

The Right to Examination of Prosecution Witnesses

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Introduction

At first sight, Article 6 of the ECHR seems to guarantee a straightforward right to question witnesses who appear before a criminal court and testify against the defendant. Nothing else about the provision and exercise of this right can be inferred from the wording of Subsection 3 (d).¹

However, the Court has provided some clarification about the context and intended scope of this right,² although its corresponding case law is still in the process of development.³ First of all, the Court has embedded the right to examine prosecution witnesses into the general notion of a fair trial, meaning that this right, as the Court understands it, fulfils some of the functions which must be met pursuant to providing a fair trial in the sense of Art. 6 (1) [I.]. Secondly, the Court has clarified, to a certain degree, the scope of the right to examine witnesses. The right has gained a procedural and a material scope [II. and III.]. Thirdly, the Court has acknowledged some legitimate reasons which can be cited in order to restrict the right to examine witnesses [IV.]. In case of a restriction, since the interests of more than one participant of a criminal trial are impaired, fourthly, the Court requires a balance to be struck between the interests of the defendant, the criminal justice authorities, and the other participants in the trial [V.]. Finally, the violation of the right to challenge witnesses depends on the result of an overall fairness test that involves the consideration of all relevant requirements [VI.].

The following contribution aims at delivering a systematic, general overview of the right to examine witnesses; for this reason, it will not address specific details and ambiguities in the case law of the Court, nor the corresponding discussions in the literature.

I. General scope within the realm of a fair trial

Looking closely at the case law of the Court, one can establish three essential components of a fair trial: firstly, the defendant must be afforded the possibility to effectively participate in criminal proceedings. Secondly, he shall have access to the evidence that the trial court and prosecution have at their disposal. Thirdly, the trial court must treat the defendant in a way that provides him with a certain “equality of arms” between him and the prosecution authority.⁴ These rights

serve to implement the adversarial model of the criminal trial, more specifically an adversarial evidence-taking process, which the Court evaluates as fair in the sense of the Convention.⁵

According to the principle of adversarial evidence-taking, in general all evidence that should be considered with regard to the guilt of the defendant or possible punishment must be taken by the Court in a public trial and in the presence of the defendant.⁶ In the case of witness evidence, the requirements of effective participation, access to evidence and equality of arms, are regarded as met if the defendant gains the opportunity to examine the witness, to confront him or her before the trial court with his version of the case, and to have influence on the outcome of trial.⁷ That is the ideal scenario or picture that the Court reads into the very brief wording of Art. 6 (3) (d) of the Convention. Thereby, the Convention does not aim to export various figures of the common law trial model, namely cross-examination, into the civil law countries of the Continent, which mostly follow the inquisitorial tradition of the criminal trial.⁸ So, if the trial is organized in an inquisitorial way, it is sufficient for the purpose of a fair trial that the defendant has the possibility of confronting the prosecution witness with his version of the case.⁹ Although the postulation of a cross-examination by Art. 6 of the Convention is thereby avoided, one can establish a certain degree

– 17362/03 (*Soysal v. Turkey*), § 63; ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 141; see also *Jahn*, JuS 2014, 948 (949); *Gaede*, StV 2006, 599 (601); *Walther*, JZ 2004, 1107 (1110); *Esser*, JR 2005, 248 (249); *Holdgaard*, Nordic J. Int. L. 71 (2002), 83 (83).

⁵ For the status of the right to examine a prosecution witness within the system of Art. 6 see *Ambos*, ZStW 115 (2003), 583 (607 ss.); see also *Lohse*, JR 2015, 60 (63); *Renzikowski* (fn. 3), p. 529; *Cornelius*, NStZ 2008, 244 (247).

⁶ ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 103; see also *Pauly*, StV 2014, 452 (456); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (130 ss.); *Esser*, JR 2005, 248 (249).

⁷ *Zöller*, ZJS 2010, 441 (443); *Renzikowski* (fn. 3), p. 529; *Wohlers*, in: Donatsch/Forster/Schwarzenegger (Hrsg.), Strafrecht, Strafprozessrecht und Menschenrechte, Festschrift für Stefan Trechsel zum 65. Geburtstag, 2002, p. 813 (817).

⁸ ECHR, Judgment of 28.5.2013 – 67318/09, 22226/12 (*Twomey and Cameron v. The United Kingdom*), § 30.

⁹ See, for instance, ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 131, “[to] contest effectively the witness’s credibility” or “a direct confrontation [with him]”; see also *Ambos*, Internationales Strafrecht, 5. Ed. 2018, p. 488; *Redmayne*, MLR 75 (2012) 865 (866); *Ambos*, ZStW 115 (2003), 583 (608); *Walther*, GA 2003, 204 (206); *Lusty*, Sydney L. Rev. 24 (2000), 361 (411).

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¹ See also *Walther*, GA 2003, 204 (212); *Holdgaard*, Nordic Journal of International Law 71 (2002), 83 (83).

² For a historical review see *Kirst*, Quinnipiac Law Review 2003, 782.

³ See below V. 2 a). and VI. 1.; see also *Renzikowski*, in: Hiebl/Kassebohm/Lilie (Hrsg.), Festschrift für Volkmar Mehle zum 65. Geburtstag am 11.11.2009, 2009, p. 529 (531).

⁴ See for that ECHR, Judgment of 4.12.2015 – 47143/06 (*Zakharov v. Russia*), § 246; ECHR, Judgment of 23.9.2014

of harmonization between the adversarial and inquisitorial trial models via the requirement of confrontation.¹⁰

This was how the Court viewed the right to examine witnesses as fitting into the more general notion of the right to fair trial. In the following, the right of examination will be elaborated more specifically.

II. Procedural scope

As long as the prosecution authority uses the testimony of a witness against the defendant, and the trial court possibly relies on this testimony in its verdict,¹¹ two specific procedural issues arise: the appearance or attendance of a prosecution witness before the trial court, and the examination or confrontation of the witness by the defendant.¹² According to the case law of the Court, the trial judge has to make “every reasonable effort [...] in order to ensure the attendance of the witnesses in court”,¹³ including inquiring about an address and summoning the witness. The same is true for the examination of the witness before the trial court by the defendant. Whenever the trial judge cannot ensure the appearance of the witness or the examination of the witness by the defendant, he is obliged to account for the factual and/or legal grounds of the restrictions that are thereby incurred by the defendant.¹⁴ As the Court emphasizes, the obligations of inquiry and reasoning pertaining to the restrictions emerge from the role of the trial judge as “being the ultimate guardian of the fairness of the proceedings”.¹⁵

III. Material scope

Besides the procedural scope, the examination of the witness needs to occur under certain conditions. I have already mentioned the meaning of this right for adversarial evidence production calling for a confrontation with the prosecution witnesses in a public trial and in the presence of the defendant. In particular, the principle of confrontation requires “that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him”.¹⁶ That means more specifically: the defendant must be “in a position to challenge the probity and credibility” of prosecution witnesses and “to test the truthfulness and reliability” of their testimonies.¹⁷ The question here is: what does the defendant

need to know or be able to do in order to achieve the purpose of the confrontation?

A closer look into the case law of the Court reveals that the defendant, firstly, must be informed about the identity of any prosecution witness; secondly, the personal appearance of the witness for examination in the trial must be secured; thirdly, the defendant must be enabled to follow the examination of the witness acoustically and visually; and finally, he needs to obtain the opportunity to question the witness and to challenge his or her testimony.¹⁸ By ensuring these conditions, the defendant gets to know the personality of his “accuser”.¹⁹ He is able to observe the demeanour of the witness, including any spontaneous reactions he or she may have to the questions asked, in the process of testifying against him and thus influencing the outcome of the trial. The defendant is directly and fully aware of the state of knowledge that the decision-makers possess with regard to the testimonies of the witness.²⁰

If the defendant is aware “of the identity of the person it seeks to question”, he may be able to “demonstrate that he or she is prejudiced, hostile or unreliable”.²¹ Moreover, in being enabled “to observe the witnesses’ demeanour under questioning”, the defendant can “form a view as to their truthfulness and reliability”.²² A direct confrontation with the prosecution witnesses and awareness of all the witness’s testimonies will make it possible for the defendant, to “press” the witnesses, “at times vigorously”, on any “inconsistencies in their account”.²³ Furthermore, the examination of prosecution witnesses by the defense itself is supposed to prevent the danger that the trial court or prosecution authority might neglect or even wilfully leave out questions for the witnesses with regard to inconsistencies in their testimonies or other

¹⁰ In this regard see also *Vogler*, ZStW 126 (2014), 239 (246); *Jung*, GA 2009, 235 (236); *Renzikowski* (fn. 3), p. 530.

¹¹ ECHR, Judgment of 26.2.2013 – 50254/07 (*Papadakis v. The Former Yugoslav Republic of Macedonia*), § 87.

¹² See also below VI.

¹³ ECHR, Judgment of 22.11.2015 – 13249/02 (*Taal v. Estonia*), § 34; see also *Ambos* (fn. 9), p. 489; *Renzikowski* (fn. 3), p. 540.

¹⁴ See also below IV.1.

¹⁵ ECHR, Judgment of 23.10.2012 – 38623/03 (*Pichugin v. Russia*), § 204.

¹⁶ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 127.

¹⁷ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 127; see

also *Ambos* (fn. 9), p. 488; *Jahn*, JuS 2014, 948 (949); *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (263); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (157); *Wohlers* (fn. 7), p. 815.

¹⁸ For the requirements of confrontation see also *Ambos* (fn. 9), p. 489; *Lohse*, JR 2015, 60 (63 ss.); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (130); *Krausbeck*, Konfrontative Zeugenbefragung, Vorgaben des Art. 6 Abs. 3 lit. d EMRK für das deutsche Strafverfahren, 2010, p. 124 ss.

¹⁹ ECHR, Judgment of 20.11.1989 – 11454/85 (*Kostovski v. The Netherlands*), § 42; *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (264).

²⁰ See also *Renzikowski* (fn. 3), p. 529; *Cornelius*, NStZ 2008, 244 (247); *Rosbaud*, HRRS 2005, 131 (135); *Ambos*, ZStW 115 (2003), 583 (609).

²¹ ECHR, Judgment of 20.11.1989 – 11454/85 (*Kostovski v. The Netherlands*), § 42.

²² ECHR, Judgment of 10.4.2012 – 46099/06, 46699/06 (*Ellis, Rodrigo and Martin v. The United Kingdom*), § 74; see also *Maffei*, The European Right to Confrontation in Criminal Proceedings, 2006, p. 78; *van Voorhout*, Utrecht Law Review 2 (2006), 139 (141).

²³ *van Voorhout*, Utrecht Law Review 2 (2006), 139 (141).

kinds of inappropriate reasons for a false statement.²⁴ Of course, the defense may consider the use of these opportunities unnecessary and then waive its right to confront the witness, whether entirely or partially, through an explicit declaration or implicit behaviour.²⁵

That, in general terms, is how the European Court of Human Rights understands the right to examine a prosecution witness and conceives of its procedural and material scope. The next issue to be dealt with is the limitations of this right.

IV. Legitimate reasons for a restriction and the usual methods of restriction

1. General concept

It is part of the established case law of the Court that the Convention not only protects the rights of the defense but also the interests of society in an effective administration of criminal justice,²⁶ and the rights of victims as well as the rights of witnesses to life (Art. 2), liberty and security (Art. 5) and to private life (Art. 8),²⁷ even if Art. 6 (3) (d) mentions none of these rights. Thus if there is a conflict between affording the right to examine a prosecution witness and protecting these interests, the Convention requires that the right to examine be interpreted within the entire system of the Convention, and allows the restriction of this right on the ground of these legitimate interests.²⁸ The core notion of this judgement is: “Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court”.²⁹ This is the broad conception of the limitations of the right to examine prosecution witnesses.

In its case law, the Court acknowledges a number of legal and factual reasons that count as legitimate limitations of the

right in view of the mentioned interests:³⁰ for instance, the vulnerability of witnesses, particularly in cases of sexual crimes where victims are themselves witnesses, or as regards the welfare of minor witnesses;³¹ the protection of witnesses from threats or reprisals by the defendant;³² the public interest in the confidentiality of some information (details about police investigation methods,³³ protection of sources,³⁴ or state-security-related circumstances³⁵); or the right of the witness to not appear (immunities) or to refuse to answer incriminating questions for reasons of self-protection³⁶ or reasonable protection of others.³⁷ As to factual reasons, the Court for instance accepts the unreachability of witnesses who are dead,³⁸ ill³⁹ or missing (absent) – for example, when abroad.⁴⁰

In principle, a due consideration of these legitimate reasons will, entirely or partially, release the trial court from its obligation to ensure the appearance or attendance of a prosecution witness in the public trial and to afford a direct examination of the witness or confrontation with the defendant.⁴¹ However, this is only true if the trial court has made every

²⁴ See for instance ECHR, Judgment of 23.10.2012 – 38623/03 (Pichugin v. Russia), §§ 210 ss.; in this regard see also *Wohlens* (fn. 7), p. 822.

²⁵ ECHR, Judgment of 12.6.2014 – 30265/09, 30265/09 (Doncev and Burgov v. The Former Yugoslav Republic of Macedonia), §§ 58 ss.; see also *du Bois-Pedain*, HRRS 2012, 120 (123); *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (268); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (138); *Renzikowski* (fn. 3), p. 536.

²⁶ Arguing in this direction also *Holdgaard*, Nordic J. Int. L. 71 (2002), 83 (84); see also *Lohse*, JR 2015, 60 (63).

²⁷ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 118; see also *Pauly*, StV 2014, 452 (456); *Safferling*, NStZ 2006, 75 (77); *de Than*, J. Crim. L. 67 (2003), 165 (168).

²⁸ For the application of the principle of proportionality in context of Art. 6 see *Maffei* (fn. 22), 64 ss.

²⁹ ECHR, Judgment of 28.2.2016 – 51277/99 (Krasniki v. The Czech Republic), § 75; see also *Ambos* (fn. 9), p. 489; *Jahn*, JuS 2014, 948 (949); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (131); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (158); *Mahler*, HRRS 2013, 333 (334); *Renzikowski* (fn. 3), p. 534; *Kirst*, QLR 4 (2003), 777 (804); *Holdgaard*, 71 (2002), Nordic J. Int. L., 83 (83).

³⁰ See for that ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 119; ECHR, Judgment of 19.2.2013 – 61800/08 (*Gani v. Spain*), § 40; see also *du Bois-Pedain*, HRRS 2012, 120 (123 ss.); *Krausbeck* (fn. 18), p. 159 ss.

³¹ ECHR, Judgment of 20.12.2001 – 33900/96 (P.S. v. Germany), § 28; ECHR, Judgment of 10.1.2012 – 315/09 (A.G. v. Sweden); see also *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (132); *Maffei* (fn. 22), p. 52 ss.; *Kirst*, QLR 4 (2003), 777 (801); *Ambos*, NStZ 2003, 14 (16).

³² ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), §§ 120–125.

³³ ECHR, Judgment of 23.9.2014 – 17362/03 (*Soysal v. Turkey*), § 78

³⁴ ECHR, Judgment of 15.6.1992 – 12433/86 (*Lüdi v. Switzerland*), § 48; see also *van Voorhout*, Utrecht Law Review 2 (2006), 119 (139); *Kirst*, QLR 4 (2003), 777 (807).

³⁵ ECHR, Judgment of 12.12.2013 – 19165/08 (*Donohoe v. Ireland*), §§ 78–81.

³⁶ ECHR, Judgment of 10.7.2012 – 29353/06 (*Vidgen v. The Netherlands*), § 42.

³⁷ ECHR, Judgment of 23.3.2016 – 47152/06 (*Blokhin v. Russia*), § 213.

³⁸ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), ECHR, Judgment of 17.7.2001 – 29900/96, 29901/96, 29902/96 (*Sadak and others v. Turkey*), § 67.

³⁹ ECHR, Judgment of 12.12.2017 – 2257/12 (*Zadumov v. Russia*), § 54; ECHR, Judgment of 19.2.2013 – 61800/08 (*Gani v. Spain*), § 45; ECHR, Judgment of 27.3.2014 – 58428/10 (*Matytsina v. Russia*), § 163.

⁴⁰ ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 135; ECHR, Judgment of 21.3.2002 – 59895/00 (*Calabro v. Italy and Germany*); for a broad definition of absent witnesses see *Maffei* (fn. 22), p. 43 ss.; *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (135).

⁴¹ See also above II.

reasonable effort to afford examination of or confrontation with the prosecution witnesses.⁴² Connected with this obligation, the Court still bears the burden of inquiring and giving an explanation of the legal and factual reasons that led to the restrictions.⁴³

2. Common forms of restriction – methods of witness protection

In any individual case, the details of the specific legal or factual reasons regarding how the trial court is going to restrict the right to examine a prosecution witness are important. In the legal practice of member states of the European Council⁴⁴ there are several forms of restrictions that the Court has ruled on. In terms of national legal orders, they are occasionally referred to as witness protection methods. The methods have common patterns, namely, they conceal the identity of the witness in question (anonymization/non-disclosure of identity);⁴⁵ or block the defense, either completely or partially, from observing the demeanour of the witness during the examination,⁴⁶ from direct confrontation with the witness,⁴⁷ from learning what the witness says,⁴⁸ or from asking questions, whether on specific issues or any questions at all.⁴⁹ As such, all corresponding measures inter-

fere with the material scope of the right to examine a witness.⁵⁰

The methods provide witnesses with protection either during their examination at the trial stage, or with reference to their examination at a previous stage of the criminal proceedings and the admission of their testimonies as part of the evidence-taking by the trial court. Examples of the first group of methods include: exclusion of the public (in camera hearings),⁵¹ examination of the witness under areal, acoustical or optical shielding (distortion of pictures and sounds),⁵² exclusion of the defendant from the court-examination,⁵³ exclusion of the defendant and his lawyer from the court examination,⁵⁴ examination of the witness by an associate judge,⁵⁵ or limitations on questions.⁵⁶ The second group of methods includes: the examination of the witness by an investigating judge,⁵⁷ public prosecutor,⁵⁸ or police;⁵⁹ admission of these individuals as hearsay-evidence or a reading of examination records as documentary evidence;⁶⁰ and, finally, the acoustic and/or visual recording of a pre-stage examination of witnesses and playback of the record.⁶¹

In general, the Court does not consider the use of one of these methods as violating the Convention per se, including

⁴² For this see above II.

⁴³ ECHR, Judgment of 18.12.2014 – 14212/10 (Scholer v. Germany), §§ 52 ss., ECHR, Judgment of 26.6.2015 – 48628/12 (Balta and Demir v. Turkey), § 41; see also *Renzikowski* (fn. 3), p. 537.

⁴⁴ In this regard see also Recommendation No. R (97) 13 Concerning Intimidation of Witnesses and the Rights of the Defence, available at:

<http://fdds.pl/wp-content/uploads/2016/05/Rekomendacja-Komitetu-Ministr%C3%B3w-Rady-Europy-dot.-zastraszania-%C5%9Bwiadk%C3%B3w-i-prawa-do-obrony.pdf> (25.5.2018); Recommendation Rec(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organised crime, available at: <https://rm.coe.int/1680092b86> (25.5.2018); Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, available at: http://www.coe.int/t/dgl/legalcooperation/economiccrime/organisedcrime/Rec%202005_9.pdf (25.5.2018).

⁴⁵ ECHR, Judgment of 10.4.2012 – 46099/06, 46699/06 (Ellis, Rodrigo and Martin v. The United Kingdom), § 74; see also *Emmerson/Ashworth/Macdonald*, Human Rights and Criminal Justice, 3rd Ed. 2012, p. 584 ss.; *Kirst*, QLR 4 (2003), 777 (784 ss.).

⁴⁶ ECHR, Judgment of 26.3.1996 – 20524/92 (Doorson v. The Netherlands), §§ 72 ss.

⁴⁷ ECHR, Judgment of 6.12.2012 – 25088/07 (Pesukic v. Switzerland), § 50.

⁴⁸ ECHR, Judgment of 18.12.2014 – 14212/10 (Scholar v. Germany), §§ 60 et seqq.

⁴⁹ ECHR, Judgment of 23.10.2012 – 38623/03 (Pichugin v. Russia), § 202.

⁵⁰ See also *Krauß*, V-Leute im Strafprozeß und die Europäische Menschenrechtskonvention, 1999, p. 129.

⁵¹ ECHR, Judgment of 1.3.2011 – 15924/05 (Welke and Bialek v. Poland), § 77.

⁵² ECHR, Judgment of 6.12.2012 – 25088/07 (Pesukic v. Switzerland), § 50; ECHR, Judgment of 12.1.2017 – 54146/09 (Batek and others v. The Czech Republic), §§ 56 ss.; see also *Ambos* (fn. 9), p. 490 ss.; *Krausbeck* (fn. 18), p. 289.

⁵³ ECHR, Judgment of 10.4.2012 – 46099/06, 46699/06 (Ellis, Rodrigo and Martin v. The United Kingdom), § 41; see also *Krausbeck* (fn. 18), p. 286.

⁵⁴ ECHR, Judgment of 26.2.2013 – 50254/07 (Papadakis v. The Former Yugoslav Republic of Macedonia), § 91; ECHR, Judgment of 12.6.2014 – 30265/09, 30265/09 (Doncev and Burgov v. The Former Yugoslav Republic of Macedonia), § 55.

⁵⁵ ECHR, Judgment of 26.6.2015 – 48628/12 (Balta and Demir v. Turkey), §§ 45 ss.

⁵⁶ ECHR, Judgment of 23.10.2012 – 38623/03 (Pichugin v. Russia), § 202.

⁵⁷ ECHR, Judgment of 20.9.1993 – 14647/89 (Saidi v. France), § 43.

⁵⁸ ECHR, Judgment of 27.2.2001 – 33354/96 (Luca v. Italy), § 40.

⁵⁹ ECHR, Judgment of 28.3.2002 – 47698/99, 48115/99 (Birutis and others), § 15.

⁶⁰ ECHR, Judgment of 19.12.1990 – 11444/85 (Delta v. France), § 37.

⁶¹ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), §§ 127 ss.; see also *Ambos*, ZStW 115 (2003), 583 (610).

the use of documentary evidence as a surrogate.⁶² Instead of a formal blanket judgement,⁶³ a closer reflection on their contents is required in order to determine whether and how their detrimental effects on defense rights might be remedied. Indeed, the methods put limitations of differing severity on the right to the examination of witnesses. Each individual method needs closer consideration regarding the question of to what extent it withdraws material advantages concerning the right to examination of a witness from the defendant.⁶⁴ The degree of restrictions should be judged by assessing the impact of the methods on the four basic conditions of the right to examine a prosecution witness that are mentioned above.⁶⁵ For reasons of space, the corresponding assessments for each individual method cannot be provided within the scope of this contribution. Additionally, individual cases generally have divergent circumstances which can only be assessed within their specific context. Nevertheless, such an investigation is of some importance because its outcome is one of the factors that the Court will consider in an examination of whether a criminal trial was fair as regards its treatment of the defendant.⁶⁶

At this level of its examination, the Court demands a certain balance between concerned interests, even if the rights of the defense have been restricted on the grounds of a legitimate reason. A closer look into the case law of the Court reveals that such a balance requires consideration of the principle of proportionality and the adoption of counterbalancing measures.

V. The balance of the interests

1. Principle of proportionality

As a general rule, the existence of a legitimate reason for restriction “could not justify any choice of means by the authorities [...]”.⁶⁷ The Court emphasizes that “any measures restricting the rights of the defence should be strictly necessary”.⁶⁸ The necessity test also includes the seriousness of the

reason that is given to justify restrictions on the rights of the defense.⁶⁹ Moreover, from among the various witness protection methods which may be considered equally justifiable reasons for restriction, the decision-makers are in general obliged to choose the least restrictive one.⁷⁰ However, if the trial court has alternatives at its disposal, it lies within its discretion to decide between the alternatives.⁷¹ In principle, the defendant is not entitled to demand the use of the more advantageous or beneficial means.⁷² Nevertheless, the complete exclusion of the witness from the public trial “must be a measure of last resort”. Before the trial court can consider this measure, it has to be satisfied that “all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable”.⁷³ This, for the defense, is indeed the most detrimental method of protecting a witness, because at no stage of the criminal proceedings can the defendant obtain a confrontation with him or her.⁷⁴ As this example indicates, the choice of the method not only determines the kind and degree of restrictions on the right to examine witnesses that will be adopted but it also predetermines the outcome of the second balancing requirement, namely, taking counterbalancing measures. Thus, it depends on the conditions of the specific protection method whether and to what extent it allows such measures that are capable of remedying disadvantages which accrue to the defence by the use of this very method. Therefore, the trial court is well advised to pay attention to the consequences of its choice for the defense,⁷⁵ and to recall that its duty as the ultimate guardian of the trial is still in force.⁷⁶

2. Obligation to take counterbalancing measures

a) Aims of counterbalancing

Indeed, the European Court of Human Rights obliges the judicial authorities to counterbalance “the handicaps under which the defence laboured sufficiently [...] by the procedures followed.”⁷⁷ In general terms, the counterbalancing has

⁶² See also *Ambos* (fn. 9), p. 490; *Riordan*, Hastings Const. L. Q. 26 (1999), 373 (403); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (130); see also below V. 1. and 2. b).

⁶³ Compare it with: “Article 6 §§ 1 and 3 (d) of the Convention contain a presumption against the use of hearsay evidence against a defendant in criminal proceedings”, ECHR, Judgment of 10.5.2015 – 19354/02 (*Thomas v. The United Kingdom*).

⁶⁴ See for instance, ECHR, Judgment of 26.2.2013 – 50254/07 (*Papadakis v. The Former Yugoslav Republic of Macedonia*), § 95.

⁶⁵ See above III.

⁶⁶ ECHR, Judgment of 23.4.1997 – 21363/93, 21364/93, 21427/93, 22056/93 (*van Mechelen and others v. The Netherlands*), §§ 59 ss.; see also *Krausbeck* (fn. 18), p. 169.

⁶⁷ ECHR, Judgment of 28.3.2002 – 47698/99, 48115/99 (*Birutis and others v. Lithuania*), § 30.

⁶⁸ ECHR, Judgment of 23.4.1997 – 21363/93, 21364/93, 21427/93, 22056/93 (*van Mechelen and others v. The Netherlands*), § 58.

⁶⁹ *Krausbeck* (fn. 18), p. 169.

⁷⁰ ECHR, Judgment of 23.4.1997 – 21363/93, 21364/93, 21427/93, 22056/93 (*van Mechelen and others v. The Netherlands*), § 58; see also *Rosbaud*, HRRS 2005, 131 (136).

⁷¹ ECHR, Judgment of 18.12.2014 – 14212/10 (*Scholer v. Germany*), § 57.

⁷² ECHR, Judgment of 26.3.1996 – 20524/92 (*Doorson v. The Netherlands*), § 54.

⁷³ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 125.

⁷⁴ ECHR, Judgment of 26.6.2015 – 48628/12 (*Balta and Demir v. Turkey*), § 52; ECHR, Judgment of 22.11.2015 – 13249/02 (*Taal v. Estonia*), §§ 32 ss.; ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 119.

⁷⁵ See also below VI. 2.

⁷⁶ See for this above II.

⁷⁷ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 141; see also *Pauly*, StV 2014, 452 (457).

to pursue objectives that the Court assigns to the right to examine prosecution witnesses. A close consideration of the case law of the Court reveals two kinds of (ultimate) aims:⁷⁸ the danger of any miscarriage of justice, in particular a wrongful conviction; and the effective participation of the defence in a criminal trial.⁷⁹

As the Court remarks: “inculpatory evidence against an accused may well be designedly untruthful or simply erroneous. Moreover, unsworn statements by witnesses who cannot be examined often appear on their face to be cogent and compelling and it is seductively easy to conclude that there can be no answer to the case against the defendant [...] the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination”.⁸⁰ As far as the second objective is concerned, the witness protection methods deprive the defendant, wholly or partially, of the opportunity to confront the prosecution witness and question him. Therefore, by the counterbalancing measures he must be put into “a position to challenge the probity and credibility” of prosecution witnesses and “to test the truthfulness and reliability of” their testimonies.⁸¹

A closer look at the two ultimate objectives of Art. 6 (3) (d) ECHR, which the Court wants to achieve, reveals that they are conflicting. A narrow understanding of the avoidance of a miscarriage of justice can give considerable importance to the corresponding efforts by the trial court, even if the participation of the defence is less ensured. Indeed, in some cases the Court seems to be convinced that the reliability of witness evidence can be sufficiently afforded through a comprehensive examination of the witness by the trial court, even if the defense has comparatively lesser opportunities for “a searching examination”.⁸² Therefore, the objective of the avoidance of a wrongful conviction has a restrictive impact on the requirements of counterbalancing measures at the expense of effective participation by the defense.⁸³ This result is quite difficult to understand as Art. 6 (3) ECHR guarantees the defendant of a criminal trial some minimum rights.⁸⁴ Nevertheless, the Court emphasizes that an “assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears *prima facie*

to be reliable, if there are no means of challenging that evidence once it is admitted.”⁸⁵

b) Common counterbalancing measures

Besides the objective of counterbalancing measures, there are also specific instructions regarding how to implement them. The measures are supposed to take the place of the advantages that the defense would have gained by unrestricted exercise of Art. 6 (3) (d) ECHR. Therefore, as an appropriate substitute, the measures should create conditions, which “as closely as [...] possible” approximate “the hearing of a witness in open court”.⁸⁶ In an individual case, this test requires the assertion of the reach of counterbalancing arguments in comparison with a case of unrestricted use of the right to examine prosecution witnesses. The sufficiency of counterbalancing measures will then depend on the degree of this proximity.

More specifically, if the identity of the prosecution witness is concealed, the appropriate counterbalancing measures should preferably consist of the disclosure of circumstances under which the witness acquired knowledge about the case against the defendant.⁸⁷ The Court also regards it as a guarantee if the identity of the witness in question is not only known by an administrative authority but also disclosed to the examining judge and he is in the position to prove its authenticity.⁸⁸ In the case of areal, acoustical or optical shielding of the witness, the transmission of sound and/or images, even if distorted, is to a certain degree able to create the atmosphere of a regular examination.⁸⁹ In connection with that, an undisturbed examination and/or observation by decision-making instances, such as the trial judges, are deemed as further guarantees.⁹⁰ The exclusion of the defendant from the examination can to a certain degree be compensated by the presence of the defendant’s lawyer.⁹¹ Even if the exclusion of the defense from the witness examination, either during the primary proceedings or at court trial, and the admission of the given testimonies as inculpatory evidence against the defendant, is an *ultima ratio*-measure, the possibility of counterbalancing measures is not excluded.⁹² The fact that a judge ex-

⁷⁸ For the more general concept of a fair trial see above I.

⁷⁹ In this regard see also *Wohlers* (fn. 7), p. 827.

⁸⁰ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 142.

⁸¹ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 127.

⁸² ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 142.

⁸³ *Meyer*, HRRS 2012, 117 (119); see also *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (267); for the debate on “a fair trial” or “an in-the-end right conviction” see *Kirst*, QLR 4 (2003), 777 (808); *Walther*, GA 2003, 204 (219).

⁸⁴ In this respect see also *Ambos* (fn. 9), p. 493; *Lusty*, Sydney L. Rev. 24 (2000), 361 (415).

⁸⁵ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (*Al-Khawaja and Tahery v. The United Kingdom*), § 141; see also *Redmayne*, MLR 75 (2012), 865 (871).

⁸⁶ ECHR, Judgment of 4.6.2000 – 43149/98 (*Kok v. The Netherlands*), § 1 Law; see also *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (164).

⁸⁷ ECHR, Judgment of 10.4.2012 – 46099/06, 46699/06 (*Ellis, Rodrigo and Martin v. The United Kingdom*), § 74.

⁸⁸ ECHR, Judgment of 6.12.2012 – 25088/07 (*Pesukic v. Switzerland*), § 50.

⁸⁹ ECHR, Judgment of 4.6.2000 – 43149/98 (*Kok v. The Netherlands*), § 1 Law; see also *Ambos*, ZStW 115 (2003), 583 (610).

⁹⁰ ECHR, Judgment of 6.12.2012 – 25088/07 (*Pesukic v. Switzerland*), § 50.

⁹¹ ECHR, Judgment of 26.3.1996 – 20524/92 (*Doorson v. The Netherlands*), § 75.

⁹² See also above IV. 2.

amines the witness in question counts as a certain guarantee in such cases.⁹³ Providing the defense with the records of the witness's examination is a further guarantee, in that it might be possible for the defence to refute the witness's version.⁹⁴ The participation of the defense might furthermore be supported by the possibility that it can pose written questions to the witness.⁹⁵ The hearing and questioning of the persons who conducted the witness examination, which can be included in the public trial as hearsay evidence, displays another measure in the right direction.⁹⁶

As has been mentioned already, the counterbalancing measures are not only those that remedy the disadvantages related to the participation of the defense. The Court also regards it as a counterbalancing measure if the trial proceeds in assessing the witness evidence with caution. The Court in general requires that "evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care."⁹⁷ And "[t]he fact that the domestic courts approached the untested evidence of an absent witness with caution has been considered by the Court to be an important safeguard. The courts must have shown that they were aware that the statements of the absent witness carried less weight [...] detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available" will show that the court was cautious in assessing the witness evidence in question.⁹⁸

c) The reach of counterbalancing measures

Not only does the consideration of the court's assessment diminish the position of the defense as a beneficiary of counterbalancing measures but there is also a further consequence of the aim to avoid a wrongful conviction, namely the potential that such a conviction could be passed by the same court. Based on this principle, the European Court of Human Rights

determined in a specific case the required degree of the counterbalancing measures. In other words, "in assessing whether the procedures involved in the questioning of the anonymous witness were *sufficient to counterbalance* the difficulties caused to the defence due weight must be given to" the weight of the witness evidence in question.⁹⁹ The Court expresses the logic behind this as follows: "*the greater the importance of the evidence, the greater the potential unfairness to the defendant* in allowing the witness to remain anonymous or to be absent from the trial and the *greater the need for safeguards to ensure* that the evidence is *demonstrably reliable or that its reliability can properly be tested and assessed*".¹⁰⁰ In the light of these considerations, the Court infers from these interlinkages the following maxim governing the extent of counterbalancing measures: "The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair",¹⁰¹ and correspondingly if "the anonymous testimony was not in any respect decisive for the conviction of the applicant. The defence was thus handicapped to a much lesser degree".¹⁰² On the contrary, "[t]he dangers inherent in allowing untested hearsay evidence to be adduced", namely, in the worst case of a wrongful conviction, "are all the greater if that evidence is *the sole or decisive evidence* against the defendant."¹⁰³

3. Interim result

Thus far, the general structure of the right to examine a prosecution witness according to Art. 6 (3) (d) ECHR has been outlined. In fact, the requirements of Art. 6 (3) (d) ECHR concern a number of issues: the existence of a legitimate reason and the obligation of the trial court to give details about its factual findings and legal assessment with regard to restriction, namely to consider the seriousness of the restriction entailed by the choice of a witness protection method, to take account of the predetermining character of its choice for possibilities of counterbalancing, to create a resemblance between the counterbalancing measures and the conditions of an unrestricted confrontation with a prosecution witness, and, finally, to pay more attention to the sufficiency of the counterbalancing measures if the untested witness testimonies are the sole or decisive evidence against the defendant. All these points have been already elaborated above. However, when the European Court of Human Rights reviews an application, it breaks it down into three headlines:

⁹⁹ ECHR, Judgment of 4.6.2000 – 43149/98 (Kok v. The Netherlands), emphasis added.

¹⁰⁰ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 139, emphasis added.

¹⁰¹ ECHR, Judgment of 12.1.2017 – 54146/09 (Batek and others v. The Czech Republic), § 40.

¹⁰² ECHR, Judgment of 12.1.2017 – 54146/09 (Batek and others v. The Czech Republic), § 40.

¹⁰³ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 142, emphasis added.

⁹³ ECHR, Judgment of 23.4.1997 – 21363/93, 21364/93, 21427/93, 22056/93 (van Mechelen and others v. The Netherlands), § 62; ECHR, Judgment of 26.3.1996 – 20524/92 (Doorson v. The Netherlands), § 73.

⁹⁴ Compare ECHR, Judgment of 26.6.2015 – 48628/12 (Balta and Demir v. Turkey), § 60; ECHR, Judgment of 20.10.1989 – 11454/85 (Kostovski v. The Netherlands), § 43; see also *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (266).

⁹⁵ Compare ECHR, Judgment of 20.11.1989 – 11454/85 (Kostovski v. The Netherlands), § 42 with ECHR, Judgment of 18.12.2014 – 14212/10 (Scholer v. Germany), § 59; see also *Beulke*, in: Hanack/Hilger/Mehle/Widmaier (Hrsg.), Festschrift für Peter Rieß zum 70. Geburtstag am 4. Juni 2002, 2002, p. 3 (7).

⁹⁶ Compare ECHR, Judgment of 20.11.1989 – 11454/85 (Kostovski v. The Netherlands), § 42 with ECHR, Judgment of 18.12.2014 – 14212/10 (Scholer v. Germany), § 59.

⁹⁷ ECHR, Judgment of 26.3.1996 – 20524/92 (Doorson v. The Netherlands), § 76; see also *Safferling*, NStZ 2006, 75 (79).

⁹⁸ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 126.

reason of restriction, the importance of witness testimonies in question, and sufficiency of counterbalancing measures for “a fair and proper assessment of reliability of that evidence to take place”.¹⁰⁴ This three-step-reduction does not mean that the right to examine a prosecution witness consists solely of the corresponding requirements. As has been shown above, the Court itself accepts that the steps are “interrelated”.¹⁰⁵ Indeed, it occasionally refers to a longer list of guidelines consisting of eight key points where not only the said interlinkages are clearly explained but also the general structure of Art. 6 (3) (d) ECHR is summarized.¹⁰⁶ Nevertheless, “the short list” of the Court sets out the main factors that it deems decisive parts of its review for the question of whether a criminal trial against a defendant was fair or not. According to the well-established case law of the Court, it is primarily interested in the overall fairness of the trial, even if specific violations of this right concern the examination of a prosecution witness. Consequently, the result of the overall test can establish that the whole trial be considered fair even though the defendant was not able to enjoy the advantages of Art. 6 (3) (d) ECHR, or the restrictions rendered the trial as a whole unfair.¹⁰⁷

VI. Overall fairness test

1. The Court’s approach

With regard to the overall fairness test,¹⁰⁸ the Court claims it conducts an open-ended review of each individual case in the light of its specific circumstances and on the grounds of the three mentioned factors. The Court has thereby abandoned its previous so-called sole or decisive rule, which led to a breach of the right to a fair trial whenever “the defendant’s conviction was solely or to a decisive extent based on evidence

provided by an absent witness”.¹⁰⁹ The questions of whether there was a legitimate reason for the not-appearance of a witness and admission of witness’s testimonies, and whether sufficient counterbalancing measures have been taken, were for the purposes of the sole or decisive test irrelevant.¹¹⁰ The background of this case law is the interpretation made by the Court concerning “Art. 6 (1) and (3) (d) of the Convention, containing a presumption against the use of hearsay evidence against a defendant in criminal proceedings”.¹¹¹ However, contrary to its previous case law where the Court gave the said presumption greater importance, it emphasizes in its current case law that it does not accept a blanket assumption that “all hearsay evidence which is crucial to a case is unreliable or incapable of proper assessment unless tested in cross-examination”.¹¹² From this case law it follows that the Convention a fortiori does not require an exclusion rule for the testimonies of a witness that the defendant was unable to test in a public trial. The Court draws attention to its interpretation that “the statement of a witness does not always have to be made in court or in public if it is to be admitted as evidence”.¹¹³ Art. 6 (3) (d) ECHR does not, so the Court says, rule on the admissibility of some witness evidence.¹¹⁴ Rather,

¹⁰⁴ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 107; ECHR, Judgment of 4.10.2016 – 29187/10 (Smajgl v. Slovenia), § 61; ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 147; ECHR, Judgment of 6.12.2012 – 25088/07 (Pesukic v. Switzerland), § 45; see also *Thörnich*, ZIS 2017, 39 (41 ss.); *du Bois-Pedain*, HRRS 2012, 120 (132 ss.); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (171).

¹⁰⁵ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 118.

¹⁰⁶ See for instance ECHR, Judgment of 12.1.2017 – 54146/09 (Batek and others v. The Czech Republic), § 38.

¹⁰⁷ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 118; for former case-law of the Court see *Riordan*, Hastings Const. L. Q. 26 (1999), 373 (404 ss.); *Kirst*, QLR 4 (2003), 777 (790 ss.).

¹⁰⁸ For a general account on see *Ambos* (fn. 9), p. 491 ss.; see *Krausbeck* (fn. 18), p. 49 ss.; *Dehne-Niemann*, HRRS 2010, 189 (192 ss.); critical on the overall test, *Ambos* (fn. 9), p. 495 (“diluting the defence rights”); *Thörnich*, ZIS 2017, 39 (44); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (131) (“not helping”); *Kühne/Nash*, JZ 2000, 996 (997).

¹⁰⁹ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 112; see also *Ambos* (fn. 9), p. 490; *Vogler*, ZStW 126 (2014), 239 (246); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (158); *Mahler*, HRRS 2013, 333 (335); *Meyer*, HRRS 2012, 117 (117); *Redmayne*, MLR 75 (2012), 865 (866).

¹¹⁰ ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), §§ 90 ss.; see also ECHR, Judgment of 28.3.2002 – 47698/99, 48115/99 (Birutis and others v. Lithuania), § 31; ECHR, Judgment of 27.2.2001 – 33354/96 (Luca v. Italy), § 40; for a critical assessment of the so-called “Luca-test” see *Maffei* (fn. 22), p. 82; see also *Meyer*, HRRS 2012, 117 (118); *Schramm*, HRRS 2011, 156 (159 ss.); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (161 ss.); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (130 and 138); *Dehne-Niemann*, HRRS 2010, 189 (195); *Jung*, GA 2009, 235 (239); *van Voorhout*, Utrecht Law Review 2 (2006), 119 (139); *Esser*, JR 2005, 248 (253); *Kirst*, QLR 4 (2003), 777 (796).

¹¹¹ ECHR, Judgment of 10.5.2015 – 19354/02 (Thomas v. The United Kingdom); see also *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (136).

¹¹² ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 139; see also *Groenhuijsen/Selçuk*, ZStW 126 (2014), 248 (264 ss.); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (136).

¹¹³ ECHR, Judgment of 4.10.2016 – 29187/10 (Smajgl v. Slovenia), § 63; compare that with ECHR, Judgment of 20.11.1989 – 11454/85 (Kostovski v. The Netherlands), § 44; see also *Zöller*, ZJS 2010, 441 (444); *Riordan*, Hastings Const. L. Q. 26 (1999), 373 (403).

¹¹⁴ ECHR, Judgment of 19.12.1990 – 11444/85 (Delta v. France), § 36; see also *van Voorhout*, Utrecht Law Review, (2) 2006, 119 (139); *Winter Bachmaier*, Utrecht L. Rev. 9 (2013), 127 (130).

the right to examine a prosecution witness in a public trial and in the presence of the defence is a specification of the conventional right to a fair trial.¹¹⁵ The treaty basis of each unfairness claim is the right to a fair trial, and as regards its scope Art. 6 (3) (d) ECHR is not constitutive but declarative. For all sort of claims, the Court reviews the question of the admissibility and fairness of the whole trial against the defendant.¹¹⁶ Thus, the question concerning Art. 6 (3) (d) ECHR is integrated into the overall fairness test that the Court conducts for each application based on a claim of breach of Art. 6 ECHR, regardless of the fact of which specific right is invoked.¹¹⁷

It is obvious that the “sole or decisive rule” provided a fair amount of predictability to the scope of Art. 6 (3) (d) ECHR with regard to the question of what are the absolute limits of this provision and when there is a breach of the guarantee to a fair trial.¹¹⁸ The new test distinguishes itself by the fact that the Court does not value all the above-mentioned guarantees and requirements of the right to examine a prosecution witness equally, and does not, for each single violation of these rights, establish the breach of the right to a fair trial. According to the case law of the Court, such a treatment would be “indiscriminate”. It therefore sets out to prove the claims “in the traditional way”, namely to consider “the fairness of the proceedings as a whole”.¹¹⁹

Even under the consideration of the three factors that the Court highlights, one must remark that a decision on the fairness or unfairness of the whole trial involves at least six variables, considering both their affirmation and negation. In addition, the Court divides the weight of the testimony of the witness in question not only into categories of “solely” and “decisively” but sometimes describes it as “of relevance/importance”¹²⁰ or “irrelevant”.¹²¹ Apart from the last category, with the new differentiation, the variables in sum yield eighteen combinations with regard to the question of how a case might be constituted. For instance, there might not be a good reason for the restriction, whereas the counterbalancing was sufficient. Even if the conviction of the defendant was decisively based on the testimonies of an untested witness, the Court might still consider the whole trial as

fair.¹²² Alternatively, for the same weight of evidence in question, there might be, besides no good reason, also no sufficient counterbalancing measures.¹²³ Or, for the same weight, there might be a good reason but no counterbalancing evidence.¹²⁴

As said before, the possible combinations are not limited to these. With regard to the degree and kind of effect of each variable on the final judgement of the Court as to whether the trial is fair or not, it only postulates certain abstract rules, and fragmentarily so. According to its case law, “the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial. This being said, the lack of a good reason for the absence of a prosecution witness is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of [Art. 6 (1) and (3) (d) ECHR]”.¹²⁵ Thereby, the Court clearly restricts itself as regards determining in which combination the absence of a good reason will lead to a breach, as the degree of such a shortcoming is to be considered as severe. Finally, it emphasizes that the counterbalancing measures are needed even if the weight of the testimony of an untested witness does not reach the degree of “sole” or “decisive”.¹²⁶

Admittedly, this case law is not satisfactory from the point of view of legal certainty, as it gives the Court quite broad discretion to determine “justice” in a single case, and thereby neglects foreseeability.¹²⁷ A close look at the overall fairness test reveals that it actually benefits the trial court, while introducing witness evidence into the trial and affording the defence the right to examine him.¹²⁸

2. For the trial court

The basic requirements of the new overall fairness test for the trial court is to take adequate account of the question of reason and counterbalancing measures while assessing the value of the witness testimonies for a certain conviction. This is especially true for the case of an entirely absent witness. In a

¹¹⁵ Critical on this *Dehne-Niemann*, HRRS 2010, 189 (194).

¹¹⁶ ECHR, Judgment of 14.12.2004 – 59457/00 (*Rajcoomar v. The United Kingdom*).

¹¹⁷ Emphasizing this aspect also *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (172); *Holdgaard*, Nordic J. Int. L. 71 (2002), 83 (85).

¹¹⁸ *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (181); opting against this rule *du Bois-Pedain*, HRRS 2012, 120 (129); *Redmayne*, MLR 75 (2012), 865 (876 ss.).

¹¹⁹ ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 112; see also *Ambos* (fn. 9), p. 493 ss.; *Redmayne*, MLR 75 (2012), 865 (866).

¹²⁰ See for instance ECHR, Judgment of 17.11.2015 – 73047/01 (*Haas v. Germany*); ECHR, Judgment of 11.9.2006 – 22007/03 (*Sapunarescu v. Germany*).

¹²¹ ECHR, Judgment of 16.10.2014 – 20077/04 (*Suldin v. Russia*), § 56.

¹²² ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 112.

¹²³ ECHR, Judgment of 26.6.2015 – 48628/12 (*Balta and Demir v. Turkey*), § 52.

¹²⁴ ECHR, Judgment of 26.2.2013 – 50254/07 (*Papadakis v. The Former Yugoslav Republic of Macedonia*), § 91.

¹²⁵ ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 113; see also *Thörnich*, ZIS 2017, 39 (43 ss.); *de Wilde*, Int. J. Evidence & Proof 17 (2013), 157 (168).

¹²⁶ ECHR, Judgment of 15.12.2015 – 9154/10 (*Schatschaschwili v. Germany*), § 115; see also *Thörnich*, ZIS 2017, 39 (46).

¹²⁷ Also drawing attention to this problem *Thörnich*, ZIS 2017, 39 (44); *Meyer*, HRRS 2012, 117 (120); *Renzikowski* (fn. 3), p. 547; *Ambos*, ZStW 115 (2003), 583 (612); *Beulke* (fn. 95), p. 9; rather supporting *Holdgaard*, Nordic J. Int. L. 71 (2002), 83 (85).

¹²⁸ See also *Ambos* (fn. 9), p. 490; *Lohse*, JR 2015, 60 (63); *Meyer*, HRRS 2012, 117 (120).

flexible way, the court is able to meet the requirement of the right to examine a prosecution witness by proceeding in the following manner.

Firstly, in the case of an absent prosecution witness, the trial court needs to recall its obligation to ensure the appearance of the witness or ensure an examination of the witness by the defendant.¹²⁹ If its efforts remain fruitless, it will and must “decide whether there is good reason for the absence of the witness and whether, as a consequence, the evidence of the absent witness may be admitted.”¹³⁰ If good reason is lacking, it can refuse to admit the evidence. However, this obligation of the court to make efforts in order to ensure the appearance of the witness in question or to decide on the factual and/or legal grounds does not mean that it is allowed to admit the witness’s evidence only if its efforts were sufficient and there was a good reason. As has been already established above, Art. 6 (3) (d) ECHR does not prescribe an absolute strict evidence rule.¹³¹ In principle, the Convention does not forbid the admission of witness testimonies that are not obtained in a public trial accompanied by the possibility of a confrontation with the witness, regardless of the question of whether the absence of the witness in the public trial is justified or not. Having said that, this does not mean that the trial court is released from its obligation to ensure the appearance and examination of a prosecution witness, the moment it assumes that some witness evidence might be relevant for the trial. The same is true for its obligations to inquire about the real circumstance of the absence and to give reasons for the absence. The trial court still bears these burdens. Any shortcomings regarding these obligations will indicate the unfairness of the trial.¹³² However, once the trial court admits the testimonies of an absent witness, by the flexibility of the overall fairness test¹³³ the ECHR gives the trial court a chance to avoid the violation of the right to a fair trial. This case law enables the trial court to prevent a breach of the Convention: it can assess the probative value of witness evidence in question as low in its reasoning for a certain verdict, when there is no good reason for the absence of the witness in question. In the Court’s own words, “only once that witness evidence is admitted can the trial court assess, at the close of the trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness [...]”.¹³⁴

In general, the trial court will “respect” the rights of the defence, if, considering the lack of a good reason, it values the untested testimonies of the witness only as “corroborative evidence” and bases the conviction of the defendant mainly

on the other evidence.¹³⁵ The following obiter dictum by the Court should be interpreted against this background: “It would amount to the creation of a new indiscriminate rule if a trial were considered to be unfair for lack of a good reason for a witness’s non-attendance alone, even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case”.¹³⁶ The question of fairness will appear in a quite different light, if the trial court decides to consider as the main inculpatory evidence the testimony of a witness for whom there was no good reason for their absence, and if the trial court intends to base the conviction of the defendant solely or decisively on this witness evidence.¹³⁷

Even for the latter case, the Court emphasizes “that the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial”.¹³⁸ The reason behind that case law is the willingness of the Court to give the trial court a second chance so that it may avoid a breach of Art. 6 (1) in conjunction with (3) (d). On the one hand, with regard to the mentioned intention, the trial court is well advised to exercise the best possible caution given that the probative value of witness evidence that is not obtained in a public trial and could not have been tested by the defense is quite low. On the other hand, it still has the possibility to foresee the lack of probative evidence and to try to “enrich” the value of the witness evidence in question by providing the defence with counterbalancing factors.¹³⁹ However, “this being said, the lack of a good reason for a prosecution witness’s absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of” Art. 6 (1) and (3) (d) ECHR.¹⁴⁰

Secondly, the trial court needs to recall the purpose of the counterbalancing measures, namely to remedy the disadvantages of the defence through affording appropriate substitutes.¹⁴¹ It is true that the manner of evidence-taking (mainly determined by the chosen witness protection method) will only permit some counterbalancing measures, and the absence of the witness in the trial reduces these measures to a significant extent. Nevertheless, again, by Art. 6 (3) (d) ECHR, the Convention does not prescribe a strict evidence rule. Even if the choice of a specific method of witness pro-

¹²⁹ For more see II.

¹³⁰ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 117.

¹³¹ See above IV. 2.

¹³² See for instance ECHR, Judgment of 26.6.2015 – 48628/12 (Balta and Demir v. Turkey), §§ 45 ss.

¹³³ Critical of this approach *Ambos*, ZStW 115 (2003), 583 (611 ss.).

¹³⁴ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 117.

¹³⁵ See for instance ECHR, Judgment of 16.10.2014 – 20077/04 (Suldin v. Russia), § 56; see also ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 113.

¹³⁶ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 112.

¹³⁷ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 117.

¹³⁸ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 113.

¹³⁹ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 117.

¹⁴⁰ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 113.

¹⁴¹ See for this above V. 2. b).

tection is supposed to be in accordance with the significance of the reason that might justify the restriction of Art. 6 (3) (d) ECHR, the trial court is still able to compensate the shortcoming that arises from the lack of a good reason, by affording the best possible counterbalancing measures and by a moderate assessment of the witness evidence in question. The trial court will remain on the safe side if its assessment does not reach the threshold of “decisive”. It does better to recall the yardstick set by the Court: “the question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.”¹⁴²

Finally, with regard to the counterbalancing measures and the weight of the evidence, the trial court will have broader discretion if there is a good reason for the restriction on the right to examine the witness because in this case it is justifiable to admit untested statements by the prosecution witness as evidence.¹⁴³

Conclusion

This contribution has shown that the case law of the European Court of Human Rights on Art. 6 (3) (d) ECHR does not only deal with specific cases but also exhibits a general structure. In some parts, the case law is nevertheless unclear. This is especially true for the overall fairness test that the Court has developed at the expense of the rights of the defence. Thereby, it is possible that a considerable amount of witness testimony be used in criminal proceedings, even though the defence has never confronted that evidence in a public trial. It seems that the Court is convinced that the trial court is still able to assess the reliability of the witness evidence in question. Additionally, the Court increasingly pays attention to the existence of a good reason and its seriousness while balancing the interest.¹⁴⁴ In sum, the right to a fair trial does not seem to have such a solid, well-entrenched place in a democratic society that it is able to resist such limitations.

¹⁴² ECHR, Judgment of 15.12.2011 – 26766/05, 22228/06 (Al-Khawaja and Tahery v. The United Kingdom), § 147.

¹⁴³ ECHR, Judgment of 15.12.2015 – 9154/10 (Schatschaschwili v. Germany), § 119.

¹⁴⁴ *Krausbeck* (fn. 18), p. 169; see also above V. 1.