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THE RIGHTS OF THE DEFENCE ACCORDING TO THE ECTHR – AN ILLUSTRATION IN THE LIGHT OF A.T. V. LUXEMBOURG AND THE RIGHT TO LEGAL ASSISTANCE[1]

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I. Introduction

The rights of the defence are a concretion of the *fair trial* principle established in article 6 § 1 ECHR and they must be understood as a consequence of the accused's status in criminal proceedings in enjoyment of the presumption of innocence granted in article 6 § 2, which is in turn also a corollary of the fair trial principle. Consequently the interpretation of the article 6 § 3 rights of the accused must always be in conformity with the general fair trial principle[2].

Following rights of the accused are included in article 6 § 3 explicitly:

- Right to information on the nature and cause of the accusation in a language which the accused understands (6 § 3 (a));
- Right to have adequate time and facilities for the preparation of the defence (6 § 3 (b));
- Right to defend oneself in person (6 § 3 (c))
- Right to legal assistance (6 § 3 (c))
- Right to legal aid (6 § 3 (c))
- Right to examine or have examined prosecution witnesses and to obtain the attendance and examination of witnesses on one's behalf under the same conditions as prosecution witnesses (6 § 3 (d));
- Right to have the free assistance of an interpreter if one cannot understand or speak the language used in court (6 § 3 (e))

In addition to these, the ECtHR has also recognized as implicitly included in the ECHR at least the following rights:

- Right against self-incrimination and to remain silent (6 § 1)

[1] This text corresponds to notes for an oral presentation and does not contain exhaustive bibliographical citations, not an exhaustive analyses of the case law.
[2] For example, the right to legal assistance in article 6 (3) (c) ECHR has been explicitly considered to be "one element, amongst others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1" – cf. *Imbrioscia v. Switzerland*, Chamber judgment of 24.11.1993, application no. 13972/88, § 37.

- Right to "fair use" of evidence (6 § 1)[3]
- Right to access to the case file (article 6 § 3 (b))
- Right to consult with one's lawyer (article 6 § 3 (b) and (c))
- Right to a reasoned decision (article 6 § 1)

The rights in article 6 § 3 are conferred, not only to the accused person, but also to the defence lawyer, since the effectiveness of the legal assistance depends on the exercise of such rights[4].

Due to time constraints this presentation will be restricted to the right to legal assistance. This right was chosen since it is the *gateway* to the information on and to the exercise of other defence rights and therefore it is of paramount significance.

II. The scope of application of the rights

A first step to determine whether the ECHR applies in a given criminal case is to determine whether there is a "*criminal charge*" in the sense of the ECtHR case law. Both concepts have an autonomous meaning for purposes of the ECHR, aiming at giving those notions a material rather than a merely formal content.

The concept of "*charge*" "depends on the circumstances of the case, as the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 § 1. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question" (*Shabelnik v Ukraine,* Fifth Section judgment of 19.02.2009, application no. 16404/03, §52, citing *Deweer v. Belgium*, Chamber Judgment of 27.02. 1980, § 44).

From the moment the position of the person is "substantially affected" by investigative acts, the Court considers that the person has been "charged", irrespectively of whether there was a formal charge. The test goes back to Commission decisions (see decisions cited in *Deweer v. Belgium*, § 46). As put out in *Corigliano v. Italy* (Chamber judgment of 10.12.2982, application no. 8304/78):

> 34. […] "[T]his may have occurred on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, § 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, pp. 26-27, § 19, the *Neumeister* judgment of the same date, Series A no. 8, p. 41, § 18, and the *Ringeisen* judgment of 16 July 1971, Series A no. 13, p. 45, § 110). Whilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he

[3] The expression. Belongs to Ölçer, F. Pınar, The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights, in: Stephen Thaman (ed.), Exclusionary Rules in Comparative Law, 2013, pp. 371ss.

[4] *Ofner v. Austria,* Decision on Admissibility of 19.12.1960, complaint 524/59, *apud* Barreto, Ireneu Cabral, Convenção Europeia dos Direitos do Homem – anotada, 4.ª Ed., 2010, comment to art. 6.

has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the above-mentioned *Eckle* judgment, Series A no. 51, p. 33, § 73).

In a more recent case, *Alexander Zaichenko v. Russia* (First Section judgment of 18.02.2010, application no. 39660/02), the Court applied the test to a person subject to a road check in relation to a suspicion of theft. Although the applicant had not been officially notified of any suspicion, the Court found that the facts of the case showed that the police should have suspected that the applicant had committed a theft and that consequently from that moment on he had been "*charged*" within the meaning of article 6 of the Convention:

41. [...] As followed from the statement made at the trial by Mr F, there had previously been cases of workers pouring out diesel from their service vehicles, and thus the company's director had asked the competent authorities to carry out checks (see paragraph 17 above). The applicant's car was apparently stopped during one of such checks. It does not transpire from the case file that at any time on 21 February 2001 the applicant was informed of the reason for which his car had been stopped and inspected. Neither was he informed of the nature and cause of any suspicion or accusation against him. After the police inspection of his car, the applicant was asked about the origin of the fuel. He did not tell them about the purchase of the fuel because he felt intimidated and did not have a receipt to prove the purchase. Instead, he stated that he had poured out the fuel from his service vehicle. An inspection record was drawn. This record contained a note indicating that the applicant had poured out the fuel from the company's premises. Shortly thereafter, the applicant was apprised of his right to remain silent and signed a statement to the police confirming that he had poured out thirty litres of fuel from his service vehicle for personal use.

42. The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51, and more recently, *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 35, ECHR 2007-...). "Charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [person] has been substantially affected" (see *Shabelnik v. Ukraine*, no. 16404/03, § 57, 19 February 2009; *Deweer v. Belgium*, 27 February 1980, § 46, Series A no. 35; and *Saunders v. the United Kingdom*, 17 December 1996, §§ 67 and 74, Reports of Judgments and Decisions 1996-VI). Given the context of the road check and the applicant's inability to produce any proof of the diesel purchase at the moment of his questioning by the police, the Court considers that there should have been a suspicion of theft against the applicant at that moment.

43. Applying these principles to the facts of the case, the Court notes that the trial court's use made of the admissions made on 21 February 2001, which led to the institution of criminal proceedings against the applicant and then served for convicting him of theft, is at the heart of the applicant's complaints under Article 6 of the Convention (compare Saunders, cited above, §§ 67 and 74; and Allen *v. the United Kingdom* (dec.), no. 76574/01, 10 September 2002). It is also noted that the inspection record itself indicated Article 178 of the RSFSR Code of Criminal Procedure as the legal basis for the inspection (see paragraph 26 above). Thus, although the applicant was not accused of any criminal offence on 21 February 2001, the proceedings on that date "substantially affected" his situation. The Court accepts that Article 6 of the

> Convention was engaged in the present case. Nor was there any disagreement on this point between the parties.

The criteria to determine whether proceedings are "*criminal*" in the autonomous meaning of the convention are the so-called "Engel-criteria", established in the case of *Engel and Others vs. the Netherlands* (Court Plenary judgment of 08.06.1976, applications no. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, §82):

- The legal classification of the measure in question in national law (being the classification not binding to the Court);
- The very nature of the measure (general rule with preventive and punitive purpose in contrast to compensation purpose);
- The nature and degree of severity of the "penalty".

The criteria have been applied to disciplinary and administrative proceedings and are alternative and not cumulative ones: "for Article 6 to apply in respect of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the "criminal" sphere. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge"" (*Grande Stevens and others v. Italy*, Second Section judgment of 04.03.2014, application no. 18640/10, §94, citing *Jussila v. Finland* [GC], application no. 73053/01, §§ 30-31, and *Zaicevs v. Latvia*, application no. 65022/01, § 31).

Once these criteria are met, article 6 §§ 1, 2 and 3 become applicable.

Concerning the procedural stages, the rights apply not only in the trial stage. In fact, although the wording of article 6 §§ 1 and 3 has been conceived with the trial stage in mind – *i.e.* to ensure a fair trial before a tribunal with jurisdiction to decide on the merits of the accusation – the rights may also be applicable in other procedural sages, depending on the circumstances of the case, the nature and the purpose of such rights[5]. Whenever the violation of article 6 in the initial stages seriously compromises fairness of proceedings, article 6 will be applicable before the trial[6]. As stated in *Salduz v. Turkey* (Grand Chamber judgment of 27.11.2008, application no. 36391/02):

> 50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia*, cited above, § 36).

In this ruling the Court recognised the importance of the investigation stage within the framework of criminal proceedings and the risk for the fairness of the trial to be

[5] Barreto, Ireneu Cabral, Convenção Europeia dos Direitos do Homem – anotada, 4.ª Ed., 2010, comment to art. 6, p. 206.
[6] Cf. *A.T. v. Luxembourg*, § 62, citing *Salduz v. Turkey*, §50, and *Panovits v. Cyprus*, §64.

seriously prejudiced by investigative acts, if the accused is not entitled to certain Convention rights at that stage, in particular the right to legal assistance, which must therefore be applicable from an early stage of proceedings:

> 54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-IX, and *Kolu v. Turkey*, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, mutatis mutandis, *Jalloh*, cited above, § 101). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see paragraphs 39-40 above), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

ECHR defence rights also apply to sentencing and appeals, but not to the execution of criminal sanctions.

Traditionally it was not possible to invoke a right established in an international convention directly in a national court, since international instruments were only binding between the states in their relations and not between the states and their citizens. But over the last decades the direct application of International Human Rights and of the European Convention of Human Rights in particular has become reality and it is now possible to invoke those rights in national courts, either directly or as a source for interpretation of national rules.

These rights may also be pleaded before the ECtHR, but not until national remedies have been exhausted.

III. The right to legal assistance in light of A.T. v. Luxembourg

In order to illustrate how the rights of defence protected by the ECHR as interpreted by the ECtHR can be useful at a national level, I chose to consider the recent

ruling of April 9, 2015, in the case of *A.T. v. Luxembourg* (Fifth Section judgment, application no. 30460/13)[7].

The case deals with the right to legal assistance and in particular 3 aspects thereof: *i)* waiver; *ii)* right to consult with the lawyer before the interrogation; *iii)* right to have access to the case files before questioning.

The suspect had been surrendered in 2009 from the United Kingdom pursuant to the execution of a European Arrest Warrant. On arrival and before being interviewed by the police he requested a lawyer but then, after having been informed of the legal rules concerning proceedings in Luxembourg, accepted to be questioned without one. He denied the facts. Hereafter the investigative judge questioned him in the presence of a lawyer, but he was not allowed to consult with the lawyer before questioning, nor did the lawyer have any access to the case files before questioning[8]. He was convicted to 7 years imprisonment with a partial suspension of 3 years. In its reasoning the Luxembourg courts mentioned among others both his pre-trial and his trial statements, noting that the defendant had constantly changed his story[9].

A.T. complained that he had not had a fair trial, since he had not been entitled to legal assistance during the police interrogation and that the legal assistance provided during the questioning by the investigative judge had not been effective. Following the rejection of his claims throughout the Luxembourg proceedings in all instances he finally presented a complaint to the ECtHR[10].

a) The waiver

The ECtHR "waiver-law" prescribes that a waiver must not only be unequivocal, but must also be made voluntarily, knowingly and intelligently, as pointed out in *Pishchalnikov v. Russia* (First Section judgment of 24.09.2009, application no. 7025/04):

> 77. In this respect the Court reiterates that 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 (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; *Kolu v. Turkey*, no. 35811/97, § 53, 2 August 2005, and *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). A waiver of the right, once invoked, must not only be voluntary, but must also 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 (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

[7] For a brief analysis of the case and its consequences in the EU-Law framework see Tinsley, Alex, A.T. v Luxembourg: the start of the EU-ECHR story on criminal defence rights, available on http://eulawanalysis.blogspot.pt/2015/05/at-v-luxembourg-start-of-eu-echr-story.html

[8] Cf. no. 12-14.

[9] Cf. no. 15.

[10] Cf. no 16-20.

In the instant case, the ECtHR decided that A.T. could not have waived his rights, since the law in force at that time in Luxembourg did not entitle him to have the assistance of a lawyer during police questioning and he had therefore been automatically deprived of his right. Accordingly there was no waiver issue, since a waiver only comes into play when there is a right to be waived[11].

b) The right to legal assistance

The case law of the ECtHR is clear in stating that the right to legal assistance provided by the ECHR is a right to *effective* legal assistance[12]. The outline of the right in practice is shaped by this concept that has significant legal consequences, since for the purposes of the ECHR it is not sufficient to simply conclude that a lawyer had been appointed or was present, i.e., that legal assistance was given. This assistance must be also be effective. In *Artico v. Italy* (Chamber judgment of 13.05.1980, application no. 6694/74) [13], the Court stated:

> 33. […] the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the *Airey* judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above). As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. […]

In what concerns the **temporal scope of application of the right within proceedings**, in accordance with the article 6 mandate for effective legal assistance, the Grand Chamber stated in its path-breaking judgment in *Salduz v. Turkey* that the right to legal assistance attached from the first interrogation by the police:

> 55. […] in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above), 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 (see, mutatis mutandis, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

The contours of the right to consultation established in *Salduz* have been object of subsequent rulings by the ECtHR. In a series of cases starting with *Dayanan v. Turkey* (Second section judgment of 13.10.2009, application no. 7377/03), the ECtHR decided that when the right to legal assistance was denied outright by law, that denial automatically rendered proceedings unfair, irrespectively of whether the suspect

[11] § 71.
[12] Extensively on the Topic, Cape, Ed/Namoradze, Zaza/Smith, Roger/Spronken, Taru, Effective Criminal defence in Europe, 2010.
[13] Cited in *Imbrioscia v. Switzerland,* §38, in turn cited in *Salduz v. Turkey*, § 51.

remained silent, or not (including the cases where he confessed, but also where he denied the facts)[14].

Dayanan also stated that the suspect was entitled to legal assistance from the moment that he was taken into custody, irrespective from any interrogation[15].

In later cases, the ECtHR went even further and adopted the *"significantly affected"* test for the attachment of article 6 and of the right to legal assistance. In *Shabelnik v Ukraine* (Fifth Section judgment of 19.02.2009, application no. 16404/03), a suspect was heard as a witness, in this capacity confessed to a murder and thereafter participated in a reconstruction and was questioned multiple times without a lawyer and without being formally charged. The ECtHR held that the right to legal assistance arises at the point that the person's position is significantly affected, i.e., "as soon as the suspicion against him is seriously investigated and the prosecution case is compiled, even if they are not formally placed in custody as a suspect"[16]. This criterion is in consistence with the test for determining whether the person has been subject of a "charge" for the purposes of article 6 ECHR as defined by the above-mentioned case law.

In respect of **the contents of the right to legal assistance**, after *Salduz* some states had alleged that while the right attached from the moment when the person was held in pre-trial or police custody and was subject to police interrogation, it did not imply that the lawyer had to be present *during* questioning.

The ECtHR stated otherwise already in *Karabil v. Turkey* (Second Section judgment of 16.06.2009, application no. 5256/02), establishing that the suspect benefited from legal assistance *during* his questioning, which was underlined in *Navone and others v. Monaco* (First Section judgment of 24.10.2013, applications no. 62880/11, 62892/11 62899/11)[17]

> 79. La Cour souligne à ce titre qu'elle a plusieurs fois précisé que l'assistance d'un avocat durant la garde à vue doit notamment s'entendre, au sens de l'article 6 de la Convention, comme l'assistance « pendant les interrogatoires » (*Karabil c. Turquie*, no 5256/02, § 44, 16 juin 2009, *Ümit Aydin c. Turquie*, no 33735/02, § 47, 5 janvier 2010, et *Boz*, précité, § 34), et ce dès le premier interrogatoire (*Salduz*, précité, § 55, et *Brusco*, précité, § 54).
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> 80. Par ailleurs, elle a déjà jugé qu'une application systématique de dispositions légales pertinentes qui excluent la possibilité d'être assisté par un avocat pendant les interrogatoires suffit, en soi, à conclure à un manquement aux exigences de l'article 6 de la Convention (voir, en premier lieu, *Salduz*, précité, §§ 56 et 61-62).

In *Dayanan* the Court went further in clarifying that the right attached from the moment the person was taken into custody and that the lawyer's role in the pre-trial stage included not only the assistance during the interrogation, but even extended to further areas:

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[14] Cf. *Fair Trials International* third-party intervention,§ 25, available on http://www.fairtrials.org/wp-content/uploads/AT-v-LUX-Intervention.pdf, giving as an example *Şiray v. Turkey*, App. No 29724/08 (Judgment of 11.02.2014); *Pakshayev v. Russia,* App. No 1377/04 (Judgment of 13.03.2014, § 30). See also *Navone and others v. Monaco,* First Section judgment of 24.10.2013, applications no. 62880/11, 62892/11 62899/11, § 84.

[15] Cf. *A.T. v. Luxembourg,* § 64, citing *Dayanan*.

[16] § 57. In *Brusco v. France*, Fifth Section judgment of 14.10.2010, application no. 1466/07, §47 and §49, the Court adopted a similar reasoning.

[17] §§79-80.

> 32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see *Salduz*, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.

The case law of the ECtHR furthermore considers the confidentiality of consultations with the lawyer a precondition for effective legal assistance, including the protection of communications and unrestricted access to the client. The lawyer must be able to consult with the client free from surveillance by third parties. The legal basis for protection is found by the Court either in article 8 or article 6 § 3 (c).[18] Communications between lawyers and clients may not be intercepted unless there are exceptional circumstances such as an abuse of the lawyer-client privilege for example by causing danger to prison security or undertaking criminal conduct. A general risk of collusion, such as a risk that lawyers will co-ordinate their defences, is not sufficient to justify lawyer-client communications' surveillance[19].

c) A.T.'s police interview

Since at the time of the facts in *A.T. v. Luxembourg* the Court of Cassation in Luxembourg maintained that article 6 of the ECHR only applied to the trial stage, the lower courts refused to apply the *Salduz*-principle and rejected requests of declaration of nullities on grounds of *Salduz*-violations following the case law of the Court of Cassation. This position first changed in a 2012 ruling of the Council Chamber of the Luxembourg Court of Appeals, and particularly in 2014 when the latter Court confirmed that article 6 applies throughout all stages of proceedings, including the preliminary investigation and the pre-trial instruction[20]. Consequently in the case of A.T. he had not benefited of legal assistance during police questioning, since the right did not exist at the time of the facts. The national courts had not examined his complaints either, since they found the right to be inapplicable.

With this background the ECtHR concluded that there had been a violation of article 6 § 3 (c), in conjunction with article 6 § 1, due to the denial of legal assistance to A.T. during the police interview and the denial of the courts to redress the consequences of the violation, since in their decisions they had relied on the inconsistence of those statements with statements made later on[21].

d) A.T.'s first interview by the investigative judge

[18] *Niemietz v. Germany,* Chamber judgment of 16.12.1992, application no. 13710/88.
[19] *S. v. Switzerland*, Chamber judgment of 28.11.1991, application no. 12629/87, 13965/88, §§ 48-49; *Lanz v. Austria*, First Section judgment of 31.01.2002, application no. 24430/94, §52.
[20] Cf. no. 25-26.
[21] §§ 67-75.

The day following his police interview, the investigative judge questioned A.T. in the presence of a legal aid lawyer appointed the same morning. A.T. gave a circumstantiated statement and maintained his previous statements denying the facts.

A.T. complained that his legal assistance had not been effective because he did not have the opportunity to consult with his lawyer before questioning and because his lawyer had not had access to the case files.

As for **access to the case files**, it had been argued in the instant case that legal assistance would not be effective unless the lawyer could have access to the files prior to questioning in order to be able to advise the client on an informed basis.

The Luxembourg law established that access to the case files would not be given until the first interview by the investigative judge had been concluded. The case law of the Cour d'Appel justified such restriction with the interests of justice in the search for the truth (namely to prevent the suspect of adapting his version of the facts to the evidence in the case files)[22]. The ECtHR found that in the light of that justification and of the fact that after the first interview the suspect was entitled to full liberty in respect of the organization of his defence (including the right to remain silent, do consult the case files after the first interview and to chose his defence strategy) there was a fair balance concerning the safeguard of access to the case files[23].

In its reasoning the ECtHR underlined that the complaint had only been brought in light of article 6 and that therefore it could not draw any conclusions from article 7 § 1 of the Directive 2012/13/UE, since this provision related to the legality of detention or arrest, covered by article 5 § 1 of the ECHR. The Court noted that the provision regulating the right of the "accused" to have access to the case files was established in article 7 § 3 of that Directive, which also foresaw the possibility of delaying the access to the moment of the opening of judicial proceedings on the merits of the accusation. This part of the judgment raises our attention to the circumstance that the rights enshrined in article 6 ECHR are complemented by article 5, which foresees specific guarantees concerning detention or arrest. During the pre-trial stage defence rights protected in article 6 may fall short of the rights enshrined in article 5. Thus particular attention should be given to the latter provision when invoking ECHR defence rights.

In what concerns the **right to consult with the lawyer before questioning**, the Court found that there had been a violation of the Convention.

Firstly the Court underlined the importance of such previous consultation, since it was the moment at which crucial conversations could be exchanged and at which the lawyer could inform the suspect of his rights, which was apparent in the instant case, where A.T. had already been questioned the day before without the presence of a lawyer and where the lawyer had been appointed the same morning[24].

The Court recalled that the assistance given by a lawyer must be able to provide an effective and practical assistance and that the abstract physical presence of the lawyer is

[22] § 30.
[23] § 79.
[24] § 86.

not sufficient, making it necessary to establish unequivocally the right to previous consultation. It further noticed that the legal provisions in force in Luxembourg (in contrast with article 3 § 2 (a) of the Directive 2013/48/UE) were not unequivocal and gave the impression that it was not possible to consult with the lawyer before the interrogation. Give the fact that the lawyer had been appointed the same morning and that questioning started around 9h, the Court concluded that A.T. could not have had consulted with his lawyer and that he had therefore not been entitled to effective legal assistance, in violation of article 6 § 3 (c) in conjunction with article 6 § 1 ECHR[25].

e) Remedies

What are the remedies for a violation of the ECHR?[26]

In *A.T. v. Luxembourg* the ECtHR found that despite no confession had been given (that was the case in *Salduz*), the statements had been used for A.T.'s conviction since at a later stage A.T. had changed his story and the inconsistence with the prior declarations was used against him.

In deciding on how the violation should be redressed, the Court citing *Salduz* recalled "the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded" (*Salduz*, § 72)[27]. Applying such principle to the instant case, the ECtHR stated that the most appropriate redress would be to reopen the case, upon request of A.T. pursuant to article 443 of the *code d'instruction criminelle*, and to entitle him to new proceedings conducted in conformity with the requirements of article 6 § 1.

This conclusion implies that his statements given in violation of article 6 could not be used in his new proceedings. Accordingly one could argue that in *Salduz* and its progeny the ECtHR established an exclusionary rule concerning statements obtained in violation of the right to legal assistance.

For many years the Court refrained from deciding on the consequences of a violation in terms of admissibility of evidence. The Court stated that it would not rule on the admissibility of evidence, since it was a matter for national courts to decide. However, it would analyse whether proceedings where unlawfully obtained evidence had been used had been fair as a whole. This case law was established in *Schenk v. Switzerland* (Judgment of 12.08.1988 of the Plenary of the Court, application no. 10862/84):

> 46. While Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.

[25] §§87-91.
[26] On the subject, see Ölçer, F. Pınar, The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights, in: Stephen Thaman (ed.), Exclusionary Rules in Comparative Law, 2013, pp. 371ss.
[27] § 97.

> The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.

For many years the Court nearly always concluded that proceedings as a whole had been fair, leading scholars to consider that art. 6 ECHR did not include an exclusionary rule for illegally obtained evidence. Most cases dealt with article 8 violations. When the Court started analysing the use of evidence obtained in breach of other Convention provisions (articles 3, 6 § 3 (c) and the privilege against self-incrimination and the right to remain silent), it has sometimes concluded that the use of evidence obtained thereby rendered proceedings unfair.

In determining the fairness of proceedings where evidence unlawfully obtained has been used, the court analyses the unlawfulness in question and, where the violation of another Convention is verified, the nature of the violation. The Court also regards whether the rights of defence have been respected, in particular "whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use". Additionally the Court gives weight to the quality of the evidence and the circumstances in which it was obtained and whether the latter cast doubts on its reliability or accuracy and to whether the evidence in question had a decisive role for the outcome of the proceedings see (*Gäfgen v. Germany*, Grand Chamber judgment of 01.06.2010, application no. 22978/05, §§163-164).

There is always a case-by-case evaluation of those factors, but some principles, which derive mainly from the nature of the provision breached, may be summarized as follows (as presented in *Gäfgen v. Germany*, §§162-168, supplemented by *Salduz v. Turkey*):

- Where evidence has been obtained in breach of Article 3, "the use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction".
- Where evidence has been obtained in violation of article 6 right against self-incrimination or right to silence, evidence may not be used, since "[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused";
- Where evidence has been obtained in breach of the right to pre-trial legal assistance, its use irretrievably prejudices the fairness of the trial (see *Salduz)*;
- Where evidence has been obtained in violation of article 8, the unfairness of the trial as a whole must be "determined with regard to all the circumstances of

the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question"[28].

According to this position, the Court has found that the admission of confessions obtained through torture or other ill-treatment in violation of article 3 "as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction".

Concerning real evidence, the Court decided that evidence obtained through torture "should never be relied on as proof of the victim's guilt, irrespective of its probative value" (*Jalloh*, Grand Chamber judgment of 11.07.2006, application no. 54810/00, §105). In *Gäfgen* the court extended this exclusionary rule to ill-treatment falling short of torture (§178), but in the instant case it considered that there had been a break in the causal chain between the violation and the conviction, since the applicant had given a confession in open court, which had not been influenced by the violation, and therefore the trial had not been unfair (§§178-188).

The case law on the privilege against self-incrimination and the right to silence always links the violation of such right with the necessary exclusion from trial of the evidence thus obtained, since that is the very nature of such right (e.g. *Saunders v. the United Kingdom,* Grand Chamber judgment of 17.12.1996, application no. 19187/91, § 71).

In the domain of the right to legal assistance, *Salduz* made clear that the suspect had to be put back into the position where he would have been, had he not given the statements in violation of the ECHR. Scholars interpreted this ruling as establishing an exclusionary rule – the only way to put the suspect back into that position would be to exclude such evidence and proceed in the case without it. Furthermore the Court ruled in *Salduz* that "[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction" (§55), reinforcing that interpretation.

For privacy violations, see e.g. *Bykov v. Russia* where the Court found that despite a violation of article 8, the use of evidence thus obtained did not render proceedings unfair[29].

It follows from here that the exclusionary rules established by the ECHR vary widely depending on the provisions that have been breached.

Where there is a violation of article 3, the use of evidence obtained by means of torture or inhuman or degrading treatment is considered to render proceedings automatically unfair as a whole in light of article 6 § 1 and therefore such evidence must be excluded. This case law was established in *Jalloh v. Germany* and *Gäfgen v. Germany.*

[28] The relevant case is *Bykov v. Russia* where the Court found that despite a violation of article 8, the use of evidence thus obtained did not render proceedings unfair. *Bykov v. Russia,* Grand Chamber judgment of 10.03.2009, application no. 4378/02, § 104,

[29] *Bykov v. Russia,* Grand Chamber judgment of 10.03.2009, application no. 4378/02, § 104.

Where there is a violation of article 6 right to silence or against self-incrimination or right to pre-trial legal-assistance, the use of evidence obtained by means of such a violation is considered to render proceedings unfair as a whole in light of article 6 § 1.

Where there is a violation of article 8, the admissibility of the use of evidence obtained by means of such a violation is subject to a balancing test and is not likely to be considered to render proceedings unfair as a whole in light of article 6 § 1, unless the evidence is of doubtful probative value.

As a concluding remark it must be noted that this branch of the case law is a developing branch and that we might see further developments and a refinement of the related ECtHR case law in a near future[30].

[30] In this respect, not long ago the in his concurring judgment in *Bykov v. Russia,* judge Ireneu Cabral Barreto pleaded for a clarification of the criteria for excluding evidence obtained in violation of article 8.