

Chapter 2

Diversions, Shortcuts and the Concept of Fairness

Abstract This chapter assesses the applicability of human rights standards to diversions and shortcuts to proof. The case-law of the European Court of Human Rights provides the most authoritative interpretation of the concept of fairness in criminal proceedings. Fairness is regarded as a principle that underlies the enforcement of criminal law. This entails that fairness applies in case of the full criminal trial, when the case is diverted, and when a shortcut to proof is used. More specifically, the concept of fairness in criminal proceedings is rooted in the idea of participation. Proceedings may be called fair if the accused has been able to participate effectively in the handling of his case, either by way of a diversion or a shortcut to proof. Four aspects of participation in criminal proceedings were identified and discussed in detail: non-compulsion; informed involvement; the ability to challenge the evidence, and the right to a reasoned judgment. These four aspects were derived from the participatory model of proof, as described by legal scholars Jackson and Summers.

Keywords Fairness • European court of human rights • Participation in criminal proceedings • Procedural justice • Article 6 ECHR • Diversions

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2.1 Introduction

This chapter provides the normative framework for the following chapters on Dutch and international criminal law. It assesses the applicability of human rights standards (in particular the right to a fair trial) to diversions and shortcuts to proof. The applicability of the notion of fairness to diversion mechanisms is not self-evident. Fairness is regarded as a fundamental principle underlying criminal proceedings, which also permeates the rules of evidence of the different legal systems that are discussed in the other chapters. Fairness is defined based on the case law of the European Court of Human Rights. The interpretation of the concept of fairness by the European Court of Human Rights has been chosen as the normative framework, because the Court has, over the past decades, created an authoritative account of the concept of fairness in criminal proceedings. Both in qualitative and in quantitative terms, the Court has established, compared to other human rights bodies, the most detailed and sophisticated concept of fairness.¹ Moreover, the case law of the Court has deeply influenced the criminal justice systems that are discussed in this book.²

It is argued that the analysis of the Court's case law should, for present purposes, eschew trying to define the *principle* of fairness as such. Although such an analysis is in itself not without merit, an abstract notion of fairness does not provide the desired normative framework that is useful for the evaluation of the chapters on diversions and shortcuts to proof. The analysis should equally eschew the opposite approach in which fairness is dissected into particular rights and analysed from a rule-level or micro-perspective. Instead, an approach is chosen in which particular rights are interpreted in light of the overall concept of fairness and *vice versa*. The chapter concludes by presenting the participatory model of proof, which is used to evaluate the chapters on Dutch and international criminal law.

2.2 Fairness and Evidence Law

Rules of evidence seem to have escaped direct supervision by the European Court of Human Rights. The Court held in the famous *Schenk* case that the admissibility of evidence is 'primarily a matter for regulation under national law': Article 6 of

¹ Cf. Roth and Tulkens 2011.

² The Netherlands ratified the Convention in 1954. The international tribunals and courts have to operate in conformity with internationally recognized human rights standards (cf Article 21(3) ICC Statute). Along with the ICCPR and ACHR, the European Convention on Human Rights is regarded as an authoritative source regarding human rights standards. Fedorova observed on the standing of the ECtHR within the case law of the *ad hoc* tribunals: 'Although starting off with a somewhat dismissive approach to the case law of the ECtHR in the first, infamous, *Tadić* case, *ad hoc* tribunals came to embrace references to this human rights body's jurisprudence.' Fedorova 2012, p. 29. On the applicability of human rights norms in international criminal proceedings, see Gradoni 2009, pp. 74–94; Vasiliev 2014, pp. 89–158.

the Convention does not, as such, lay down any rules on the admissibility of evidence.³ Considering the holistic approach of the Court regarding the fairness of the proceedings, this is not surprising: detailed rules on the admissibility of specific means of proof would not sit well with the overall determination of the fairness of the proceedings. Evidence that has been obtained in breach of domestic law will not automatically result in unfair proceedings: the use of illegally obtained evidence does not, as such, render the proceedings unfair.⁴

Not only does the Court refrain from stipulating general rules on the admissibility of evidence, but it also refrains from weighing the evidence presented before the domestic courts. Considering the Court's fourth instance doctrine, it is not in a position to evaluate and weigh the evidence presented in the domestic proceedings unless the evidence infringes upon a right protected under the Convention:

The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.⁵

According to Trechsel, the Court guarantees that 'procedural justice' has been done: the right to a fair trial does not include the right to an accurate factual outcome of the case. 'Outcome-justice', as Trechsel put it, is concerned solely with the outcome of the procedure as such.⁶ One of the few dissenters to this view is former ECtHR judge Loucaides, who argued that the right to a fair hearing encompasses the right to a fair result.⁷ He argued that it would be contrary to the *raison d'être* of Article 6 to be unable to challenge proceedings that have been fair, but have resulted in an unjust outcome.⁸ Manifestly unjust judgments should be declared unfair.⁹

Loucaides ignored the important distinction between the two central aims of criminal proceedings: fairness and factual accuracy. Both aims are interdependent (e.g. fairness requires that witness evidence be contested in open court, which arguably also enhances the accuracy of the court's factual findings) but remain autonomous, in the sense that fair proceedings may result in an inaccurate

³ ECtHR, 12 July 1988, App. No.: 10862/84, (*Schenk v. Switzerland*), para 46.

⁴ ECtHR (GC), 1 June 2010, App. No.: 22978/05, (*Gäfgen v. Germany*) para 163. With references to other case law.

⁵ ECtHR (GC), 13 July 2000, App. No.: 25735/94, (*Elsholz v. Germany*), para 66. Cf. ECtHR (GC), 21 January 1999, App. No.: 30544/96 (*Garcia Ruiz v. Spain*), para 28. 'In particular, it is not its [the Court, KV] function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.' Cf. Goss's argument that the fourth instance doctrine is 'incoherent and internally inconsistent'. Goss 2014, pp. 42–58.

⁶ Trechsel 2006, p. 83. Trechsel 1997, p. 102.

⁷ Loucaides 2003, p. 31.

⁸ ECtHR, 2 July 2002, App. No.: 33402/96, (*Göktan v. France*), Partly Dissenting Opinion of Judge Loucaides, p. 15.

⁹ Loucaides 2003, p. 32.

outcome and *vice versa*.¹⁰ The criminal trial is indeed, as Rawls observed, a classic example of imperfect procedural justice: even if all the rules of evidence and fair trial guarantees have been observed, the outcome of the trial may be unjust (i.e. a factual inaccurate outcome).¹¹ Therefore, to ‘apply’ standards of fairness to factual accuracy, or to evaluate the fairness of the proceedings by referring to the outcome of the proceedings, is misconceived. This seems to be at odds with the idea that the law of evidence has been shaped and deeply influenced by fair trial standards. If we regard the law of evidence as the category of rules that promote the factual accuracy of the verdict, then it would be useless to *evaluate* evidence law using fair trial standards. It is suggested, however, that although the outcome *as such* does not come within the ambit of Article 6 (or within any fair trial standard, for that matter), the manner in which the outcome has been reached, including the use that has been made of rules of evidence, is deeply influenced by fair trial considerations. In other words, if one were to argue that rules of evidence are fundamentally epistemic rules aimed at guaranteeing an accurate outcome of trial proceedings, fair trial considerations have adapted those rules in order to provide for a fair determination of the outcome of the proceedings.

The case law of the Court on evidentiary matters has been interpreted traditionally as a hands-off approach: evidentiary matters are for the domestic courts to decide. However, this analysis has obfuscated the fact that the Court has made significant inroads in the law of evidence of domestic jurisdictions.¹² To give a well-known but telling example, the Court has ruled on several occasions that the manner in which Dutch courts handled the testimony of witnesses in court was in violation of Article 6(3)(d). The Court ruled in *Kostovski* that the applicant was convicted on the basis of evidence that to a decisive extent consisted of anonymous witness statements and found a violation of Article 6(3)(d), taken together with Article 6(1).¹³ In *Van Mechelen*, the use of anonymous statements from police officers was found to be incompatible with Article 6(1) and Article 6(3)(d).¹⁴ In the more recent *Vidgen* case, the Court ruled that the mere appearance of a witness in court cannot, without more, be equated with an opportunity for the defendant to have examined the witnesses against him.¹⁵ The Dutch Supreme

¹⁰ Cf. Rawls’s characterization of criminal proceedings as ‘imperfect procedural justice’: the rules of procedure do not guarantee the desired outcome (an accurate verdict). Rawls 1999, pp. 74–75.

¹¹ ‘The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome [a factual accurate verdict, KV], there is no feasible procedure which is sure to lead to it.’ Rawls 1999, pp. 74–75.

¹² In this respect, it is telling that the book edited by Roberts and Hunter starts with a chapter called ‘The Human Rights Revolution in Criminal Evidence and Procedure’. Common law legal scholars have paid significantly more attention to the influence of the Court’s case law on the rules of criminal evidence and procedure than Continental scholars. Roberts and Hunter 2013.

¹³ ECtHR, 20 November 1989, App. No.: 11454/85, (*Kostovski v. The Netherlands*), para 43–45.

¹⁴ ECtHR, 23 April 1997, App. No.: 21363/93; 21364/93; 21427/93 and 22056/93 (*Van Mechelen and Others v. The Netherlands*), para 62–63.

¹⁵ ECtHR, 10 July 2012, App. No.: 29353/06, (*Vidgen v. The Netherlands*), para 47.

Court had to reconsider its position on the examination of witnesses following the Court's judgment.¹⁶ To analyse these cases in isolation, i.e. as cases that are relevant only for a specific (procedural) right under the Convention (the right to examine witnesses), would be wrong. A piecemeal approach does not do justice to the manner in which the Court has, over several decades, created an intriguing and complex framework regarding evidentiary issues.

The Court's approach to the specific guarantees under Article 6(3) (such as the right to be informed of the accusation, the right to defend oneself in person or with the assistance of counsel and the right to examine witnesses) is a holistic and principled one:

The Court recalls that the guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of the proceedings.¹⁷

The Court emphasized that whether a trial has been fair can be determined only by evaluating the proceedings as a whole.¹⁸ Therefore, the Court's case law should not be analysed from the perspective of a particular right. One should not primarily look at particular rights (the rule-level, or the micro-perspective) or the notion of fairness as such (the principle-level, or the macro-perspective), but one should rather try to distil from the detailed case law elements that constitute the notion of fairness. When one regards the specific rights under Article 6 as rules that have to be interpreted and applied in the light of the fundamental principle of fairness, it becomes clear why an analysis focused on the general notion ('fairness') or any specific right ('the right to...') is either too broad or too narrow. It obfuscates the hermeneutic manner in which the specific rules and the principle of fairness interact with each other.

2.3 Principles and Rules

The concepts of principles and rules deserve some closer analysis before examining the model that will be used to analyse the Court's case law. Commenting on the distinction between principles and rules, Vasiliev observed:

principles be defined as fundamental and absolute provisions permeating the legal system (some would say 'capturing its spirit'), formulated at such an abstract level where they cannot be detracted from by any exceptions, qualifications or reservations. Generality and intolerance to exceptions appear distinctive and inherent features of a principle. By contrast, rules are always accompanied by explicit or implicit exceptions, restrictions of scope, or conditions for application.¹⁹

¹⁶ HR 29 January 2013, *ECLI:NL:HR:2013:BX5539*. Trechsel 2006, p. 317 and further.

¹⁷ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 118.

¹⁸ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 118.

¹⁹ Vasiliev 2009, p. 51.

Abels argued that principles will never be completely realized and are open-ended.²⁰ They are also non-conclusive, in the sense that they will never have the definite answer to a particular (factual) situation.²¹ Dworkin observed in this respect:

Only rules dictate results, come what may. When a contrary result has been reached, the rule has been abandoned or changed. Principles do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail.²²

Vasiliev observed that rules are more ‘concrete provisions’ than principles and are ‘action-orientated’.²³ The relationship between rules and principles is hierarchical: a rule is a *lex specialis* of the underlying principle.²⁴ Whereas principles do not allow for any exceptions to them, ‘rules are always accompanied by explicit or implicit exceptions, restrictions of scope, or conditions for application.’²⁵ This is an important insight because it helps to explain the distinction between an analysis on the principle-level and on the rule-level. Although one can legitimately analyse the Court’s case law concerning a particular rule (e.g. the right to examine witnesses, or the right to legal assistance), such an analysis does not provide the answer to whether or not the proceedings as a whole were fair: this requires an analysis on the principle-level. Similarly, to analyse the Court’s case-law solely from the principle-level (i.e. by asking, ‘What does fairness entail?’) is a legitimate and interesting approach but does not reveal much about the specific aspects of fairness.

To illustrate the distinction between principles and rules, four categories of cases can be discerned. The first category consists of cases in which a rule has been infringed upon, but where the principle of fairness has not. An example can

²⁰ Abels 2012, pp. 190–191.

²¹ Abels 2012, p. 193. Cf. Sluiter et al. 2013, p. 21.

²² Dworkin 1978, p. 35.

²³ Vasiliev referred to the work of Stephen Perry, who argued that rules ‘specify a course of action to be followed in a particular type of circumstance.’ Perry juxtaposed action-orientated rules with value-orientated principles. Perry 1997, p. 788.

²⁴ Vasiliev 2009, p. 46. Vasiliev noted that *lex specialis* should not be equated with *lex superior*: as such, a rule cannot prevail over a principle. *Idem*, p. 47.

²⁵ Vasiliev 2009, p. 51. An interesting example is the Court’s reasoning on the ‘sole and decisive rule’, regarding examination of witnesses. The Court’s Grand Chamber held that: ‘It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise [...]. To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and the public interest in the effective administration of justice.’ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 146.

be found in the case of *Al-Khawaya and Tahery*, where the right to examine witnesses had been infringed upon (in Mr Al-Khawaya's case, the witness was dead, while in Mr Tahery's case the witness was absent due to fear). Although the applicants' rights under Article 6(3)(d) had been infringed upon, in the case of Mr Al-Khawaya, the Court found no violation of Article 6(1) in conjunction with Article 6(3). The unavailability of the witness did not result in a violation of the principle of fairness: sufficient counterbalancing factors were in place to compensate for not hearing the witness.²⁶

The second category consists of cases in which the infringement of a rule, results in the violation of the principle of fairness. For example, the right to access to a lawyer may be restricted to such an extent that it amounts to a violation of the principle of fairness.²⁷ Similarly, the Court has found a violation of Article 6 when no convincing reason was provided by the domestic court for the absence of a witness: assessing Article 6(3)(d) in conjunction with Article 6(1) resulted in a violation of the right to a fair and public hearing.²⁸

The third category includes the cases in which no particular rule has been infringed upon as such, but where, nevertheless, the proceedings as a whole were found to be unfair.²⁹ In the case of *Barberà, Messegué and Jabardo*, the applicants complained that their rights under Article 6(1) in conjunction with paras 2 and 3 had been violated by the Spanish authorities. The Court found a violation of Article 6(1), due to the fact that the applicants were confronted with a sudden change in the composition of the Spanish court (although this did not, in itself, amount to an infringement of the right to an impartial tribunal), the brevity of the trial proceedings and the fact that certain evidence was not properly assessed in the presence of the accused and the public in general. Therefore, the Court concluded, the proceedings taken as a whole were unfair.³⁰

The fourth category is included for the sake of completeness: conceptually, there are cases in which neither a particular rule nor the principle of fairness has been violated (such cases are likely to be declared inadmissible).

²⁶ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 153–158. In Mr Tahery's case, the Court found that the counterbalancing factors did not compensate for the handicaps under which the defence laboured. (para 159–165).

²⁷ Cf. ECtHR (GC), 27 November 2008, App. No.: 36391/02, (*Salduz v. Turkey*), where the Court held that the applicant's rights under Article 6(3)(c) in conjunction with Article 6(1) were violated.

²⁸ ECtHR, 26 July 2005, App. No.: 39481/98 and 40227/98, (*Mild and Virtanen v Finland*), para 45–48; ECtHR, 8 June 2006, App. No.: 60018/00, (*Bonev v. Bulgaria*), para 43–45; ECtHR, 12 April 2007, App. No.: 11423/03, (*Pello v. Estonia*), para 34–35.

²⁹ Cf. Rainey, Wicks and Ovey: 'Compliance with specific rights set out in Article 6 will not alone guarantee that there has been a fair trial. It is not possible to state in the abstract the content of the requirement of a fair hearing; this can be considered only in the context of the proceedings as a whole, including any appeal proceedings.' Rainey et al. 2014, p. 263.

³⁰ ECtHR, 6 December 1988, App. No.: 105990/83, (*Barberà, Messegué and Jabardo v. Spain*), para 89.

Having described the interaction between the specific rights of Article 6(3) and the overall requirement of fairness, the following section turns to the normative framework that will be applied in this study.

2.4 Participation in Criminal Proceedings

As illustrated above, analysing the European Court's case law on either a principle-level or a rule-level is not very helpful in describing a normative framework based on the notion of fairness. In this paragraph, the focus will be on the notion that fairness in criminal proceedings is rooted in the idea of participation: proceedings may be called 'fair' if, and only if, the accused has been able to participate effectively in the proceedings.³¹ Moreover, the participation model offers the possibility to evaluate diversions, despite the fact that case law of the Court on diversions is virtually absent.³² The notion of participation has the benefit of simplicity: it seems quite straightforward and it has an intrinsic appeal to our sense of (procedural) justice. However, upon closer inspection the notion of participation is more complex and requires a detailed discussion. In this paragraph, the various aspects of participation will be discussed.

In the article 'Procedural Justice', Solum argued that the participation principle consists of two basic rights: the right of notice and the right to be heard.³³ The first right guarantees that the accused is duly notified of the charges brought against him, while the second right guarantees that the accused has standing in court and can object to the charges and the evidence collected against him. Although Solum's observations were concerned with U.S. civil procedure, his conclusions are relevant for the participatory model for criminal cases.³⁴ Solum argued that the right to participate in proceedings is essential for the legitimacy of the proceedings as such. He argued that any outcome-related or subjective aim, such as accurate fact-finding or respecting the dignity and autonomy of the litigant does not suffice to provide the normative underpinning of the participation principle.³⁵

³¹ Cf. the remarks of the Court in *Stanford*: '[...] Article 6 (Article 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial.' ECtHR, 23 February 1994, App. No.: 16757/90, (*Stanford v. United Kingdom*), para 26.

³² ECtHR, 27 February 1980, App. No.: 6903/75, (*Deweere v. Belgium*) is an interesting, but rather atypical, exception.

³³ Solum 2004, p. 308.

³⁴ Solum argued that his model can, with some necessary modifications, be used for criminal procedure as well. Solum 2004, pp. 240–241.

³⁵ 'Because a right of participation must be afforded to those to be bound by judicial proceedings in order for those proceedings to serve as a legitimate source of authority, the value of participation cannot be reduced to a function of the effect of participation on outcomes; nor can the value of participation be reduced to a subjective preference or feeling of satisfaction.' Solum 2004, p. 275.

He further asserted that these basic rights are essential and are often found in authoritative judicial opinions.³⁶ The value of Solum's arguments lies predominantly in his observation that participation *legitimizes* the proceedings. This entails that any outcome-orientated approach will simply not suffice: to argue that the lack of participation by the litigant or the accused did not result in a less accurate outcome than with his participation is missing the point. This (which Solum aptly coined the 'participatory legitimacy thesis') needs, however, some more elaboration. The right of notice and the right to be heard are indeed very important aspects of any participatory model, but are insufficient as a coherent normative participatory framework.

In their search for a proper normative framework for the criminal trial as such, Duff et al. argued that criminal trials that result in a guilty verdict can be regarded as legitimate only if the verdict has been reached by 'communicative participation.'³⁷ Although their analysis focused primarily on the concept of the criminal trial within the common law tradition of England and Wales, they claimed that their model of communicative participation is applicable to adversarial and inquisitorial systems as well (with the necessary modifications).³⁸ The model of participation they envisaged, requires from all trial participants an active attitude: not only is the defendant encouraged (but not forced) to participate actively in the proceedings, but the same also holds true for the prosecution, witnesses or victims and the fact-finder.³⁹ The goal of this model is to attain 'normative knowledge': the court, after participatory proceedings, declares the truth about the accused's conduct. In this way, they argued, participation also has an epistemic aspect to it.⁴⁰

³⁶ Solum 2004, pp. 308–309. Solum referred solely to US courts. His observations, however, transcend the specifics of US civil procedural law. Cf. Lord Bingham who noted: 'a long established principle of the common law that the defendant in a criminal trial should be confronted by his accusers' in: Dennis 2010, p. 255.

³⁷ '[...] it is essential to the trials' character that truth or knowledge is to be pursued by a process in which the defendant is invited (but not required) to participate: allowing such a role to the defendant is not important merely as a means to establishing the truth, or as a side-constraint on the pursuit of a kind of truth or knowledge that could in principle be established without giving the defendant any such role, but as integral to the process as one of calling the defendant to answer to the charge.' Duff et al. 2007, p. 119.

³⁸ Duff et al. 2007, pp. 200–201.

³⁹ Duff et al. 2007, Chap. 7. See also Weigend who observed: 'We have seen, however, that a trial is not necessarily the ideal mechanism for searching for and finding the 'truth'. As has been pointed out above, an administrative-style 'inquisitorial' investigation potentially provides a broader information base for the judgment because it enables the investigator to take his time in collecting the evidence and places lesser emphasis on the least reliable and most volatile form of evidence, that is, live witness testimony. The participation rights of the parties, including the right to be heard, the right to present evidence and the right to confront adverse witnesses, would of course have to be scrupulously respected even in an investigatory, non-trial process of proof-taking.' Weigend 2006, p. 220.

⁴⁰ Duff et al. 2007, p. 218.

Although the possibility for the participant to contest evidence may very well result in more accurate fact-finding (based on the idea that *contested* evidence is *better* evidence), participatory rights should be seen primarily as aspects of fairness.

The Dutch legal scholar Peters also referred to the importance of an adversarial setting, or ‘procédure contradictoire’, in criminal proceedings. Such proceedings enhance accurate fact-finding and, more importantly, institutionalize the conflicting interests of the State and the accused.⁴¹ This entails that the adversarial trial protects the accused against a State that strives for an efficient handling of the case. Adversarial proceedings allow the accused to exercise his (fair trial) rights to the greatest extent and also provide for the accused’s participation in the criminal justice system. Peters emphasized the importance of the ‘ethics of conflict’: the interests of the State and the accused differ fundamentally, which necessitates an adversarial procedural setting in which the accused can challenge the accusations of the State.⁴² In order to effectively challenge the charges, legal assistance at all stages of the proceedings is essential.⁴³ Peters argued that, in bureaucratized criminal justice systems, the ability of the accused to participate and to influence the outcome of the proceedings may be jeopardized.⁴⁴

Jackson and Summers discerned more specific aspects of participation in criminal proceedings in their impressive study *The Internationalisation of Criminal Evidence*. They distinguished four aspects that, taken together, form the ‘participatory model of proof’ as developed by the European Court of Human Rights. They argued that the Court has constructed a normative framework, which transcends the old dichotomy of civil and common law legal traditions, including the emphasis the respective traditions place on inquisitorial and adversarial elements.⁴⁵ The first aspect of this framework is non-compulsion: the accused cannot be forced to participate in his own trial. This notion is closely related to the possibility of waiving particular procedural rights, which will be discussed in further detail below. The second aspect entails that the accused must be sufficiently informed about his procedural rights. Third, the accused must, in order to be able to participate effectively, be able to challenge the evidence that has been collected against him. Finally, the accused is entitled to a reasoned opinion of the court, which can be challenged.⁴⁶ All four aspects, or ‘strands’ as Jackson and Summers coined them, will be discussed in some more detail below.

⁴¹ Peters 1972, pp. 284–285.

⁴² Peters 1972, pp. 283–285.

⁴³ Peters 1975, p. 105.

⁴⁴ Peters 1975, pp. 103–105.

⁴⁵ See also Jackson 2005, pp. 737–764; Jackson and Summers 2013, pp. 114–130.

⁴⁶ Jackson and Summers, pp. 103–106.

2.4.1 *Non-compulsion*

The first aspect entails that the accused cannot be forced to participate in the proceedings. This is evident in the privilege against self-incrimination, which the Court regards as a fundamental right of the accused.⁴⁷ As Jackson and Summers readily acknowledged, this notion seems to be at odds with any participatory model: how can a model of participation allow the accused to *not* participate? They argued convincingly that the right to participate should not be construed as a duty to participate: instead, it should respect the procedural autonomy of the accused. This entails that the accused may indeed not use his procedural rights and remain silent or act non-cooperatively. In this regard, participatory rights can be seen as subjective rights that the accused may wish to use or not.⁴⁸

Besides simply not using procedural rights, the accused may also waive his procedural rights. The notion of waiver implies a well-informed accused who voluntarily decides to abstain from using his rights. The Court has emphasized that, in order to accept a valid waiver, the domestic court must ensure that the waiver complies with certain guarantees. Rights under Article 6 may be waived either expressly or tacitly. A tacit waiver may be accepted if the accused could reasonably have foreseen the consequences of his conduct.⁴⁹ The Court has held that an accused has (tacitly) waived his right to examine a witness who fears to testify in open court, if the fear can be attributed to the accused.⁵⁰

An express waiver must be ‘established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. It must not run counter to any important public interest.’⁵¹ If an accused deliberately and knowingly chooses not to attend trial proceedings, he may have validly waived his right to be present during the proceedings.⁵² Similarly, an accused who wishes not to put any questions to a witness present in court waives his right to examine such a witness. Not all rights under Article 6 can be waived, though. It would be hard to

⁴⁷ ‘As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court observes that these are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6.’ ECtHR (GC), 11 July 2006, App. No.: 54810/00, (*Jalloh v. Germany*), para 100. For a detailed analysis of the scope of the privilege, see: ECtHR (GC), 29 June 2007, App. No.: 15809/02 and 25624/02, (*O’Halloran and Francis v. United Kingdom*).

⁴⁸ Note however that not every fair trial right can be regarded as a subjective right: the rationale of certain fair trial guarantees, such as the right to a public hearing, transcend the interest of the accused. The integrity of the criminal justice system as such may be challenged when such rights are not respected.

⁴⁹ ECtHR, 9 September 2003, App. No.: 30900/02, (*Jones v. United Kingdom*). Cf. ECtHR (GC), 18 October 2006, App. No.: 18114/02, (*Hermi v. Italy*).

⁵⁰ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 123.

⁵¹ ECtHR (GC), 17 September 2009, App. No.: 10249/03, (*Scoppola v. Italy No. 2*), para 135.

⁵² ECtHR (GC), 1 March 2006, App. No.: 56581/00, (*Sejdovic v. Italy*), para 82.

imagine to waive, when trial proceedings have been initiated, the right to be tried by an independent and impartial tribunal. This right not only protects the accused, but it also aims to uphold the integrity of trial proceedings in general: an important public interest.⁵³ Whether certain procedural rights can be waived relates to the distinction between the notion of fair trial rights as subjective rights, which are attributed to the accused, and the notion of fair trial rights as manifestations of systemic features that have to be respected regardless of the position of the accused.⁵⁴

It is noted that the right not to participate undermines the idea that participatory rights also have a significant (some even argue: predominant) epistemic aspect: participation in this view is required in order to ensure an accurate factual outcome. However, the European Court has regarded the guarantees under Article 6 of the Convention as fair trial guarantees *as such*. Although fairness is deeply intertwined with the need for an accurate factual outcome, the two notions should be clearly separated on a conceptual level. Fair trials can indeed have inaccurate factual outcomes and *vice versa*. It is hard to agree with Redmayne's observation on the examination of witnesses that:

To date, most of the indications are that the ECtHR understands the value of confrontation [of witnesses, KV] in purely epistemic terms.⁵⁵

The Court has consistently held that the right to examine witness [the same holds true for the other minimum guarantees of Article 6(3)] is a specific aspect of the right to a fair hearing in Article 6(1). The Court did not state that these rights are aspects of the need to guarantee an accurate factual outcome of the proceedings. When an accused has threatened a witness against him and the witness refuses to testify in open court, the Court has held that the accused has waived his right to examine this particular witness.⁵⁶ This means that a potentially valuable witness who can testify against the accused will not be examined in open court by the accused. From an epistemic perspective this is unacceptable. From a fair trial perspective, however, the court could not do otherwise: it would be highly unjust to have the accused benefit from his criminal acts regarding the witness. The value of examining witnesses lies primarily in considerations of fairness.

This is, of course, not to argue that fair trial rights do not contribute to accurate fact-finding (on the contrary, they certainly do). However, the rationale for these rights should not be found in epistemic considerations but rather in the concept of fairness as a fundamental principle underlying criminal proceedings.⁵⁷

⁵³ For an analysis of US practice on waiving constitutional rights, see: Stuntz 1989.

⁵⁴ Cf Jackson 2009, pp. 5–6.

⁵⁵ Redmayne 2013, p. 290.

⁵⁶ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 123.

⁵⁷ The right to a fair trial is so fundamental that it has acquired the status of international customary law. See: Fedorova 2012, p. 27.

2.4.2 *Informed Involvement*

The second aspect entails that the accused, in order to participate effectively, should be well informed about his rights and the consequences of any procedural choice he may wish to make.⁵⁸ Jackson and Summers argued that disclosure obligations and the right to legal assistance enable the accused to make well-informed decisions regarding his trial.⁵⁹ Article 6(3)(a) and (e), for example, ensure that the accused is put on notice of the charges formulated against him. Trechsel argued that the wording of sub-paragraph (a) creates the obligation to automatically render any relevant information to the accused. This is, however, not how the Court has interpreted this provision: the question is whether the accused actually had the information relevant for the proceedings and not whether the authorities fulfilled their duty to provide the accused with this information.⁶⁰

The aspect of informed involvement is closely related to the right to have adequate time and facilities for the preparation of the defence, protected under Article 6(3)(b). An effective defence presupposes full knowledge of the evidence that has been collected against the defendant. The Court held:

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. [...] In addition Article 6 § 1 requires [...] that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.⁶¹

Exceptions to this right are allowed under certain specific circumstances (such as the need to withhold evidence due to national security interests or in order to protect the legitimate interests of vulnerable witnesses) and it is, in principle, for the domestic courts to assess whether a restriction on disclosure is strictly necessary. The Court confines itself to its well-known holistic approach and determines whether the proceedings as a whole were fair. An important factor in this regard is which counterbalancing measures were taken to compensate the accused.

⁵⁸ Jackson and Summers 2012, p. 103.

⁵⁹ Jackson and Summers 2012, p. 103.

⁶⁰ Trechsel 2006, pp. 203–204. ‘The guarantee is interpreted in a simply functional perspective—instead of insisting on a clear act of the authorities which informs the defendant in a reliable way of the accusations against him or her, the Court lets it suffice if the accused, with due diligence, had the possibility of acquiring the information necessary for his or her defence, or if a circumspective strategy of the defence had in any case covered the point which was missing in the information.’

⁶¹ ECtHR (GC), 16 February 2000, App. No.: 28901/95, (*Rowe and Davis v. United Kingdom*), para 60. Cf. ECtHR (GC), 27 October 2004, App. No.: 39647/98 and 40461/98, (*Edwards and Lewis v. United Kingdom*); Trechsel 2006, pp. 238–242.

2.4.3 *Challenging the Evidence*

The third aspect of the participatory model of proof is the most important: every accused must be provided with sufficient time and facilities to challenge any incriminating evidence. It is a fundamental right of each accused to be able to question and challenge the reliability of any incriminating witness statements or non-testimonial evidence. The right to challenge the evidence is closely related to the principle of equality of arms, in the sense that the latter prescribes that the accused must be allowed to present exonerating evidence: ‘The Court recalls that under the principle of equality of arms, as one of the wider features of the concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.’⁶² In *Edwards*, the Court held that ‘it is a requirement of fairness (...) that the prosecution authorities disclose to the defence all material evidence for or against the accused’.⁶³ The Court’s observation was made regarding the non-disclosure of evidence within the trial context. However, the fundamental importance of disclosure should not be limited to trial proceedings only: disclosure is also important within the setting of out of court agreements.

The right to challenge the evidence is most problematic with regard to witness evidence: restrictions on the scope of the right to challenge the evidence occur most frequently in relation to witness evidence.⁶⁴ This stands to reason, because witnesses and victims may have legitimate interests not to be questioned by the accused or his counsel. Balancing between the accused’s right to confrontation and any legitimate interests that witnesses may have, the Court has over several decades developed a rather complicated framework. In *Al-Khawaya and Tahery*, the Court set out the scope of the right to examine witnesses as protected under Article 6(3)(d). In principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.⁶⁵ This is not controversial and has been held consistently by the Court.⁶⁶ This entails that good reasons must be presented for the non-attendance of a witness: failure to provide such reasons

⁶² ECtHR, 22 February 1996, App. No.: 17358/90, (*Bulut v. Austria*), para 47.

⁶³ ECtHR, 16 December 1992, App. No.: 13071/87, (*Edwards v. United Kingdom*), para 36.

⁶⁴ Challenging non-testimonial evidence often requires calling (expert) witnesses that may testify on the reliability of such evidence.

⁶⁵ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 118.

⁶⁶ E.g. ECtHR, 27 February 2001, App. No.: 33354/98, (*Lucà v. Italy*), para 39; ECtHR, 31 October 2001, App. No.: 47023/99, (*Solakov v. the Former Yugoslav Republic of Macedonia*), para 57; ECtHR, 20 November 1989, App. No.: 11454/85, (*Kostovski v. The Netherlands*), para 41; ECtHR, 6 December 1988, App. No.: 105990/83, (*Barberà, Messegué and Jabardo v. Spain*), para 78.

may, *without more*, result in a violation of the right to a fair trial.⁶⁷ If a good reason has been provided, the question must be answered whether the untested evidence is the sole or decisive evidence against the accused.⁶⁸ When the untested evidence is indeed the sole or decisive evidence, the Court must then verify whether sufficient counterbalancing factors have been put in place to compensate the accused for not being able to examine the witness. Such counterbalancing factors may result in the conclusion that although the accused was not able to examine the witness, the proceedings as a whole were fair. This means that the sole or decisive-rule is not absolute: the evidence against the accused may consist solely or to a decisive degree of the statement of a non-examined witness.⁶⁹ The Court observed that ‘the question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the *reliability* of that evidence to take place.’⁷⁰ The use of the term ‘reliability’ implies that the non-examination of an important witness has implications not only for the fairness of the trial, but also for the factual accuracy of the final verdict. This way, the Court directs the domestic courts to provide for specific counterbalancing factors that enable the accused to question the veracity of the witness statement.

⁶⁷ ‘Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3(d) when no good reason has been shown for the failure to have the witness examined.’ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 120 (with references to relevant case law).

⁶⁸ Decisive evidence is defined, somewhat circularly, as follows: “‘Decisive” (or “déterminante”) in this context means more than “probative”. It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance, a test which, as the Court of Appeal in *Horncastle and others* pointed out [...], would mean that virtually all evidence would qualify. Instead, the word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.’ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 131.

⁶⁹ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 147.

⁷⁰ ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v. United Kingdom*), para 147 (emphasis added). In a later case the Court (the fourth section) held: ‘As the Grand Chamber indicated in *Al-Khawaya and Tahery*, the problems posed by absent witnesses, at issue in that case, and anonymous witnesses, as in the present case, were not different in principle. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. That principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence’ ECtHR, 10 April 2012, App. No.: 46099/06 and 46699/06, (*Ellis, Simms and Martin v. United Kingdom*), para 74.

2.4.4 Reasoned Judgment

The fourth and final aspect of Jackson and Summer's participatory model of proof concerns the right to a reasoned judgment that can be challenged. The authors did not elaborate extensively on this aspect and presented it almost as a given: every criminal trial should, in order to be fair, result in a reasoned judgment. On the face of it, jury trials cannot comply with this standard, but, as the Court has held, as long as the reasons for the verdict can be distilled from the proceedings as such (such as the summing-up of the judge before the jurors go into deliberation), the right to a reasoned judgment is respected. There is, however, a bit more to say on this aspect in particular with regard to the right to challenge the reasoned judgment.

The right to a reasoned judgment is part of the right to a fair hearing, protected under Article 6(1).⁷¹ Although this does not entail that the domestic court must provide answers to every single argument the parties have raised during the proceedings, the court must address the essential issues of the case.⁷² The Court has noted that, in order to guarantee a fair trial and to avoid arbitrariness, the accused and the public must be able to understand the verdict.⁷³ The right to a reasoned judgment is the logical final aspect of the participatory model of proof: the court has to account for its decisions and, in doing so, enable the accused to verify whether his arguments have been duly considered by the court.⁷⁴

⁷¹ ECtHR, 19 April 1994, App. No.: 16034/90, (*Van de Hurk v. The Netherlands*), para 61; ECtHR, 9 December 1994, App. No.: 18390/91, (*Ruiz Torija v. Spain*), para 29. The right to a reasoned judgment does not require the domestic court to provide a detailed answer to every argument raised during the proceedings. The nature of the decision determines the required detail of the reasoning. The Court's Grand Chamber held: 'The Court reiterates that Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 § 1, can only be determined in the light of the circumstances of the case.' ECtHR (GC), 20 March 2009, App. No.: 12686/03, (*Gorou v. Greece (No. 2)*), para 37. The nature of an appeal decision, dismissing the appeal by the accused may result in simply confirming the reasons stated in the lower court's judgment. ECtHR, 27 September 2007, App. No.: 6301/05, (*The Estate of Nitschke v. Sweden*), para 39.

⁷² ECtHR, 15 February 2007, App. No.: 19997/02, (*Boldea v. Romania*), para 30.

⁷³ ECtHR (GC), 16 November 2010, App. No.: 926/05, (*Taxquet v. Belgium*), para 90.

⁷⁴ 'The Court emphasises that a further function of a reasoned decision is to demonstrate to the parties that they have been heard.' ECtHR, 1 July 2003, App. No.: 37801/97, (*Suominen v. Finland*), para 37.

The right to a reasoned judgment is often linked to the right to a remedy, such as the possibility of initiating appeal proceedings: in order to estimate any chances on appeal, the accused must know the reasons for the verdict of the first-instance court.⁷⁵ It is obvious that any effective appeal procedure requires a reasoned judgment by the first-instance court. It is, however, a different question whether the right to a reasoned judgment should be linked automatically with the right to challenge that judgment or even whether the accused has a right to challenge the judgment at all. The right to appeal is, as such, not absolute. Article 2 of the 7th Protocol to the ECHR states that convicted persons have the right to appeal their conviction or sentence, but subject to the following exceptions.⁷⁶ No right of appeal exists in relation to offences of a minor character. Similarly, no appeal has to be provided for convictions handed down in first instance by the highest tribunal, nor for convictions on appeal after an acquittal in the first-instance proceedings.⁷⁷ Besides the guarantees in the Additional Protocol, no general right to appeal can be derived from the Convention itself. The Court has held that neither Article 6 nor Article 13 obliges member States to provide for appeals in criminal cases.⁷⁸ Under the ICCPR, however, a general right to appeal does exist. Article 14(5) of the ICCPR holds that everyone convicted shall have the right to have his conviction and sentence reviewed by a higher tribunal.⁷⁹ This does not preclude leave to appeal proceedings, as long as these procedures provide, rather contradictorily, for a full and substantial review of the conviction and sentence.⁸⁰

⁷⁵ Cf. ECtHR, 22 February 2007, App. No.: 1509/02, (*Tatishvili v. Russia*), para 58.

⁷⁶ The Netherlands has not ratified this Protocol.

⁷⁷ In the case of abbreviated proceedings, the right to appeal may be waived. Cf. ECtHR, 29 April 2014, App. No.: 9043/05, (*Natsvlishvili and Togonidze v. Georgia*), para 90–98.

⁷⁸ ECtHR, 22 February 2011, App. No.: 26036/08, (*Lalmahomed v. The Netherlands*), para 34; ECtHR, 9 June 2011, App. No.: 16347/02, (*Luchaninova v. Ukraine*), para 37 (with reference to case law).

⁷⁹ The right of appeal is not limited to the serious offences, according to the Human Rights Committee. ‘As the different language versions (crime, infraction, delito) show, the guarantee is not confined to the most serious offences. The expression “according to law” in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognized by the Covenant, and not merely by domestic law.’ Human Rights Committee, *General Comment No. 32*, UN Doc. CCPR/C/GC/32 (2007), para VII. The Dutch Minister of Justice observed during the parliamentary debates on the new system of appellate review, that minor offences may be excluded from appellate review.

Kamerstukken II, 2005/06, 30320, 3, p 17. The Netherlands has not made a reservation to Article 14(5) regarding the nature of the offence.

⁸⁰ HRC, 30 April 1999, Communication No 662/1995, U.N. Doc. CCPR/C/65/D/662/1995, (*Lumley v. Jamaica*), para 7.3; HRC, 24 August 2010, Communication No. 1797/2008, U.N. Doc. CCPR/C/99/D/1797/2008 (2010), (*Mennen v. The Netherlands*), para 8.3; HRC, 3 April 2002, Communication No. 802/1998, U.N. Doc. CCPR/C/74/D/802/1998 (2002), (*Rogerson v. Australia*), para 7.5.

Despite the close relationship between the right to a reasoned judgment and the possibility to challenge the judgment, it is argued that a reasoned judgment is an important element of the concept of fairness in criminal proceedings. Especially when no remedy is available, it is essential to provide the accused with a reasoned judgment.

2.5 Diversions and the Concept of Fairness

The normative framework of participation rights described above applies without more to proceedings conducted before a court: any shortcut to proof cannot evade the test of fairness. The question remains, however, how the participatory model of proof relates to diversions: on the face of it, it is not obvious that this model applies to diversions that strive to avoid the context of the full criminal trial as such.⁸¹

From the perspective of Article 6 itself, the protection of the Article is triggered by the notion of the ‘criminal charge’: the moment someone is charged, the rights under Article 6 have to be respected. In its well-known case law, the Court has stated that its autonomous interpretation of ‘criminal charge’ consists of three components: the classification of the offence under domestic law, the essential nature of the offence and the nature and degree of the penalty imposed.⁸² More specifically, the Court held that ‘charge’ should be understood as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’.⁸³ Besides such a notification, the Court also held that, when the situation of the suspect is ‘substantially affected’, the provisions of Article 6 come into play.⁸⁴ It follows that, regard being had to any prose-

⁸¹ Diversion mechanisms are used in most ECHR member states. This entails that criminal law is to a significant degree enforced outside the classical court setting. The case law of the ECtHR on Article 6 with the typical court setting in mind, does not fully capture the enforcement of criminal law in member states. See also Turner, who favours more judicial involvement in plea agreement procedures. Turner 2006, pp. 501–570. See also Peters 2012.

⁸² ECtHR, 8 June 1976, App. No.: 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72 (*Engel and Others v. The Netherlands*), para 82. The criteria are not cumulative. When a State Party has labelled an offence as criminal, the guarantees of Article 6 apply without more. ECtHR (GC), 9 October 2003, App. No.: 39665/98 and 40086/98, (*Ezeh and Connors v. United Kingdom*), para 86.

⁸³ ECtHR, 27 February 1980, App. No.: 6903/75, (*Deweere v. Belgium*), para 46.

⁸⁴ Such was the case in *Deweere*, where the applicant was faced with an offer for friendly settlement by the Belgian public prosecutor for violations of economic regulations. If he would refuse, a closure order for the applicant’s shop would come into force. ECtHR, 27 February 1980, App. No.: 6903/75, (*Deweere v. Belgium*). See also, ECtHR, 15 July 1982, App. No.: 8130/78, (*Eckle v. Germany*), para 73; ECtHR, 10 December 1982, App. No.: 7604/76; 7719/76; 7781/77 and 7913/77, (*Foti and Others v. Italy*), para 52.

cutor's competence *ratione materiae*, a notification sent by a prosecutor is based on the assumption that the person concerned has committed a particular criminal offence.

It is against the object and purpose of the protections of the Convention to regard fairness as a principle that should be respected solely during trial proceedings conducted before a judge. It is unacceptable to have diversions operate in a normative vacuum: this would allow States to circumvent fairness considerations by simply using diversion mechanisms on a massive scale. As the Court noted, the use of such mechanisms by decriminalizing petty offences cannot result in the exclusion of the principle of fairness.⁸⁵ This does not mean, however, that all guarantees of Article 6 are applicable to diversions: on the contrary, such mechanisms were put in place to avoid public hearings by an independent and impartial tribunal, which is one of the essential rights of Article 6(1). The accused can waive certain fair trial guarantees, provided he has been able to participate effectively in the diversion proceedings. This relates to the principle of *nulla poena sine iudicio* that was discussed in the Introduction. This principle can be interpreted strictly ('no sanction without a judicial order'), or more leniently: every sanction should be eligible for judicial review. The last reading of the principle corresponds with the participatory model described above and the Court's stance on the content of this right. The moment someone is notified of a criminal charge, he is entitled to the guarantees of Article 6. However, he can choose to waive certain rights under this Article, notably the right to be tried by an independent and impartial tribunal; in other words, the accused can choose to divert from full criminal proceedings and reach some sort of extra-judicial (not: extra-legal) settlement with the prosecutor.⁸⁶ In fact, after the prosecutor has offered the accused the chance to opt for a diversion mechanism it is imperative that the accused makes his choice in full cognizance of his position and the consequences of his choice.⁸⁷

The Court has held that, for a bargain to be valid under the Convention, the following requirements must be met. First, the accused must be fully aware of the facts of the case (arguably, this includes the evidence against him) and the legal

⁸⁵ ECtHR, 21 February 1984, App. No.: 8544/79, (*Öztürk v. Germany*), para 49.

⁸⁶ In a similar vein, the Court held: 'Where a penalty is criminal in nature there must be the possibility of review by a court which satisfies the requirements of Article 6 § 1, even though it is not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities.' ECtHR, 4 April 2013, App. No.: 21565/07; 21572/07; 21575/07 and 21580/07, (*Julius Kloiber Schlachthof GmbH and Others v. Austria*), para 28.

⁸⁷ The initiative to opt for a diversion mechanism lies normally with the prosecutor. The rather exotic possibility of 'submission' (Article 74a CC) will not be discussed here. Submission entails that someone offers to pay the maximum fine for an offence that is punishable only by a fine. The prosecutor can, in such cases, not refuse the offer of the person involved.

consequences of striking a bargain (most importantly, waiving the right to have the case fully determined before an independent and impartial tribunal). Second, the acceptance of such a bargain must be ‘genuinely voluntary’.⁸⁸ Moreover, the Court held that ‘the content of the bargain and the *fairness of the manner in which it had been reached between the parties* had to be subjected to sufficient judicial review.’⁸⁹ This means that the parties, when operating in the shadow of full trial proceedings, should make sure fairness is respected during the negotiations. Considering the different legal and institutional positions of the parties, this requirement is primarily directed to the prosecutor. The observation by the Court entails that not only is the concept of fairness applicable to diversions, but also that any issue regarding fairness should be capable of judicial review. In other words, whether the accused entered voluntarily and informed into an agreement and whether a sufficient factual basis existed for the agreement does not suffice: the manner in which the agreement was reached should also be part of the judicial review.

The notion that fairness applies to diversions is not only to be derived from the perspective of the Convention itself. From a rule of law perspective, it would be unthinkable that public authorities could operate outside any normative framework, especially when their actions result in (minor) penalties or limitations on the accused’s freedom.⁹⁰ The principle of legality makes it explicit that public authorities may exercise their powers only within the realm of the law: regarding the Dutch context, both the Dutch Constitution and the Code of Criminal Procedure stipulate that criminal proceedings must be based on the law. The prosecutor can exercise his powers only when he is convinced that a criminal offence has been committed: to do otherwise would result in abuse of power. In order to effectively protect the accused from such abuse, the prosecutor must comply with certain norms when he opts for a diversion mechanism. Especially in the case of the transaction and the conditional dismissal, a solid normative framework is required: neither the Criminal Code nor the Code of Criminal Procedure provide a detailed framework of procedural guarantees for the accused. The punitive order, in contrast, is embedded in the Code of Criminal Procedure and has been categorized as a modality of prosecution.⁹¹ This categorization entails that the punitive order has to be regarded as a criminal charge, which results in the applicability of the guarantees of Article 6.

In case of the transaction and the conditional dismissal, the protection stems from the fact that the prosecutor can offer a transaction or conditional dismissal

⁸⁸ ECtHR, 29 April 2014, App. No.: 9043/05, (*Natsvlishvili and Togonidze v. Georgia*), para 92.

⁸⁹ ECtHR, 29 April 2014, App. No.: 9043/05, (*Natsvlishvili and Togonidze v. Georgia*), para 92. Emphasis added.

⁹⁰ Hildebrandt argued that fair trial considerations should function as normative guidelines for diversion mechanisms. Hildebrandt 2002, p. 388.

⁹¹ The specific paragraph in the CCP in which the provisions on the punitive order are placed is called ‘prosecution by way of a punitive order’ (‘vervolging door een strafbeschikking’).

only when he is convinced that the person concerned has committed a criminal offence.⁹² The first *Engel* criterion requires that the guarantees of Article 6 are applicable if an offence is classified as criminal by domestic law. Offering a transaction or conditional dismissal may then be regarded as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.’⁹³ The question then arises whether the person involved has validly waived his right to an independent and impartial tribunal. The procedural guarantees of Article 6 are, aside from the guarantees that the person involved explicitly or implicitly waived, fully applicable to these mechanisms.

Commenting on the notion of fairness in relation to the work of international prosecutors, Mégret observed that fairness is a ‘crucial quality’ of the international prosecutor.⁹⁴

The *Standards of Professional Conduct for Prosecution Counsel* of both the ICTY and ICTR stipulate that prosecution counsel is expected:

to respect, protect and uphold the universal concepts of human dignity and human rights [...].⁹⁵

Referring to a decision by the ICTR Appeals Chamber, Côté observed that the duty for the prosecutor to act fairly extends to all stages of the proceedings.⁹⁶ However, negotiations preceding a plea agreement between the prosecutor and the accused can hardly be called a ‘stage of the proceedings’. Stages of proceedings commonly refer to, the pre-trial, trial and appeal stages. Although not acting in a proper stage of the proceedings, the normative appeal on the prosecutor to abide by the notion of fairness when opting for a diversion mechanism does not diminish. On the contrary, one could argue that, devoid of any direct judicial supervision, the prosecutor must ensure, as an authority with public power, that the basic notions of fairness are respected. The fact that prosecutors should be able to

⁹² Cf. Reijntjes 2010, aant. 17.2 and aant. 18.6. See also for the *Berufsethos* of the prosecutor: De Doelder and De Meijer 2013, pp. 127–143. See also Den Hartog, who argued that Article 6 guarantees are applicable to transaction proceedings. The first *Engel* criterion applies in such cases. Den Hartog 1992, p. 252.

⁹³ ECtHR, 27 February 1980, App. No.: 6903/75, (*Deweert v. Belgium*), para 46.

⁹⁴ Reydams et al. 2012, p. 437. See also the Chapter ‘Independence and Impartiality’ by Côté in the same volume, at p. 363.

⁹⁵ Article 2(f) Standards of Professional Conduct for Prosecution Counsel, *ICTY Prosecutor’s Regulation No. 2* (1999). Article 1.7 of the draft Code of Professional Conduct for Prosecutors of the International Criminal Court contains a similar provision. The draft was prepared by the International Association of Prosecutors and the Coalition of the International Criminal Court. The Regulations of the Office of the Prosecutor, as currently in force, do not contain a similar provision. Noteworthy, however, is Regulation 62 (1), concerning admissions of guilt (a diversion mechanism). The relevant part of the Regulation reads: ‘The Office shall make its own assessment of any admission of guilt by an accused [...]. The Office shall bring to the attention of the Trial Chamber any credible information or evidence indicating that the admission of guilt was not informed, voluntary or supported by the facts pleaded.’

⁹⁶ Reydams et al. 2012, p. 364.

exercise their duties independently and impartially and that they should function autonomously *vis-à-vis* the executive or the judiciary comes at a price: it is precisely because the prosecutor acts independently and impartially, that he must also act fairly.⁹⁷

Fairness should permeate the (international) prosecutor's decisions and, he should have an eye for any exonerating evidence he comes across. Acting in a fair manner is regarded here as a desirable professional attitude of the prosecutor, which underlines the importance and applicability of fair trial notions regarding diversion mechanisms.⁹⁸ This means that acting in a fair manner is not confined to the trial stage: in the exercise of any public power, the notion of fairness should be respected. To refrain from conducting trial proceedings, either with or without the informed consent of the accused, means that no independent and impartial tribunal will hear the case. It does not, however, result in the non-applicability of fairness as such: the forum in which the prosecutor operates differs, but the level of fairness should not.

In international criminal proceedings the diversion mechanisms are rather uniform, as discussed in more detail in Chap. 4. The plea agreement procedure before the *ad hoc* Tribunals and the admission of guilt procedure before the ICC both allow for a negotiation process.⁹⁹ The validity of the reached agreement is determined by the court, which decides eventually whether or not to accept the agreement.¹⁰⁰ The judicial supervision of such agreements aims to ensure that they are reached in a fair way.

2.6 Conclusion

The participatory model presented above provides the normative framework to evaluate the diversions and shortcuts to proof that are described in Chaps. 3 and 4.

Regarding diversions, the participatory model provides a useful framework to evaluate such mechanisms in the light of the Court's case law. Although the Court

⁹⁷ On the notions of independence and impartiality regarding international prosecutors, see: Reydams et al. 2012, pp. 319–415.

⁹⁸ Cf. the observations made by Cleiren, who argued that principles of due process apply to every agent of the State in the exercise of any public power attributed to him. She argued that such principles do not only apply within a formal trial setting. Cleiren 1989, p. 263. De Meester argued that fair trial standards are not only applicable to proper trial proceedings, but are also applicable to pre-trial investigations: '[...] it (the right to a fair trial, KV) cannot be doubted that it applies to all stages of criminal proceedings, including investigations.' De Meester 2014, p. 67.

⁹⁹ ICC judges have to take into account the interest of victims when deciding on the admission of guilt [Article 65(4)]. A similar provision is absent in the RPE of the *ad hoc* Tribunals.

¹⁰⁰ Rule 62bis ICTY RPE; Rule 62 ICTR RPE; Article 65 ICC Statute. Interesting in this regard is the obligation for the Prosecutor at the ICC to verify *proprio motu* whether the admission of guilt is voluntary and informed, and whether the admission is supported by the facts pleaded. Regulation 62 ICC Regulations for the Office of the Prosecutor, ICC-BD/05-01-09.

has, for obvious reasons, not been able to produce extensive case law on diversions, a useful framework can be distilled from the Court's case law. The main question is to what extent the accused has been able to participate effectively in the out of court proceedings. The four different elements that Jackson and Summers identified in the Court's case law are regarded as guidelines here: compliance with every element is not necessary. Rather, the evaluation will focus on whether the accused has been able to participate effectively, where the possibility of challenging the evidence is of primary importance.

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