

Evidence and proofs from the perspective of the European Court of Human Rights

„*De his quae non sunt et quae non aparent idem est iudicium*”¹

I. Why did we choose this subject and why is it so important?

One may ask such perfectly justified questions. In order to offer the answer we shall use an old religious², but also secular³, dictum: "*And you shall know the truth and the truth shall set you free*".

In that matter, it is known that there are many kinds of truth: there is a philosophical truth, an historical truth, a social truth, there is a scientific truth, an absolute and a relative truth, or a judicial truth, to mention only a few faces of this notion's rich polysemantic potential. But the part of truth that we are interested in for the purpose of the present paper is the *judicial truth*.

Our opinion is that the achievement of judicial truth is possible by joining correctly four variables: the facts, the counsellors' eloquence, the laws and the judge's wisdom. Starting from the facts, as established, the counsellors would try, by their eloquence, in relation to the law, to convince the judge of the "truth" of the one who they represent. Within this frame, the cornerstone is the discovery and the correct establishment of the judicial relevant facts. Only if this task is completed, one may hope to find the judicial truth. Due to the fact that, most of the time, the facts are hidden to the eye and awareness of the judge, counsellors and even parties, the questions is how they may be brought into the judicial light? The answer is offered by the institution of the *evidence* and *proofs*.

In other words, the judicial truth is founded on a correct establishment of the relevant facts, and the accurate establishment lies on *evidence* and *proofs*; in order to have a good judicial decision, any court has to have a good way of using the evidence to the aim of finding and proving the real facts.

As to definitions, from a logical perspective, we may say that *the proof* is what allows one to establish the value of *true* or *false*, regarding a statement or a fact, judicially relevant. In current language, as it is shown in the *romano – germanic* law system doctrine⁴, there is only one word⁵ to speak about

¹ The dictum meaning may be expressed as: *the things that are not and the things that are not proven (that are non-existent), are similar before justice*.

² Jesus to the Jews [the Bible - Joan 8, 32].

³ This goal of reaching the truth is not only a religious goal, but also a secular one, fact proved by the inscription on the siege's pavement of one of the most *secular* institution of our modern times (the Central Intelligence Agency – Langley, Virginia, USA) and is also specific to any court, including European Court of Human Rights.

⁴ M. Planiol, G. Ripert, *Traite pratique de droit civil français (Practical Treaty of french civil law)*, t. VII, LGDJ, Paris, 1931, nr. 1407, p. 743; H. Croze, C. Morel, O. Fradin *Procédure civile. Manuel pédagogique et pratique (Civil procedure, Practical and pedagogical Manual)*, Éditions Litec, Paris, p. 214 and next; A. Colin and H. Capitant, *Traite de droit civil (Treaty of civil law)*, updated by Léon Julliot de la Morandiere, first chapter, Dalloz, Paris, 1957,

evidence and *proofs* and its meaning includes a certain material fact (a certain situation), a mean of probing (every type of proof legally presented at trial, as an expertise, a deposition etc.) or the result obtained by using the evidence (a fact is proved). According to the French lawyer Jean Domat, the *proof* is what convinces the mind of the existence of truth, for Greek reformist king Solon, the *proofs* were the rational motives to state or to deny something, for Ambroise Colin and Henri Capitant to *prove* something means to establish the alleged reality and according to Gerard Cornu, the *proof* is the demonstration of a fact or of an act by means prescribed by the law. As to the *common law* system, even if they may be used as synonyms⁶, there is a clear distinction between *evidence* and *proofs*, the first being considered from a *procedural* perspective as "every type of proof legally presented at trial"⁷ and the latter meaning, from a *substantial* point of view, "the confirmation of a fact by evidence"⁸.

Therefore, within the frame drawn above, according to the Latin saying "*da mihi factum, dabo tibi jus*"⁹ (*give me the facts and I shall give you the right*), the litigant has to show only the roots of his right, in other words, the acts or facts which created his right, and the judge shall establish the judicial consequences. We may conclude saying that *evidence* and *proofs* are some of the most important institutions of the judicial process, suggestively expressed by the dictum "*idem est non esse aut non probari*".

Moving on with this theoretical approach, it has to be said that, on one hand, the *evidence* is part of every procedural institution of every national law system and it stems from times when confession was considered "*regina probationum*"¹⁰ or when confession was admissible even obtained by torture¹¹. Today the evidence system is strictly organized, at national level, at least in the countries where the state of law is instituted, in respect of human rights and in order to allow the finding of judicial truth.

On the other hand, the approach of the European Court of Human Rights (hereinafter *the Strasbourg Court or ECHR*) related to the notions of *evidence* and *proofs*, is special. Being forced, by its own nature, to accommodate different views of the evidence systems from the member states' law and taking into consideration its purpose¹², that is to watch to the respect of the Human Rights, the Court has developed its own approach in that matter. In other words, the notion of *evidence* and *proofs* or, in French "*la notion des preuves*", is autonomous, having a particular meaning in the Court's case-law.

At this point, it has to be emphasised that the Convention or the Rules of the Court are not very detailed as to the notions of *evidence* or *proofs*. Thus, rule A1, point 1, 2 and 3 from the Annex to the Rules of the Court is such an example that tells the reader that any Court's organism may adopt "*any*

p. 264;

⁵ fr. *preuves*.

⁶ In the American law system, for instance - *American Jurisprudence: a modern comprehensive text statement of American law: State and federal [...]: Evidence*, editors GS Gulick, RT Kimbrough and OC Sattinger ... [et al.], The Lawyers Co-Operative Publishing, New York, 1967, page 36.

⁷ <http://legal-dictionary.thefreedictionary.com/evidence>.

⁸ <http://legal-dictionary.thefreedictionary.com/proof>.

⁹ J. – M. Brisson, N Kassier, Civil Code of Quebec, Critical edition, 2000 – 2001, 8th edition, Quebec, Canada, p. 668.

¹⁰ queen of evidence.

¹¹ Greek rethorician Isocrat said: "nothing reveals the truth better than torture. A witness may lie, but in the middle of torture, the truth speaks for itself".

¹² "Law of the European Convention of Human Rights", D.J. Harris, M. O'Boyle, C. Warbrick, Butterworths, London, Dublin, Edinburgh, 1995, page 210.

investigative measure which it considers capable of clarifying the facts of the case". Having such a liberty at its disposal, the Court's approach in that matter may be summarised from a double perspective, having as criteria of separation the organisms before which the evidence and proofs are presented. To be more specific, in the Conventional system there are evidence and proofs presented before the national courts and there are evidence and proofs presented before the Strasbourg Court.

First category is the one composed by rights with a procedural touch, most visible in Article 6, but also in other Articles such as the procedural sides of Article 2 and 3. We shall not be using the term "*procedural right*" as it is used in its classical meaning¹³, but instead, we shall define it as being a right which involves the obligation, imposed on Contracting States by the Convention, to conduct a trial or an investigation – implicating the use of evidence and proofs. In this matter, the evidence and proves are presented before the national courts¹⁴, the Strasbourg Court being only interested to find if the instruction was held, at national level, according to the guarantees imposed by the Convention. That means that, if a fact was established in a fair trial (under Article 6), or if an investigation was conducted promptly and diligently (from the perspective of the procedural level of Articles 2 or 3), the facts are no longer analysed by the Court, except for the obvious arbitrary situations¹⁵. In this case, the Strasbourg Court does not act like a fourth Court, but like a Cassation Court¹⁶, and is not interested in the facts, but in the respect of the rules, its task being rather to ascertain whether the national proceedings as a whole, including the way in which evidence was taken, were fair¹⁷ (or conventional). The possible evidence that is admissible before it in such circumstances, regard only the qualities of the proceedings or of the investigations, which have to be respectful to the Convention's requirements.

On the other hand, related to the Second category of rights, the evidence and proofs are presented by the applicant or the defendant before the Court and it has to be convinced on the solidity of the allegation, in order to render a judgment on the violation of human rights. In the followings, we shall use for such rights the term of *substantial rights*. So, if an allegation of Article 5 § 3 violation is made, the Court has to establish if there were *reasonable suspicions* for an arrest, regardless of the establishment of such a conclusion at national level. In other words, the evidence of a human right violation is presented before the Strasbourg Court. A similar approach is also present in Articles 2 or 3 in their substantial side, Article 8 or Article 10.

In conclusion, ECHR is interested to know the relevant aspects from the perspective of the human rights of the Convention, those not being necessarily the national proceeding's facts.

Bearing this in mind, in the following pages we intend to identify and present the means used by

¹³ "*Droit européen et international des droits de l'homme*", Frédéric Sudre, 6^e édition refondue, Presses Universitaires de France, septembre 2003, page 299. As Mr. F. Sudre says, the procedural rights contain the guarantees implied by the rules of a state of law, in order for a person to have his rights and liberties protected. The author also includes here Article 7 and Article 13 which are of no relevance to the present work.

¹⁴ ECHR, *García Ruiz v. Espagne* [GC], judgment of 21 January 1999, § 28; ECHR, *Perez v. France*, judgment of 12 February 2004, § 82; ECHR, *Coëme and others v. Belgium*, judgment of 22 June 2000, § 115; ECHR, *Shenk v. Suisse*, judgment of 12 July 1988, §§ 45, 46.

¹⁵ *La Convention Européenne des Droits de l'Homme. Commentaire article par article*, sous la direction de Louis-Edmond Pettiti, Emanuel Decaux, Pierre-Henri Imbert, Edition Economica, Paris, 1995, page 247.

¹⁶ *La Convention Européenne des Droits de l'Homme. Commentaire article par article*, cited above, page 247.

¹⁷ ECHR, *Doorson v. the Netherlands*, judgment of 26 March 1996, § 67.

the Court in its search for the truth, meaning the relevant aspects of the notions of *evidence* and *proofs*, as they appear in the Court's case-law, related to some of the Convention's procedural rights, especially Article 6, on one hand, and substantial rights, especially Article 5, on the other hand.

II. Evidence and proofs before the national courts, regarding Article 6 in particular

We chose to dedicate this section to presenting the approach of the Court on *evidence* and *proofs* presented before national courts, regarding Article 6 in particular. In doing so, we shall be focusing, especially on the right to a fair trial, with all of its particular aspects, such as, for instance, § 2 – presumption of innocence or § 3 (d) – aspect related to witnesses. Also, similar aspects that are present in other articles shall be revealed.

Thus, in its case-law, the Strasbourg Court constantly held that Article 6 of the Convention does not require the adoption of any particular rules of evidence because that is a matter of domestic law. Stating its own **approach in the matter of evidence and proofs**, the Court noted in *Van Mechelen and Others v. the Netherlands* case that "*the admissibility of evidence is primarily a matter for regulation by national law and as a general rule, it is for the national courts to assess the evidence before them*". In these circumstances, the Court's task under the Convention "*is not to give a ruling as to whether treatments of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair*"¹⁸. Such an approach was considered inevitable by the doctrine¹⁹ given the wide variations in the rules of evidence in different European legal systems. For this purpose the Court examines if the evidence were produced in a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not violate the rights of the defence²⁰. In that connection, the equality of arms is considered²¹ as an act of the general principle of equality which ensures the equability of the trial²².

The right to an adversarial trial means, in a criminal case, "*that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party*". National law may secure that request in many ways. Whatever method is chosen, "*it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon*"²³. In *Jasper v. United Kingdom* case, the Court reiterated that a fundamental aspect of the right to a fair trial is that criminal proceedings, including the elements that strictly regard the proceedings, "*should be adversarial and that there should be equality of*

¹⁸ ECHR, *Van Mechelen and Others v. the Netherlands*, judgment of 18 of March 1997, § 50.

¹⁹ *Law of the European Convention of Human Rights*, D.J. Harris, M.O'Boyle, C. Warbrik, Butterworths, London, 1995, page 210.

²⁰ ECHR, *Luca v. Italy*, judgment of 18 of March 2001, § 39 - In that connection, the Court held that "§§ 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage.

²¹ *Les grands arrêts de la Cour Européenne des Droits de l'Homme*, Frederic Sudre, Jean-Pierre Marguenaud, Joel Andriantsimbazovina, Adeline Gouttenoire, Michel Levinet, Presses Universitaires de France, 2003, Paris, page 238.

²² ECHR, *Werner c. Austria*, judgment of 24 Novembre 1977, § 63 - **the principle of equality of arms** is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial.

²³ ECHR, *Brandstetter v. Austria*, judgment of 28 August 1991, §§ 66,67.

*arms between the prosecution and defence*²⁴.

As to the **interpretation of Article 6 (3) (d)**, in principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, is not in itself inconsistent with §§ 3 (d) and 1 of Article 6, to use as evidence such statements obtained at the pre-trial stage if the rights of the defence have been respected. As a rule, these rights require that an accused should be given "*an adequate and proper opportunity to challenge and question a witness against him*", either at the time the witness makes his statement or at some later stage of the proceedings²⁵. The rights of the defence are however infringed (raising an issue under Article 6) when a conviction is exclusively based on a statement taken at the proceedings pre-trial stage if the accused had no opportunity to challenge and question the witness (either when he makes his statements or at a later stage). The rights guaranteed by Article 6 § 3 (d) of the Convention can be exercised by the accused/defendant or by his consult. If the accused's lawyer does not attend a confrontation and the accused has the possibility to put questions and to make comments himself, he enjoys the guarantees secured under Article 6 § 3 (d) to a sufficient extent²⁶. The Court also held that the defendant "*must be identified with the counsel who acted on his behalf, and he cannot therefore attribute to the respondent State any liability for his counsel's decisions in this respect*"²⁷.

Also, it grants to the accused **the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as the witnesses against him**. This provision is closely related with the principle of the *equality of arms*, as an element of a fair hearing in the sense of the first paragraph. Consequently, the Court often examines an alleged violation of Article 6 § 3 (d) under those two provisions taken together²⁸.

The term *witness* has an autonomous meaning in the Conventional system²⁹. As long as the statements of a usual witness, of a civil party, of a injured party, of a police informant or of an expert are used to found a conviction, all these statements are evidence which fall under the protection of Article 6 § 1 and 3. The Court held, in *Luca* case, that *the fact that the deposition is made by a co-accused rather than by a witness in a stricto-sensu terminology, is of no relevance. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply*³⁰. Statements not made in court in person, but for example to the police, are to be regarded as statements of witness as far as the national courts take account of these statements³¹. To use as evidence a statement made in the pre-trial phase, by a person who, subsequently, in according with the national law, refuses to give evidence in

²⁴ ECHR, *Jasper v. United Kingdom*, judgment of 16 February 2000, § 51.

²⁵ ECHR, *Delta v. France*, judgment of 19 Decembre 1990, § 36.

²⁶ ECHR, *Isgro v. Italy*, judgment of 19 February 1990, § 37.

²⁷ ECHR, *Kamasinsky v. Austria*, judgment of 19 Decembre 1989, § 91.

²⁸ ECHR, *Asch v. Austria*, judgment of 26 April 1991, § 25 - *the guarantees in § 3 of Article 6 are specific aspects of the right to a fair trial set forth in § 1. Therefore the Court considers that the complaints under the two provisions should be taken together.*

²⁹ ECHR, *Vidal v. Belgium*, judgment of 22 April 1992, § 33.

³⁰ ECHR, *Luca v. Italy*, judgment of 7 August 1996, § 41; *mutatis mutandis*, ECHR, *Ferrantelli et Santangelo v. Italie*, judgment of 7 August 1996, §§ 51-52.

³¹ ECHR, *Isgro v. Italy*, judgment of 19 February 1991, § 12.

court, it is not, itself, incompatible with §§ 1 and 3 (d) of Article 6³². However, it may lead to conviction only if it is corroborated with other evidence. The Court had the same approach in the event that a witness disappears and therefore cannot be summoned to appear to court³³. The doctrine considered³⁴ that the refusal by an investigating judge to hear a defence witness is likewise not a breach of Article 6 (3) (d) if the witness may be called at the trial.

In any event, § 1 of Article 6 taken together with § 3 requires "*the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him*"³⁵. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner³⁶. In *Unterpertinger* case, the Strasbourg Court noted that *corollary of that, (...), is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6*³⁷.

Nevertheless, the Court stated that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts "*to decide whether it is necessary or advisable to hear a witness*"³⁸. The doctrine³⁹ agrees with such an approach only when it is favourable defending better person's rights.

Given the level of intimidation present in some communities nowadays, in order for some trials to be held, national authorities have to take **measures in order to protect the rights of the witnesses or the victims called upon to testify**. Witness protection represents a process in which witnesses or victims who testify in criminal Trials are provided with specific procedural and non-procedural measures aimed at effectively ensuring their safety before, during and after their testimony. There are two principal ways: either consideration must be given to a witness protection programme as a resort or by adopting appropriate devices capable of reassuring witnesses - such as voice modulation, screening and concealment of identity.

Even if the interests of the witnesses and those of the victims are not expressly protected by Article 6 of the Convention, their involvement in the criminal procedure may put their life, liberty, security or the rights contained in Article 8 of the Convention in danger. Such interests are in exchange protected by other provisions of the Convention which require that Member States take the adequate

³² ECHR, *Unterpertinger v. Austria*, judgment of 24 November 1986, § 33;

ECHR, *Isgrò v. Italy*, judgment of 19 February 1991, § 34 - the Court held that "*All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided the rights of the defence have been respected.*"

³³ ECHR, *Artner v. Austria*, judgment of 28 August 1992, § 11.

³⁴ *Law of the European Convention of Human Rights*, D.J. Harris, M.O'Boyle, C.Warbrick, Butterworths, London, 1995, page 266.

³⁵ ECHR, *Barberà, Messegue and Jabardo v. Spain*, judgment of 6 December 1988, § 78.

³⁶ ECHR, *Sadak v. Turkey*, judgment of 17 July 2001, § 67.

³⁷ ECHR, *Unterpertinger v. Austria*, judgment of 24 November 1986, §§ 31-33.

³⁸ ECHR, *Bricmont v. Belgium*, judgment of 7 July 1989, § 89.

³⁹ *Droit Europeen des Droits de l'Homme*, Jean Francois Renucci, Librairie Generale de Droit et de Jurisprudence EJA, 2002, page 288.

measures to insure that those interests are not unjustifiably infringed⁴⁰. The protection measures taken by the national authorities can often defy the rights of the defence. In that regard, the Court reminded⁴¹ that evidence obtained from a witness 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*". For that purpose, the judicial authorities are charged to take the measures in order to counterbalance the handicap of the defence. Nevertheless, the Convention cannot be interpreted as requiring in all cases that questions be put directly by the accused or his defence counsellor, through cross-examination or by other means. However, the accused must have the opportunity to challenge the victim's statements and his credibility in the course of the criminal proceedings. Special attention has to be given to the proportionality between the nature of the protection and the seriousness of the intimidation of the witness/victim. In all cases, the national authorities have to be able to explain in what way the witness/victim concerned would have been exposed to any danger by appearing before the trial court⁴². In that connection, the Court stated⁴³ that a decision taken by national authorities to not disclose to the defence the identity of a witness can be regarded as a reasonable and sufficient measure when the latter had, apparently on a previous occasion, suffered violence and threats from drug dealer against whom he had testified. The Court⁴⁴ also grants a special attention to the criminal proceedings concerning sexual offences. Taken into consideration that such proceedings are often conceived of as an ordeal by the victim, the Court accepted certain measures may be taken for the purpose of protecting the victim. Such measures must be reconciled with an adequate and effective exercise of the rights of the defence.

As to the **anonymous witness**, that is defined as any person, irrespective of his status under national criminal law, who provides or is willing to provide information relevant to criminal proceedings and whose identity is concealed from the parts during the pre-trial investigations or the trial proceedings, through the use of procedural protective measures⁴⁵. The Strasbourg Court gave a larger extent, including into this notion the informers and the under-cover police agents. The anonymity of witnesses is usually based on the ground of public interest immunity, in order to protect their identity in front of the reprisals on the part of the suspects. The use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention. However, if the anonymity of the prosecution witness is maintained, the defence will be faced with difficulties which in normally procedures should not involve. For this reason, there must be proper safeguards to counterbalance the resulting disadvantages for the defence⁴⁶. The Court indicated⁴⁷ that, when assessing whether the procedures followed in the questioning of an anonymous witness had been sufficient to counterbalance

⁴⁰ ECHR, *Doorson v. the Netherlands*, judgment of 20 February 1996, § 70.

⁴¹ ECHR, *S. N. v. Sweden*, judgment of 2 July 2002, § 54.

⁴² ECHR, *Sadak v. Turkey*, judgment of 17 July 2001, § 67.

⁴³ ECHR, *Doorson v. the Netherlands*, judgment of 20 February 1996, § 71.

⁴⁴ ECHR, *S. N. v. Sweden*, judgment of 2 July 2002, § 54.

⁴⁵ *E.U. Cross border Gathering and Use of Evidence in Criminal Matters*, Wendy de Bondt, Yasmine Van Damme, Ghert Vermeulen, Malku 2010, page 141.

⁴⁶ ECHR, *Windish v. Austria*, judgment of 27 September 1990, § 30.

⁴⁷ ECHR, *Kok v. the Netherlands*, décision of 4 July 2000.

those disadvantages, it takes into account the weight that had to be given to the anonymous testimony, to the extent to which it had been decisive in convicting the applicant. If this testimony was not in any respect decisive, the defence was handicapped to a much lesser degree.

The police investigators, the instruction judge and the trial judge must examine very carefully into the seriousness and substantiation of the reasons for granting anonymity to the witnesses when they decide to use this kind of statements in evidence against the accused⁴⁸. These reasons must be well-founded so they can justify the limitations of the rights of the defence. It is, in fact, an application of the principle of proportionality which requires that there is a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective⁴⁹.

The **anonymous witnesses which are members of the police force of the State** have a different position from that of a disinterested witness or a victim. Owing to their general duty of obedience to the State's executive authorities and especially to the prosecution, their use as witnesses should be resorted to only in exceptional circumstances. On the other hand, it is in the nature of things that their duties may involve giving evidence in open court. However, the Court has recognised⁵⁰ in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations. In police under-cover agents' case, the trial judge has to carry out an even more careful examination of the seriousness and the basis of the reasons which justify the said measures than in the disinterested witness's case. Its decision cannot be exclusively based on the seriousness of the crimes committed⁵¹. For the rights of the defence to be respected and for the accused to have a fair trial, it has to have an opportunity to question the undercover agent and cast doubt on his credibility during the proceedings⁵².

The protection against self incrimination and the right to remain silent are not expressly stated in Article 6 of the Convention. However, the Court's case law ruled that the two principles are generally recognised by international standards⁵³ and are included in the notion of a fair trial under Article 6. The privilege against self-incrimination means that the accused/defendant in a criminal case has the right to remain silent and may not be forced to provide answers or to disclose information that is self-incriminating. It presupposes "*that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused*"⁵⁴. In this sense it is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention. As for the aim of the privilege, the Court held that Article 6 does not

⁴⁸ ECHR, *Krasniky v. Czech Republic*, judgment of 2 February 2006, § 80

⁴⁹ *The Law of Human Rights*, R. Clayton, H. Tomlinson, Oxford, 2000, p. 278.

⁵⁰ ECHR, *Lüdi v. Switzerland*, judgment of 15 June 1992, § 49.

⁵¹ ECHR, *Van Mechelen v. Netherlands*, judgment of 23 April 1997, § 56.

⁵² ECHR, *Ludi v. Switzerland*, judgment of 15 June 1992, § 50.

⁵³ This principle is also found in the American Constitution (the 5th and the 14th amendments) and in the American case law: *Carter v. Kentucky* – in "Evidence: cases and materials", Charles T. McCormick, Jr. John Fr. Sutton and Olin Guy Wellborn III, St. Paul, West Publishing, 1992, pag. 804.

⁵⁴ ECHR, *Saunders v. the United Kingdom*, judgment of 17 December 1996, § 68-69.

extend to the phase prior to the criminal charge⁵⁵.

The right is not confined to statement of the admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears to be of a non-incriminating nature, such as exculpatory remarks or mere information of question of fact, may later be used in criminal proceedings, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to undermine his credibility. Regarding the extent of the privilege, the Court held that both the right to remain silent and the principle against self-incrimination "*lie of the heart of the notion of fair procedure*". Still, the right to not incriminate oneself is primarily concerned with the right of an accused person to remain silent. That means that the principle primarily extends to (oral) statements. It does not extend to the use, in criminal proceedings, of the material which may be obtained through compulsory powers but which have an existence independent of the will of the suspect, such as, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissues for the purpose of DNA testing.

The reason for the distinction between the statements and the other material which exists independent of the accused will is based on the safeguards against improper compulsion⁵⁶. However, not even reasons like the security and public order "*cannot justify a provision which extinguishes the very essence of the rights to silence and against self-incrimination*"⁵⁷. Given the autonomous meaning in the Conventional system of the *criminal charge* notion, the Strasbourg Court considered that it is also admissible for a witness to refuse to answer any questions from the judge that are likely to incriminate him. Nevertheless, the witness's obligation to take the oath "*is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence*"⁵⁸. In other words, a witness cannot be coerced to give a statement as evidence when there is the possibility to self incriminate but he can be compelled to take the oath requested by the procedure. To determine whether a procedure has infringed the privilege against self-incrimination, the Court will examine the following elements: the nature and degree of the compulsion, the existence of any relevant guarantees in the procedures and the use to which any material so obtained is destined⁵⁹.

As for the **right to silence**, it can be understood in a broad or a narrow way. The broad meaning refers to the right of the accused not to be disadvantaged on the basis of his silence⁶⁰. In this conception, the right contains several legal corollaries among which is the right not to self-incriminate. According to the narrow conception the right of silence refers to the right of a person not to have his silence adversely taken into account by a court of law in the assessment of the charges against him or in the determination

⁵⁵ ECHR, *Saunders v. the United Kingdom*, judgment of 17 December 1996, § 67.

⁵⁶ ECHR, *Jalloh v. Germany*, judgment of 11 July 2006, § 101.

⁵⁷ ECHR, *Heaney and McGuinness v. Ireland*, judgment of 21 Decembre 2000, § 58.

⁵⁸ ECHR, *Serves v. France*, judgment of 20 October 1997, § 47.

⁵⁹ ECHR, *Jalloh v. Germany*, judgment of 11 July 2006, § 101.

⁶⁰ *The right to silence reconsidered*, DJ Galligan, CI, p.76.

of his sentence.⁶¹ The Strasbourg Court ruled that this right serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police⁶². The right to silence is not an absolute right. The fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused silence either, during police interview or during his trial cannot of itself be considered incompatible with the requirements of a fair trial. However, in order to protect the right to silence, the possibility of a domestic court to invoke an accused silence against him has to be limited⁶³. Even if, in most cases, an innocent is willing to cooperate with the police forces in order to support his uninvolved in committing crimes, in certain circumstances, it is possible that he has good reasons for the lack of cooperation. For example, he may wish to remain silent until he will take the advice of a consult⁶⁴. It would be incompatible with the right to silence to base a conviction exclusively or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. However, the right should not prevent that the accused's silence, in situations which call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution⁶⁵. The freedom of choice of the accused whether to speak or to remain silent during the questioning is "*undermined in a case in which, the accused having elected to remain silent, the authorities use subterfuge to elicit, from him, confessions or other statements of an incriminatory nature, where the confessions or statements thereby obtained are used as evidence at trial*"⁶⁶.

As to the **presumption of innocence**, as stated in Article 6 § 2 of the Convention, it is a *sacred* principle of every judicial system founded on the principle of rule of the law and it translates the idea that a person accused of having committed a criminal nature deed, is considered to be innocent until a verdict of guilt is delivered in court⁶⁷. That presumption requires, *inter alia*, that when carrying out its duties, the court should not start with the preconceived idea that the accused has committed the offence charged. In that manner, the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him⁶⁸.

The presumption of innocence also has a privileged status in relation to other types of presumption⁶⁹. In principle, the Convention does not prohibit presumptions of fact or of law, which operate in every legal system. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law, having in mind the importance of what is at stake, the need to maintain the rights of the defence and the object and purpose of Article 6, which, by protecting the

⁶¹ *Human Rights, Serious Crimes and Criminal Procedure*, A.Ashworth, London, 2002, p18.

⁶² ECHR, *Allan v. France*, judgment of 05 November 2002, § 44.

⁶³ ECHR, *Beckles v. United Kingdom*, judgment of 8 October 1996, § 57.

⁶⁴ ECHR, *Averill v. United Kingdom*, judgment of 6 June 2000, § 49.

⁶⁵ ECHR, *Beckles v. United Kingdom*, judgment of 8 October 1996, § 58.

⁶⁶ ECHR, *Allan v. France*, judgment of 5 November 2002, § 44.

⁶⁷ ECHR, *Nölkenbockhoff v. Germany*, judgment of 25 August 1987, § 33.

⁶⁸ ECHR, *Barberà, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, § 77.

⁶⁹ ECHR, *Salabiaku v. France*, judgment of 7 October 1988, § 28.

right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law⁷⁰.

Another aspect that may be brought up, in relation with evidence, is found within the concept embodied in the French expression "*accusation en matière pénale*". That notion has an "autonomous" meaning and it has to be understood "within the meaning of the Convention"⁷¹, more specially since the English text of Article 6 § 1 employs the term "*charge*" which is very wide in scope. In that respect, the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and other forms of law, as disciplinary law, and to draw the dividing line, but only subject to certain conditions. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary level rather than on the criminal level, the operation of the fundamental clauses of Articles 6 would be subordinated to their sovereign will. Latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 to satisfy itself that the disciplinary does not improperly encroach upon the criminal. Thus, if a deed is sanctioned, under the national law, as a disciplinary one, but the Strasbourg Court finds it as being a criminal one, all the requirements stated in Article 6 of the Convention must be guaranteed in national trial, in order to maintain the respect of the Convention. In such a situation⁷², the burden of proof and the presumption of innocence, analysed above, are activated and must be respected, same rules as to a criminal accusation being applied.

In some circumstances, relevant **evidence** can be excluded as a matter of law discretion, on the grounds that it was **obtained illegally** (for instance by a crime, tort or breach of contract or in contravention with the statutory or other provisions governing the powers and the duties of the police or others involved in investigating crime), **improperly or unfairly** (for instance by trickery, deceptions, bribes, inducements or threats⁷³). There are also circumstances when evidence is obtained as a result of **entrapment**.

The use of evidence obtained illegally under national law is not, in itself, a breach of the right to a fair trial. Excepting the recognised unacceptability of allowing reliance of evidence obtained by entrapment, there is no strict doctrine of *the fruit of the poisoned tree* embodied in Article 6. As we mentioned in the previous paragraphs, what Article 6 requires is that in all circumstances of the case, including the way in which evidence was obtained, the proceedings taken a whole, should be fair. This approach of the Court is conditioned by certain aspects: the defence has to have the chance to challenge the use and authenticity of the material used as evidence and that there has to be other evidence supporting the conviction.

⁷⁰ ECHR, *Sunday Times v. Great Britain*, judgment of 26 April 1979, § 55.

⁷¹ ECHR, *König v Germany*, judgment of 28 June 1978, § 88.

⁷² ECHR, *Anghel v. Romania*, judgment of 4 October 2007, § 67 – 68.

⁷³ *The Modern Law of Evidence*, Adrian Keane, Oxford University Press, 2008, page 53.

As to **entrapment**, it refers to the actions of government agents such as police or their informants, to induce a target to commit a crime for the purpose of prosecution. The Court⁷⁴ established the principle that if undercover police agent had gone beyond an essentially passive investigation of a suspect criminal activity and exercised an influence such as to commit an offence, the defendant would be deprived of a fair trial. Although the admissibility of evidence is primarily a matter of regulation by national law, the requirements of a fair trial under Article 6 entail that the public interest to fight against crime does not justify the use of evidence obtained as a result of a police incitement. The Court made a distinction between the activities of the *agents provocateurs*, which created the criminal intention previously non-existent, and the cases in which the suspect had already the predisposition to commit crimes⁷⁵. In *Vaniane v. Russia*⁷⁶ case, the Court found that the police had no prior evidence that the suspect was a drug dealer and that there was nothing to suggest that the offence would have been committed in the absence of the police collaborator's intervention. These are, in fact, the most important two elements that ECHR relies on in order to determine if the offence was committed as a result of incitement. The Court reiterated these principles in *Ramanauskas*⁷⁷ case, which regards the simulate acts of bribery made by an under-cover police agent.

Having presented the main aspects related to *evidence* and *proofs* in the Article 6 case-law, we shall move on showing briefly the Court's approach to other articles that may show similar aspects.

In that matter, the most relevant problems are raised by **Article 2** and **3**, where the incidence of the notions of *evidence* or *proof* is felt in States' positive obligation to carry out an effective investigation in the case of death or when torture, degrading or inhuman treatment or punishment is alleged. This obligation has a procedural nature, basically, and one of its most important components is the **evidence gathering that has to be done with promptness and within a reasonable time frame**. The authorities must secure the evidence concerning the incident, including *inter alia*, eye witness testimony⁷⁸, forensic evidence⁷⁹, and where appropriate, an autopsy⁸⁰ which provides a complete and accurate record of injuries and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard. For instance, an evidence taken more than seven years after the relevant facts affects inevitably and irreversibly the evidence that might have been obtained⁸¹.

The Strasbourg Court examined also the **compatibility of the right to a fair trial guaranteed by**

⁷⁴ ECHR, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, §§ 38, 39.

⁷⁵ K Starmer, M. Strange, QWhitaker, *Criminal justice, Police Powers and Human Rights*, Blackstone Press, 2001, p.201-202.

⁷⁶ ECHR, *Vaniane V. Russia*, judgment of 15 December 2005, § 49 - In this case, the Court concluded that the police incited the offence of procuring drugs and that the use of the resultant evidence in the ensuing criminal proceedings irretrievably undermined the fairness of the trial guaranteed by Article 6 § 1

⁷⁷ ECHR, *Ramanauskas v. Lithuania*, judgment of 5 February 2008, §§ 66 - 68 - After establishing that the actions complained of by the accused were attributable to the authorities, the Court held that the police agents went beyond the mere passive investigation of existing criminal activity: there was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences; all the meetings between the applicant and under-cover police agent took place on the latter's initiative and, the applicant seemed to have been subjected to repeated prompting on the part of under-cover police agent to perform criminal acts, although there was no objective evidence to suggest that he had been intending to engage in such activity.

⁷⁸ ECHR, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV.

⁷⁹ ECHR, *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000.

⁸⁰ ECHR, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII.

⁸¹ ECHR, *Menteş and others v. Turkey*, judgment of 18 January 2005, § 54; ECHR, *Mikayil Mammadov v. Azerbaijan*, judgment of 17 December 2009, § 130.

Article 6 with the conviction found of evidence obtained in breach of Article 3 of the Convention.

It held that the examination of the fairness of the procedure presuppose to take into consideration the quality of the evidence and the circumstances in which it was obtained⁸². The general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment not amounting to torture automatically, renders a trial unfair was left open. The Court did not exclude that on the facts of a particular case the use of this kind of evidence "*will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial*"⁸³. The Court has confirmed⁸⁴ that "*even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned*".

The Court attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings⁸⁵. Thus, in a recent case⁸⁶, the Court found that the effective protection of individuals from the use of investigation methods in breach of Article 3 may require, as a rule, the exclusion from use at trial of real evidence obtained as a result of a breach of that Article. It considered that this protection and a criminal trial's fairness were only at stake, however if the evidence obtained in breach of Article 3 had an impact on the defendant's conviction or sentence.

In other cases⁸⁷, the Court considered that due to the absence of a lawyer and the breach of the privilege against self-incrimination, the procedural guarantees had not prevented confessions obtained under torture from being used. In that connection, the Court found irrelevant that the conviction was not mainly based on the statements illegally obtained. It was enough to ascertain that part of the facts assessed by the domestic court in proving the accused guilty, were based on the confessions made in breach of Article 3.

III. Evidence and proofs presented before the Strasbourg Court, mainly Article 5

The present section will provide analysis of the problem of *evidence* and *proofs* that are presented before the Strasbourg Court in order to determine the violation of substantial rights, mainly Article 5. In that respect, we shall be looking in particular to the basic rules governing arrest in the field of application of Article 5 § 3 (c), in order to see what evidence is necessary for the national authorities to deprive a

⁸² ECHR, *Jalloh v. Germany*, judgment of 11 July 2006, § 105 - the Court stated that, "*the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings*". In its view, "*incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value.*"

⁸³ ECHR, *Jalloh v. Germany*, judgment of 11 July 2006, § 22.

⁸⁴ ECHR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, § 79.

⁸⁵ ECHR, *Khan*, judgment of 12 May 2000, § 35 and 37.

⁸⁶ ECHR, *Magnus Gafgen v. Germany*, judgment of 1st of June 2010, § 104 - In this case, the evidence in dispute had not been necessary in determining the accused sentence, therefore his trial as a whole had been considered to have been fair.

⁸⁷ ECHR, *Örs and others v. Turkey*, judgment of 20 June 2006, § 60; ECHR, *Gocmen v. Turkey*, judgment of 17 October 2006, §75.

person of his liberty. In doing so, we shall focus on the necessary evidence for a "reasonable suspicion", on the proofs needed in order to detain persons within the categories mentioned in Article 5 § 1 (e) and on the necessary proof for prejudice under Article 5 § 5 which provides the right to compensation for illegal detention. We shall also be looking to other articles such as Article 2 and 3, in their substantial side, Article 8 and Article 10, aiming to present similar aspects related to *evidence* and *proofs*.

Thus, Article 5 § 1 (c) permits lawful arrest or detention of a person motivated by **reasonable suspicion** of having committed an offence, of the necessity to prevent the committing of an offence, or of danger of absconding⁸⁸. In other words, if a person has been deprived of his liberty in a national proceeding, the State has to prove before the Court that that was founded on *reasonable suspicions*.

First of all, it is to be said that a reasonable suspicion of having committed an offence is to be analysed in conjunction with a deed forbidden by the criminal law. If one committed an action which has not a criminal nature, according to the national law, an arrest or a detention cannot be regular⁸⁹. The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c). Having a *reasonable suspicion* presupposes the existence of facts or pieces of information which would satisfy an objective observer that the person concerned may have committed the offence. Anyway, what may be regarded as "reasonable" will depend upon all the circumstances. For instance, the terrorist linked criminality would have to be placed in a different category. Article 5 § 1 (c) is to be applied in such a manner as not to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism⁹⁰. Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. The state authorities have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.

Also, with regard to the level of "*suspicion*", it does not presuppose that the investigating authorities should have obtained sufficient evidence to bring charges. Facts which raise a suspicion need not to be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation⁹¹. The existence of such a purpose must be considered independently of its achievement and Article 5 § 1 (c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody. As to the necessity to prevent the committing of an offence and the danger of absconding, the reasonableness of the suspicion must always be proved by the Contracting State. In other words, the data that it has to produce, have to be able to make credible to an external and uninvolved observer, the presumption that the alleged possible facts of the accused are imminent.

⁸⁸ *Human Rights in Criminal Proceedings*, S Trechsel, European University Institute, 2005, page 423.

⁸⁹ ECHR, *Wloch v. Poland*, judgment of 19 October 2000, § 109.

⁹⁰ ECHR, *Klass and Others v. Germany*, judgment of 6 September 1978, §§ 58, 68.

⁹¹ ECHR, *Brogan and others v. United Kingdom*, judgment of 29 November 1998, § 53.

Article 5 § 1 (e) permits "*the lawful detention of persons for the prevention of the spreading of infectious disease, of persons of **unsound mind, alcoholics or drug addicts or vagrants***". In order for a detention to be regular under this Article, a Contracting State has to prove that a person is of unsound mind, alcoholic or drug addict or vagrant, those terms having an autonomous Conventional meaning.

As to an **infectious disease** and how can it be proved, the obvious conclusion is that the disease in question must be of a dangerous kind – for instance, the Convention cannot justify the deprivation of liberty of person because of influenza. At present, one of the most well-known contagious diseases is acquired immune deficiency syndrome (AIDS). However, unlike tuberculosis or yellow fever, the infection is only transmissible in a limited number of ways and protection is to a large extent effectively possible. Only in the case of totally irresponsible persons could internment therefore be justified. The proof can be obtained by testing the person which can imply blood tests.

The meaning of "**persons of unsound mind**" was considered in *Winterwerp v. Netherlands*. It is not a term that can be given a "definitive interpretation". What is clear is that the detention of a person cannot be justified under Article 5 § 1 (e) "*simply because his views or behaviour deviate from the norms prevailing in a particular society*". The Court has set some minimum conditions which must be fulfilled in order for a person to be considered of unsound mind and be deprived of liberty: she or "*he must be reliably shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement*". Furthermore, in determining these issues, "*the national authorities are to be recognized as having a certain margin of appreciation since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case*"⁹². So proof is necessary and its limits are defined by the margin of appreciation of the national authorities.

A way to define mental illness consists in referring to international systems of diagnostics such as the DSM-IV (the Diagnostic and Statistical Manual of Mental Disorders) and ICD-10. However, even such a classification does not provide more than a label; the essential element lies in the second condition, the necessity for an intervention regarding the patient. The elements of danger must be present, meaning that the danger must be reliably shown to exist by medical evidence and also continuous. The evidence in this case can be furnished by the system of diagnostics and the evaluation of every person.

The possibility to confine **alcoholics** and other **drug addicts** is similarly problematic. In determining the meaning of the term *alcoholics*, the Court will be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties, as it has repeatedly been guided in other cases where an interpretation of the Convention was required⁹³. Furthermore, a drug addict is not a person who casually takes drugs and an alcoholic is not a person who sometimes uses alcohol so the proof in this

⁹² ECHR, *Luberti v. Italy*, judgment of 23 February 1984, § 27 - "*the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder*". Also, "*in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognized as having a certain margin of appreciation since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case*".

⁹³ ECHR, *Johnston and Others v. Ireland*, judgment of 18 December 1986, § 51; ECHR, *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, § 114, 117.

case must be given by the medical evidence and the person detained for this reason must also be asserted by specialists as dangerous. In the same time, the text does not apply only to alcoholics (persons who consume alcohol on regular basis), but also to persons who, due to their dangerous behaviour alcohol generated, are a threat to public order or themselves⁹⁴.

The term "**vagrants**" was examined in *De Wilde, Ooms and Versyp v. Belgium*⁹⁵, where the Court accepted the Belgian Criminal Code definition for "vagrants" as "*persons who have no fixed abode, no means of subsistence and no regular trade or profession*". In *Guzzardi v. Italy* case, the Court rejected a Government argument that suspected mafia members who lacked any identifiable sources of income were vagrants.

As to the right of compensation under Article 5 § 5, it presupposes, primarily, that a person "*has been the victim of arrest or detention in contravention of the provisions of this Article*", that is § 1-4. As these rules frequently refer to "**lawfulness**", a violation of national law also amounts to a violation of Article 5. Where an applicant alleges in his application a violation of Article 5 § 5 at the same time as he claims a breach of some other clause of Article 5, the Strasbourg authorities will proceed to examine the Article 5 § 5 claim if they find that the other alleged paragraph of Article 5 has been infringed. They will do so without requiring the applicant to go back and exhaust local remedies to see whether he could in fact obtain the compensation that Article 5 § 5 requires under national law. Instead, a state will be found to comply with Article 5 § 5 if it can show with a sufficient degree of certainty that a remedy required by Article 5 § 5 is available to the applicant. For instance, in the *Sakik*⁹⁶ case, the Turkish Government had alleged that Article 19 of the Constitution granted such a right to remedy but the Court noted that the Government did not refer to a single case where such compensation had been paid. On the contrary, in *Steel*⁹⁷ case, it was possible for the applicant to file a civil action for damages against the police, therefore there could be no violation of § 5.

Anyway, Article 5 § 5 does not prohibit a state from requiring **proof of damage** resulting from the breach of Article 5 before compensation is available⁹⁸. As the Court has stated, although a person may be a victim of such a breach in the sense of Article 5 § 5 even though he has not suffered any damage thereby, "*there can be no question of compensation where there is no pecuniary or non-pecuniary damage to compensate*"⁹⁹.

As to other Articles, there are some relevant things to mention about *evidence* and *proofs* presented before the Strasbourg Court.

Thus, when analysing evidence in the substantial side of **Article 2 and 3**, the Strasbourg Court is guided by the principle of proof "*beyond any reasonable doubt*". Nevertheless, a conclusion of guilt may

⁹⁴ ECHR, *Witold Litwa v. Poland*, judgment of 4 April 2000, § 61.

⁹⁵ ECHR, *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, § 68.

⁹⁶ ECHR, *Sakik c. Turkey*, judgment of 26 novembre 1997.

⁹⁷ ECHR, *Steel and others c. United Kingdom*, judgment of 23 September 1998.

⁹⁸ *Law of the European Convention on human rights*, DJ Harris, M O'Boyle, C Warbrick, 1995, page 159.

⁹⁹ ECHR, *Wassink v. Netherlands*, judgment of 27 September 1990, § 38.

arise from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact, both in Article 2¹⁰⁰ and in Article 3¹⁰¹, namely the result of indirect evidence.

Another relevant aspect related to **Article 2** is the **burden of proof** when it is established that a state agent caused death to a person. Thus, ECHR will analyse, similar to an national court, the relevance of the evidence presented by the state, the later having to prove¹⁰² that death was generated in the conditions of Article 2 § 2 and that the use of force was absolutely necessary¹⁰³. In a similar manner, the Court deals with the situation where **decease is provoked to a person being into the state's custody**. That is the case when a person dies in conditions which are more susceptible to be known by state agents, for instance in the case of the death of a detained person, situation from which a strong presumption of guilt regarding the state arises, the later having the burden of proof in order to produce evidence of innocence or, at least, to provide a plausible explanation with the aim to exonerate its agents¹⁰⁴.

Also, in the first sentence of its first paragraph of Article 2, lays down a **positive obligation** on States to take appropriate steps to safeguard the lives of those within their jurisdiction¹⁰⁵. When a person dies and an allegation of such an infringement is made, the State has to prove that it put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life¹⁰⁶.

In the case of **Article 3**, as to the **burden of proof**, the applicant is to produce evidence, meaning that he has to prove the facts that constitute torture, inhuman or degrading treatment or punishment, according to the Latin saying "*actori incumbit probatio*". The burden of proof is reversed and lies with the state, when a person is presenting with injuries at the release from the state's custody, if he was in a normal state of health or if he was not medically checked at the time of entering into the state custody (for instance, by means of arrest). In this case, a strong presumption of culpability¹⁰⁷ is born, the state having to produce evidence or at least a plausible explanation of its innocence¹⁰⁸.

Article 2 and 3 may also be brought up when talking about **expulsion** or **extradition** of persons to a third party State, where those may be subjects to actions that may infringe the above mentioned Articles. Thus, a state member of the Convention is responsible not only for the respect of the Article 2 and 3, on its own territory, but also if the state where it extradites or expels a person to, may not guarantee the respect of the human rights. In the recent case *Klein v. Russia*, the Court offers a sample of the way things must be looked at. Among other things related to evidence, it is to be emphasized that the Court founded

¹⁰⁰ ECHR, *Jalloh v. Germany* [GC], judgment of 11 July 2006, § 67; ECHR, *Tanrikulu v. Turkey*, judgment of 8 July 1999, § 97; ECHR *Mahmut Kaya v. Turkey*, judgment of 28 March 2000, § 87.

¹⁰¹ ECHR, *Pruneanu v. Moldova*, judgment of 16 January 2007, § 45.

¹⁰² ECHR, *Tanrikulu v. Turkey*, judgment of 8 July 1999, § 97; ECHR, *Velikova c. Bulgaria*, judgment of 18 May 2000, § 70.

¹⁰³ ECHR, *McCann and others v. Great Britain*, judgment of 5 September 1995, § 148 – 150.

¹⁰⁴ ECHR, *Salman v. Turkey*, judgment of 27 June 2000, § 100.

¹⁰⁵ ECHR, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, § 36; ECHR, *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 Mars 2002, § 54.

¹⁰⁶ ECHR, *Osman v. Turkey*, judgment of 28 Novembre 1998, §115; ECHR, *Paul et Audrey Edwards c. the Royaume Uni*, judgment of 14 March 2002, §54; ECHR, *Ilhan c. Turquie* [GC], judgment of 27 June 2000, §91; ECHR, *Kılıç c. Turquie*, judgment of 28 June 2005, § 62; ECHR, *Mahmut Kaya c. Turquie*, judgment of 28 March 2000, §85.

¹⁰⁷ ECHR, *Salman c. Turquie* [GC], 27 June 2000, § 100.

¹⁰⁸ ECHR, *Selmoumi c. France* [GC], judgment of 28 July 1999, § 87; CEDH, *Berkday c. Turquie*, judgment of 1 of Mars 2001, § 167; ECHR, *Altay c. Turquie*, judgment of 22 May 2001, § 50.

its conclusion on opinions of independent organisms such as non-governmental organizations (Transparency International) or entities uninvolved in the procedure, such as the American State Department (Reports on Democracy status around the world) or UNO Reports. In any case, the file of evidence has to be a consistent one, and the state that extradites or expels has to be fully convinced of the risk that the extradited or the expelled person is exposed to¹⁰⁹.

Another Article able to give rise to discussions related to the notion of evidence, in both procedural and substantial level, according to the distinctions made at the beginning of the present work, is **Article 8**, mainly its aspects regarding the protection of the home and of the correspondence.

The notion of "*home*" enters under the protection of the Convention, both in a classical meaning, as domicile, but also as a professional location, where a person carries on its professional life¹¹⁰, for instance, a liberal profession like advocacy. As to the meaning of "*correspondence*", this notion does not claim special attention, only the specification that it was adapted to the scientific development of the society and includes letters, emails¹¹¹, phones¹¹², mobile phones and pagers¹¹³ etc. Taking into consideration that *house search* and *interception of correspondence* are efficient ways to obtain evidence, the Convention permits national law to allow a public authority to break into private area of a person, that is found under the protection of article 8 of the Convention, in regulated situations (those shown by Article 8 § 2 – prescription by law, justification and proportionality). From all the situations allowing such interference, we shall be focusing our attention on those who, in the national law system of every member state are regulated as means of obtaining evidence, namely ***house search, interception of correspondence or surveillance in private spaces***.

The Court held¹¹⁴ that in order to determine if the **use as evidence of information obtained in violation of Article 8** renders a trial as a whole unfair contrary to Article 6, it had to be examined "*all the circumstances of the case, including, respect for the applicant's defence rights and the quality and importance of the evidence in question*". In *Khan v. United Kingdom*¹¹⁵ case, the accused had been convicted on the basis of evidence obtained by a secret listening device installed by the police which had been contrary to Article 8. The Strasbourg Court noted that the accused had had ample opportunity to challenge both the use and the authenticity of the recording and indeed he challenged its use, although not its authenticity; at each level of jurisdiction the domestic courts have assessed the effect of the admission of this evidence of the fairness of the trial and discussed the non statutory basis for the surveillance. This being so, the use at the trial of the secretly taped material did not, it was held, conflict with the requirements of fairness under Article 6 § 1. The right to a private life, emanating to a right to see

¹⁰⁹ CEDH, *Klein v. Russia*, judgment of 1 April 2010 - joint dissenting opinion of judges Klover and Jajiyev - In this case, the Court has correctly established such a potential risk in the extradition of Mr. Klein from Russia to Colombia, founding its conclusion on a number of inferences and presumptions, even if, among others, it used as evidence a copy from a journal, without any references (who published the paper, what day etc.).

¹¹⁰ ECHR, *Niemietz v. Germany*, judgment of 16 December 1992, § 31.

¹¹¹ ECHR, *Copland v. United Kingdom*, judgment of 3 April 2007, § 41

¹¹² ECHR, *Taylor-Sabori v. United Kingdom*, judgment of 22 October 2002, § 19

¹¹³ ECHR, *Amann v. Switzerland* [GC], judgment of 17 February 2000, §§ 45, 70.

¹¹⁴ ECHR, *P.G. and J.H. v. the United Kingdom*, judgment of 25 September 2001, § 77 - 79

¹¹⁵ ECHR, *Khan v. the United Kingdom*, judgment of 12 May 2000, § 38.

personal data safeguarded from use for an incompatible purpose, has been in this way disconnected from Article 6. Data can thus be collected in a way that infringes upon a private person's life but can be successfully used in a criminal procedure. As long as the defendant has been given the opportunity to challenge the evidence brought against him and as long as the evidence is reliable and not gathered by means of entrapment, violating the right to privacy can still produce admissible evidence.

The Court has reached similar conclusions in relation to evidence obtained in breach of Article 8 in the **unlawful installation of a listening device** in the accused home¹¹⁶ or in the unlawful listening devices installed in police cells¹¹⁷. Also, recordings may not contain any incriminating statements, but they may still be used at trial as a control to identify the voice of the accused on other tapes¹¹⁸. It was held that they could be regarded as akin to blood, hair or other objective specimens used in forensic analysis and to which the privilege against self-incrimination did not apply. In these circumstances, the requirements of fairness guaranteed by Article 6 § 1 of the Convention had not been violated. Therefore, the right to privacy does not need to be complied with in order to assure a fair trial.

In what regards **Article 10**, an analysis is to be made relating the **statements of journalists when exercising the freedom of expression**. Thus, if it is true that a **value judgment** (for instance, the statement that "*X is immoral*") does not imply the obligation of backing it up because this is the result of a mental, abstract, logical mechanism, it is also true that a total lack of proofs is not acceptable. In that manner, the injurious assertions are as much as possible prevented and the Court asks the one who makes such a statement to sustain it by a minimal factual base. In the above mentioned example¹¹⁹ ["*X is immoral*"], the journalist was not sanctioned because he made that statement having in view a politician's attitude of defending publicly another politician colleague who, in the past, was a member of the SS troops in the Second World War. On the other hand, **factual statements** as "*X is responsible for the disappearing of evidence from a file*" had to be founded on solid proofs. In *Pedersen and Baadsgaard*¹²⁰ case, where such a statement was made, the Court considered that a sufficient factual base did not exist to sustain the accusation, given that the alleged action was only confirmed by one witness out of thirty others who did not sustained such a hypothesis. Also, in the lack of any factual base, the Court is interested to know if the inaccurate assertion was made in good faith, this finding being usually sufficient not to attract conviction.

¹¹⁶ ECHR, *Chalkley v. the United Kingdom*, judgment of 12 June 2003, § 25.

¹¹⁷ ECHR, *P.G. and J.H. v. the United Kingdom*, judgment of 25 september 2001, § 25.

¹¹⁸ ECHR, *P.G. and J.H. v. the United Kingdom*, judgment of 25 september 2001.

¹¹⁹ ECHR, *Lingens v. Austria*, judgment of 8 July 1986 - The Court considered that the politician's past and the political context were themselves, the proof of a factual base able to sustain the journalist's statement which, in other circumstances, might have been regarded as injurious.

¹²⁰ ECHR, *Pedersen and Baadsgaard*, judgment of 17 December 2004, § 89.

IV. Conclusion

Along with the fact of presenting particular situation in the Court's case-law, in order to emphasise its view on *evidence* and *proofs*, mainly relating to Articles 5 and 6, we tried to create a classification in what regards those notions, classification that is used by the Court in its case-law. As we already stated, those terms have an autonomous Conventional meaning, the Court having created its own conception that it uses in order to ensure the respect of the Conventional order.

Thus, there is a type of cases, linked to so called procedural rights, as defined in the introductory section of the present paper, where the Court is not interested in establishing the facts, but in supervising the national proceedings in order that those be respectful to the Convention. In this type of cases, the evidence produced before the Court is trying to prove the correctness or the in-correctness of the proceedings. The actual facts of the case are a matter that is “*delegated*” to the national courts and the Strasbourg Court usually trust their findings, excepting the obvious arbitrary situations. In other type of cases, the ones that we defined as substantial rights, evidence has to be produced before the Strasbourg Court, in order to state on the violation of the Human Rights. The applicants and the defendant States have to use the rules of evidence as established by the Court in its case law, in order to state on the violation of Human Rights.

Having in mind the fact that notions as *evidence* and *proofs* are not regulated in a very detailed manner by the Convention or the Rules of the Court and also the fact that the Strasbourg Court has to accommodate different law systems of the Member States, with different rules in what regards the above mentioned terms, a classification as the one we propose may prove useful in the frame of the effort of understanding the ways of the European Court of Human Rights.

Taking into account the previous classification, the way the Court applies its conception related to evidence and proofs may be understand in an easier way: the main rules used are being brought to light. Or, in a more stylized manner, paraphrasing the Greek philosopher Anaxagoras, *all things* related to evidence and proofs *were mixed together*, and than, we tried, by conceiving the above mentioned classification, to *set them in order*¹²¹.

¹²¹ The original saying was: “*all things were mixed together, than came Nous [the mind] and set them in order*”.