an absent witness's testimony at the trial must be more expansive when a judge has collected evidence at the pre-trial stage, and less expansive when it has been collected by a public prosecutor or the police.

Guideline 4: When there is a good reason for not calling or cross-examining a witness and for the pre-trial witness's testimony being read out in court, the trial court must ensure that sufficient counterbalancing measures were or are taken to compensate for the handicaps imposed on the defence, such as a special pre-trial hearing at which the witness's evidence was taken under adversarial conditions.[116] Neither a direction to the jury that the untested statement should be given less weight,[117] nor the possibility that the defendant challenge or rebut the testimony of the absent witness, by giving evidence himself or herself or by examining another witness, suffices.[118]

Guideline 5: Even when sufficient counterbalancing measures were taken to compensate for the handicaps imposed on the defendant, the trial court must not base a judgment, alone or to a decisive extent, on the pre-trial testimony of an absent witness.[119] Such reasoning would negate the essence of the principle of immediacy.

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109. *Artner v. Austria*, no. 13161/87, Series A no. 242-A.
110. *Schatschaschwili*, cited above, § 155, and *Nechto*, cited above.
111. *Lucà*, cited above.
112. *Vidgen v. the Netherlands*, no. 29353/06, 10 July 2012.
113. This is the situation in *Unterpertinger v. Austria*, no. 9120/80, Series A no. 110, and *Asch v. Austria*, no. 12398/86, Series A no. 203. The Court decided these cases in a contradictory way, as the dissenting Judges Evans and Bernhardt pointed out in the latter case.
114. *Kostovski v. the Netherlands*, no. 11454/85, Series A no. 166.
115. *P.S. v. Germany*, cited above.
116. *Schatschaschwili*, cited above, § 162, and *Melnikov v. Russia*, no. 23610/03, § 80, 14 January 2010.
117. *Al-Khawaja and Tahery*, cited above, § 164, but see also §§ 156 and 157. Careful evaluation of evidence does not suffice (*Hulki Günes v. Turkey*, no. 28490/95, § 95, 19 June 2003).
118. *Paic v. Croatia*, no. 47082/12, § 51, 29 March 2016.

Guideline 6: When the trial court is faced with a contradiction between the pre-trial and the trial statements of a witness, the principle of immediacy requires that the latter should be given greater weight.

Guideline 7: These are bright red lines that cannot be crossed by a trial court, under pain of leading to a violation of the principle of immediacy and consequently the unfairness of the trial. No evidence can be taken into account by the trial court in breach of the above guidelines, unless domestic law provides for the possibility of an agreement between the prosecution and the defence regarding the reading out of pre-trial testimonial evidence, and both parties agree to that reading.

Application of the Convention standards to Witness A.

58. Witness A. was an officer of the Organised Crime Department and always acted on instructions from his superiors. The Government themselves described his role as follows: "Therefore, Mr A.'s role in the events in question was limited to his technical facilitation of operative-search activity in respect of the applicant."[120] In fact, there was a covert operation against the applicant, and witness A. acted as a covert agent whose activities led to the collection of the entire body of evidence against her, mostly through video recordings made in the dormitory room she shared with V. and Ku.

59. The categorisation of witness A as a defence witness is problematic. Although it had been on the applicant's behalf that A. was questioned as a witness at the pre-trial stage, it was the public prosecutor who moved to have his testimony read out at the trial and the trial court relied on this written testimony to convict the applicant. This problematic categorisation is not excluded by the fact that the national courts did not explore the probative meaning of the testimony given by A. The particularity of the situation in the present case lies in the fact that the conviction relied on the assumption that no entrapment or other kind of police-induced circumstance had occurred which could have resulted in the acquittal or exoneration of the applicant.

60. The applicant herself reiterated during the trial that she had insisted on a confrontation with witness A., but to no avail.[121] No steps were taken to establish the whereabouts of witness A., who had taken part in the covert operation against the applicant, and to have him attend the trial.[122] The trial

119. See footnote 88 above.

120. See the Government's observations of 28 November 2017, page 21.Although they consider witness A. as a witness on behalf of the applicant (paragraph 8 of the observations), the Government treat this witness, in reality, as a prosecution witness (paragraph 115 and 116 of the observations).

121. Paragraph 57 of the judgment.

122. Contrast *Bykov*, *v. Russia* [GC], no. 4378/02, § 97, 10 March 2009.

court merely concluded that all the evidence against the applicant was admissible, and the Russian Supreme Court upheld that finding on appeal without any further elaboration. With regard to the applicant's submission on entrapment, the Supreme Court merely stated that the appeal bench was "unable to agree" with the defendant, without adding any further considerations.[123]

Neither the applicant nor her lawyers were present at the questioning of witness A. during the pre-trial phase. The defence was not given an opportunity to confront A. at the pre-trial stage or during the trial. Since there was no waiver of the examination of witness A. or valid consent to reading out the absent witness's testimony under Article 281 § 1 of the Russian Code of Criminal Procedure, section two of the same Code applied. It was for the trial court to verify whether the reasons for witness A.'s non-attendance were valid and, if they were not, to ensure that witness A. appeared before it, for example by issuing orders compelling him to appear.

61. It is plain that no good reason can be given to justify the failure to call witness A. to testify at the hearing as required by section two of Article 281. The Russian Code of Criminal Procedure explicitly provides examples of good reasons, as well as an omnibus clause referring to "other exceptional circumstances". These come close to the criteria that were established by the Court in *Al-Khawaja and Tahery*. Besides, like many other provisions in European codes of criminal procedure, the provision in the Russian code does not differentiate between witnesses on behalf of the defence and those appearing for the prosecution.

62. In this context the Court has held "that where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded."[124] Applying these principles to the present case results in a special duty on the national court to have the evidence on whether police incitement took place closely examined, in order then to be able to exclude the respective part of the evidence. This duty did not arise from the applicant's defence concerning her perception of "provocation" by law-enforcement agents alone, but also from A.'s deep involvement in the case, as became clear from his own pre-trial statement as well as the videotapes collected from a hidden surveillance camera in the applicant's flat. Another important hint which should have made clear the obligation to investigate the possibility of witness A.'s involvement in the offences was the testimony from witness V., who stated that some of the books on "the way of jihad" had been given to the applicant by her acquaintance A.[125]

123. See the applicant's observations before the Grand Chamber, § 58.
124. *Ramanauskas v. Lithuania [GC]*, no. 74420/01, § 60, 5 February 2008.
125. Paragraph 29 of the judgment.

63. Finally, witness V. gave contradictory statements during the pre-trial and the trial questioning[126] and witness Ku. retracted the statements made by her at the pre-trial stage, instead stating that the applicant had not incited her to become a suicide bomber.[127] In sum, witness V. stated during the trial that the applicant had been preparing her and Ku. to become suicide bombers and witness Ku. denied V.'s statement, stating that the applicant had not incited her to become a suicide bomber. In view of these contradictions, the pre-trial statements of both witnesses were read out during the trial. Ultimately, the trial court made use of the pre-trial statements by witnesses V. and Ku. and of the statements made at trial by V.[128]

64. The majority conclude that the applicant was able to conduct various other procedural measures, without referring to the important question of what the cross-examination of witness A. would – at best – have meant for the applicant's defence. The procedural aim of confrontation could neither be reached by commenting on his pre-trial statements nor, for example, by questioning other witnesses about the events in which A. had been involved, as the majority claim.[129] The fact that other procedural rights of the defendant were upheld by the court should be considered as a matter of course, not as an argument for lowering the threshold for assessing whether the court violated another of the defendant's rights. These rights are not to be confused with procedural safeguards with respect to evidence that could not be challenged by the defendant. With this argument the majority – despite their conviction that the national court is better placed than the Court to decide about the necessity of evidence – contravene the prohibition on anticipating evidence (*Verbot der Beweisantizipation*). By using the argument that the applicant could have used these other kinds of evidence, they anticipate that the result of witness A.'s cross-examination would not have changed the content of his testimony in relation to the pre-trial stage.

Application of the Convention standards to witnesses B. and K.

65. B. and K. were attesting witnesses. As a matter of principle, the status of an attesting witness is problematic in the light of the Convention. According to Article 60 of Criminal Procedure Code of the Russian Federation, an attesting witness is "a person, disinterested in the outcome of the criminal case"; he or she is entitled to take part in an investigative action and make comments on it, and these comments are to be entered into the record. An attesting witness is also entitled to familiarise himself or herself with that record.[130] Since there are no legal requirements as to the legal

126. Paragraph 31 of the judgment.
127. Paragraph 32 of the judgment.
128. Paragraphs 58 and 60 of the judgment.
129. Paragraph 99 of the judgment.
130. Government's observations of 28 November 2017, paragraph 108.

qualification of the attesting witness, he or she may not be in a position to comment on, let alone verify, the legality of the procedure adopted by the investigator. This evidently empties the role of the attesting witness of much of its interest. Even where he or she does possess a legal qualification, the attesting witness evidently cannot replace the guarantee of legal assistance to the accused or to suspects who have not been charged, for the obvious reason that he or she is chosen by the investigator. Furthermore, there is a serious risk of misuse of this witness by the prosecutorial side, since it can be easily anticipated that the investigator will choose individuals who have his or her trust and who will not create problems. Moreover, when brought and questioned before the trial court, an attesting witness may be led to reproduce what he or she heard from the material witnesses or the accused or the suspect during the investigative action. Such questioning would correspond to misuse of the attesting witness as a hearsay witness at the trial. In order to comply with the prohibition on hearsay, the questioning of attesting witnesses would have to be limited to the circumstances surrounding the investigative action and its conduct. Finally, the Court itself has already held that the absence of attesting witnesses in court does not infringe Article 6 §§ 1 and 3 (d) of the Convention, since "it appears that the contribution by attesting witnesses to the proceedings was limited to statements on the manner of conducting the investigative measures" and "their depositions did not serve to a material degree as a basis for the applicants' convictions".[131]

66. In the case at hand, attesting witnesses B. and K. were invited to attend the search of the applicant's bag. The criteria for inviting these specific persons are unknown, as are their qualifications for that purpose and whether they were sworn in. They were not questioned during the preliminary investigation and no confrontation took place between them and the applicant. In due course the defence lawyers requested their attendance at the trial, in order to determine the exact circumstances of the search of the applicant's bag. The applicant did not insist that these witnesses be questioned, but acceded to the motion of her lawyers, who argued that the questioning was necessary.[132] Without any justification, the trial court rejected the defence motion. In its judgment, the trial court did not mention witnesses B. and K, but only referred to the testimony of the patrol officers and officers at the police station, who denied the allegation that the explosives had been planted in the applicant's bag, and to the official report, according to which the personal search had preceded the taking of fingerprints.[133] The Supreme Court did not consider the defence request unsubstantiated or unreasoned, but argued that the attendance of witnesses

131. *Shumeyev and Others v. Russia (dec.)*, no. 29474/07, 8669/09 and 55413/10, § 37, 22 September 2015.
132. Paragraph 52 of the judgment.
133. Paragraph 61 of the judgment.

B. and K. was not necessary, because the applicant claimed that the explosives had been planted in her bag before their arrival.[134] Like the Government,[135] the Russian courts prejudged the requested witnesses' testimony, adducing that they would in any case be unable to provide any evidence beyond that already available to the courts.[136]

67. Contrary to the majority's claim,[137] it is not true that the defence request to examine witnesses B. and K. during the trial "did not contain any particular factual or legal arguments": it contained the factual subject matter of the questioning (the exact circumstances of the search) and its legal purpose (establishing whether the explosives had been planted in the applicant's bag)[138]. Furthermore, when requesting the attendance of defence witnesses, the defence does not have to "elaborate in concrete terms" on how their testimony would assist the case for the defence.[139] Such elaboration would equate to asking the defence to surrender its trial strategy and particularly its questioning strategy. More troubling still, no such elaboration is demanded from the prosecution.[140] It is patent that the majority demand from the defence much more than they require the prosecution to do. Ultimately, the majority contradict themselves, because they admit that, on the basis of the defence request alone, the attesting witnesses' testimony "would have ranged beyond the mere modalities of the search and the information subsequently entered in the police records",[141] and therefore acknowledge their relevance as defence witnesses; at the same time, however, they affirm that "further reasons for the examination of these witnesses would have been required".[142]

68. The majority's uneven approach becomes even more questionable when, in order to justify the non-attendance of witnesses B. and K., they embark on an open-ended criticism of the defence strategy, pointing twice to the defence's "general passivity"[143] during the examination of the police officers. Such virulent criticism, which goes far beyond the prima facie pertinence test, is unacceptable. When assessing the request for the attendance of defence witnesses, it is absolutely illegitimate to extrapolate

134. Paragraph 67 of the judgment.
135. See the Government's observations before the Grand Chamber, § 107.
136. Paragraph 42 of the Chamber judgment. The conclusion was followed by the Chamber itself (paragraph 98 of the Chamber judgment). Strangely enough, this fact disappeared from the Facts part of the Grand Chamber judgment. Yet the argument was made by the Government again before the Grand Chamber (paragraph 135 of the judgment).
137. Paragraph 171 of the judgment.
138. Paragraph 169 of the judgment.
139. Paragraph 171 of the judgment.
140. *A contrario*, *Schatschaschwili*, cited above, §§ 119-121.
141. Paragraph 138 of the judgment.
142. Paragraph 171 of the judgment.
143. Paragraphs 171 and 174 of the judgment.

conclusions that are negative for the defence from its strategy in the cross-examination of prosecution witnesses. The majority here mix apples and oranges. In so doing, they assume that "the significance of the attesting witnesses' possible testimony ... from the perspective of the trial court, was only remotely relevant to the subject matter of the accusation."[144] In other words, they contravene the prohibition on anticipation of the evidence. Even worse, in so doing, the majority verify the allegation of planted evidence only by giving credence to the very police officers who could possibly be responsible for such planting of evidence. This is simply not fair. Such blatantly unfair treatment of the defence is not compensated by the promised "overall fairness" assessment.

69. In fact, in the eyes of the majority, the overall fairness test is ultimately applied, not to the proceedings, but to the merits of the trial court's judgment. In condoning the decision not to examine witnesses B. and K., the majority invoke the fact that the conviction was based "on a considerable body of evidence".[145] The alleged fairness of the outcome of the proceedings justifies the shortcomings in the procedure. The end justifies the means. The Court is going back hundreds of years in time, ignoring the fact that any short-term gains associated with more attainable convictions in some high-profile cases, such as the present one, must be assessed against longer-term systemic losses.

70. In this context, the subsequent allegation that the applicant, "assisted by professional lawyers, was able to conduct the defence effectively, confront and examine witnesses testifying against her, comment without hindrance on the incriminating evidence, adduce evidence she considered relevant and to present her account of the events to the domestic courts" means little, but the little it means is dangerous. It is dangerous that respect for certain other procedural rules can be used as an excuse to justify a failure to comply with Article 6 § 1 (d). It is dangerous because it assumes that compliance with Article 6 § 1 (d) would have not have changed the outcome. As if the majority had divinatory power to perceive material truth beyond the limits of the procedure and to determine, in all their inexplicable, transcendental discretion, which rule of procedure should apply in each individual case. Human justice playing God's justice is justice at its worst.

144. Paragraph 173 of the judgment. Here, the majority patently contradict the liberal criterion exposed in paragraph 160 of the judgment.

145. Paragraph 175 of the judgment. This unfortunate method is not new in the Court's case-law (see, for example, *Sievert v. Germany*, no. 29881/07, § 67, 19 July 2012, and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07 and 2 others, § 82, 12 May 2016).

Conclusion

71. Alarm bells should be ringing among lawyers as a result of this judgment. It is particularly striking that the majority state that the applicant was able to "adduce evidence she considered relevant",[146] as if this had been the most impeccable of trials. The true novelty of this judgment is twofold: the enhanced obligation for the defence to "elaborate in concrete terms" on how the defence witness's testimony would assist the case for the defence, and the corrosive expansion of the overall fairness test to the assessment of alleged violations of the right to examine defence witnesses. This test is nothing more than a blank cheque for the domestic courts to do whatever they want with Article 6 § 3 rights and for the Court to confirm the outcome of the proceedings. After the weakening of the right to a confrontation with prosecution witness in the *Al-Khawaja and Tahery* and *Schatschaschwili* judgments and the eroding of the right to legal representation in *Ibrahim and Others*, the present judgment on the non-attendance of defence witnesses closes the circle, by revisiting the *Perna* test on the basis of the overall fairness test. With the unfortunate triangle *Schatschaschwili/Ibrahim and Others/Murtazaliyeva*, the Court erroneously pursues the double path of persistently watering down defence rights and "deferential[ly]"[147] abandoning its supervisory powers to the domestic courts. The silent assault on the rights of the defence in criminal procedure has been incontrovertibly stepped up, to such an extent that one wonders where it will stop.

146. Paragraph 175 of the judgment.
147. Paragraph 154 of the judgment.