

Presumed Innocent until Proved Guilty
The Principle of
Article 6, Paragraph 2 of the European Convention on
Human Rights
and Article 70, Paragraph 2 of the Constitution of Iceland
that the Burden of Proof Rests with the Prosecution

Eiríkur Tómasson

1	Status of the Convention in Icelandic law	506
2	What is Implied by the Stipulations Contained in Article 6, Paragraph 2 of the Convention?	507
3	Interrelations between Article 6, Paragraph 2 and other Provisions of the Convention	509
4	The Burden of Proof Rests with the Prosecution	510
5	Contracting States' Margin of Appreciation with Respect to Admissibility and Assessment of Evidence	511
5.1	Evidence Obtained in an Unlawful Manner	511
5.2	Assessment of Evidence	515
6	Do Reversal of the Burden of Proof and Objective Criminal Liability <i>Per se</i> Violate Article 6, Paragraph 2 of the Convention? .	520
6.1	Reversal of the Burden of Proof	520
6.2	Objective Criminal Liability	526
6.3	Conclusion	530

Article 6, Paragraph 2 of the European Convention on Human Rights (hereinafter referred to as the Convention) contains the following provision: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” This rule, which is one of the fundamental principles in any state governed by the rule of law, was adopted in Article 70, Paragraph 2 of the Icelandic Constitution (hereinafter referred to as the Constitution) by means of Article 8 of the Constitutional Act, no. 97/1995. That provision states *verbatim*: “Everyone charged with criminal conduct shall be presumed innocent until proven guilty.”¹

1 Status of the Convention in Icelandic law

Iceland joined the Council of Europe in 1950 and ratified the Convention in 1953. The Convention was later incorporated into Icelandic law through Act no. 62/1994 on the European Convention on Human Rights. Accordingly, the Convention became part of the domestic legal system ranking as ordinary law. Although it did not gain the status of constitutional law *per se*, the provisions of the Constitution that pertained to human rights were amended one year later, *inter alia* to bring them into conformity with the Iceland’s international obligations under human rights instruments, particularly the Convention. Thus many of the provisions, including Article 70, Paragraph 2, are formulated in way similar to the relevant provisions of the Convention; therefore, it can at least be concluded that they rank as fundamental law in Iceland and have a status equal to that of the constitutional provisions.²

Article 2 of Act no. 62/1994 stipulates that the case-law of the Convention’s organs is not binding according to Icelandic law. However, it is assumed that Icelandic courts will seek guidance from that case-law in their interpretation of the Convention as well as of the appropriate provisions of the Constitution, including Article 70, Paragraph 2.³ In keeping with this, the Supreme Court of Iceland (hereinafter referred to as the Supreme Court) has repeatedly made reference, in those of its judgments that involve interpretation of these provisions, to the interpretation by the European Court of Human Rights (hereinafter referred to as the Human Rights Court or the Court) and, as appropriate, the European Commission of Human Rights (hereinafter referred to as the Commission), of the pertinent provisions of the Convention.⁴ An example

1 According to the official English translation of the Constitution. In Icelandic, this provision is worded as follows: “*Hver sá sem er borinn sökum um refsiverða háttsemi skal talinn saklaus þar til sekt hans hefur verið sönnuð.*”

2 Gauksdóttir, Guðrún, Chapter on *Iceland*, in *Fundamental Rights in Europe, the European Convention on Human Rights and its Member States, 1950–2000*, Oxford 2001, p. 400–403. See also Explanatory Report to the Constitutional Act no. 97/1995, Parliamentary Reports 1994–95, Document 389, p. 2073 and 2098–2099.

3 Explanatory Report to Act no. 62/1994, Parliamentary Reports 1993–94, Document 105, p. 800–801.

4 Protocol no. 11 to the Convention, which entered into force on 1 November 1998, replaced the former European Court of Human Rights and the Commission with a single Court.

of this is the Supreme Court judgment of 2 November 2000 (Case no. 248/2000), which is discussed in further detail in Section 6.1, wherein the Court supports its conclusions with reference to how Article 6, Paragraph 2 of the Convention “has been implemented.”⁵

2 What is Implied by the Stipulations Contained in Article 6, Paragraph 2 of the Convention?

It can be said that at the core of Article 6, Paragraph 2 of the Convention, and therefore of Article 70, Paragraph 2 of the Constitution, is the concept that the burden of proof of a defendant’s guilt and of any issues that can be considered detrimental to his case rests with the prosecution, cf. Article 45 of the Icelandic Act on Criminal Procedure, no. 19/1991 (hereinafter referred to as the Act on Criminal Procedure or the Act). The stipulation that a person shall be presumed innocent until proven guilty, however, has much broader implications.

In interpreting Article 6, Paragraphs 1 and 2 of the Convention, the organs in Strasbourg have assumed, as a general principle, that the courts alone are competent to judge the guilt of a person accused of criminal conduct. In other words, Article 6, Paragraph 2 implies a prohibition against declaring a person guilty before a judgment has been rendered in his or her case.

This means, *inter alia*, that a person may not be subjected to sanction for conduct of which he or she is accused before he or she has been found guilty of that conduct in a court of law. This does not apply, however, if a defendant freely agrees to submit to penalty in the form of a fine or other sanctions imposed by the police or other public authorities.

During the investigative stage and proceedings before the courts, the authorities — that is, the police, the prosecution, and the courts — must, in general, avoid declaring or even implying that the defendant is guilty. It is obvious, however, that after an indictment has been issued, the prosecution may maintain before the courts that the defendant is guilty.⁶ On the other hand, he and other public spokespersons must observe caution when making statements outside the courtroom. If parties other than the authorities — such as the press — declare the defendant’s guilt, the Contracting State in question will not be held liable unless such a declaration can be traced to its authorities.⁷ It is not only the police and the prosecution that must avoid stating that a person is guilty of criminal conduct before that person has been found guilty in a court of law;

5 Supreme Court Reports 2000, p. 3412.

6 See, for example, *Bråten v Norway* (Application no. 29094/95), regarding the prosecutor’s opening speech at the applicant’s trial. The complaint was considered manifestly ill-founded by the Commission on 22 October 1997.

7 Aall, Jørgen, *Rettergang og menneskerettigheter, Den europeiske menneskerettighetskonvensjons artikkel 7 og norsk straffeprocess*, Bergen 1995, p. 259–260, Lorenzen, Peer, Rehof, Lars Adam, Trier, Tyge, Holst-Christensen, Nina and Vedstad-Hansen, Jens, *Den Europæiske Menneskerettighedskonvention med kommentarer (art 1–10)*, 2nd edition, Copenhagen 2003, p. 330–331, and Harris, D J, O’Boyle, M and Warbrick, C, *Law of the European Convention on Human Rights*, London 1995, p. 247–248.

other administrative organs must also abide by this fundamental principle enshrined in Article 6, Paragraph 2 of the Convention.⁸

Once a final judgment has been rendered and the defendant found guilty, the protection provided by Article 6, Paragraph 2 of the Convention no longer applies.⁹ On the other hand, if the defendant is acquitted, it is necessary to continue to view him as innocent of the charges brought against him. The above-described viewpoint concerning announcements or statements made about the defendant prior to a court judgment also applies in such instances. The prohibition against declaring an acquitted person guilty is directed primarily at the authorities, including the courts.¹⁰ This does not eliminate the possibility, however, that others, including appointed or nominated counsel representing a victim, could, by making careless statements, behave in such a manner that a Contracting State might be considered liable according to Article 6, Paragraph 2.¹¹

The aim of this article is to explain the stipulations found in Article 6, Paragraph 2 of the Convention, which assign the burden of proof in a criminal case to the prosecution. First, however, it is necessary to discuss briefly the interrelations between that provision and other provisions of the Convention.

8 See, for example, *Lindelöf v Sweden* (Application no. 22771/93), where the Human Rights Court decided on 7 September 1999 to examine further the merits of the case, wherein one of the applicants complained that he had not been presumed innocent by the Swedish social authorities and administrative courts. An amicable settlement was later reached by the parties, before the Court, Judgment 20 June 2000.

9 Aall, p. 322–323, which refers, *inter alia*, to Report of the Commission on 15 March 1961 in *Schouw-Nielsen v Denmark* (Application no. 343/57). The Commission found that Article 6, Paragraph 2 was not applicable to the reopening of a criminal case, Yearbook IV (1961), p. 490.

10 See, for example, *Sekanina v Austria* (Application no. 13126/87). The circumstances of the case were that the applicant had been accused of homicide in the death of his wife. After he had been acquitted of that charge, he filed suit and demanded compensatory damages for having been remanded into custody for the period during which the investigation and case proceedings were carried out. The applicant's demand for damages was rejected by both the court of first instance and the appellate court. In explaining their decision, both courts mentioned that there was a strong suspicion that the applicant was indeed guilty of homicide despite his having been acquitted of that charge. According to Austrian law, a person was not entitled to compensation under these circumstances. The Human Rights Court emphasises particularly in its judgment that Article 6, Paragraph 2 does not guarantee that a person who has been acquitted of a criminal charge will receive compensation for detention on remand if the conditions in Article 5 of the Convention were fulfilled. The Court states, however, that it is incompatible with Article 6, Paragraph 2 to imply, in the grounds for the judgment, that there is a significant likelihood that a person who has been acquitted of a criminal act was nonetheless guilty of that act. This would cast doubt on the person's innocence, which is a breach of the stipulation that a person shall be presumed innocent until proven guilty. Judgment 25 August 1993, 266-A, para. 25-31. See also *Sigurðardóttir v Iceland* (Application no. 32451/96), an amicable settlement before the Court, Judgment 30 May 2000, and *O v Norway* (Application no. 29327/95), Judgment 11 February 2003.

11 Aall, p. 331.

3 Interrelations between Article 6, Paragraph 2 and other Provisions of the Convention

Article 6 of the Convention stipulates “a fair trial,” as the title of the Article indicates. Because the provision contained in Article 6, Paragraph 2 — that a person shall be presumed innocent until proved guilty — falls within this concept, which is closely related to the concept of “a fair hearing,” contained in Article 6, Paragraph 1, it is often appropriate to apply Paragraphs 1 and 2 simultaneously. The organs of the Convention seem to have a tendency to refer solely to Paragraph 1 in such instances, however, instead of referring to Paragraph 2 as well.¹² Nevertheless, this is not universally the case, as was revealed in *Heaney and McGuinness v Ireland*, where the Human Rights Court considered it a breach of Paragraphs 1 and 2 to punish the accused for refusing to answer questions concerning the criminal conduct with which they were charged.¹³

The provisions of Article 6, Paragraph 2 refer only to criminal cases, as does Paragraph 3 of the same Article, while Paragraph 1 refers equally to civil and criminal cases. The wording “a criminal offence” has been interpreted so broadly that it includes not only typical criminal cases that are referred to as such, cf. Article 1, Paragraph 1 of the Act on Criminal Procedure, but also cases wherein punitive measures such as deprivation of rights are demanded, cf. Article 1, Paragraph 2 of the Act, and private criminal cases involving offences such as defamation.¹⁴ That being the case, Article 6, Paragraph 2 refers solely to the decision by the courts — and, as appropriate, governmental authorities — concerning the conviction or acquittal of a defendant, and not to the subsequent decision on punishment or other penalties for criminal offence.¹⁵

Though an accused person cannot be punished before his guilt has been proven in a court of law, he can be subjected to coercive measures in the interest of the investigation if the need for such measures exists, including the suspicion that the accused has committed a criminal offence, cf. Article 5, Paragraphs 1 (c) and 3 of the Convention. On the other hand, it is necessary to ensure that such measures do not involve an assertion of guilt, as such an assertion could constitute an infringement of Article 6, Paragraph 2.¹⁶

In this context, it is interesting to consider the Human Rights Court’s grounds in *Heaney and McGuinness v Ireland*. As is stated above, the applicants were sentenced to imprisonment for refusing to answer police questions

12 Lorenzen and others, p. 328–329, and van Dijk, P and van Hoof, G J H, *Theory and Practice of the European Convention on Human Rights*, the Hague 1998, p. 458.

13 Judgment 21 December 2000 (Application no. 34720/97), para 40 and 59.

14 Aall, p. 253, and Lorenzen and others, p. 328. See, for example, *Minelli v Switzerland* (Application no. 8660/79), where the Court applied Article 6, Paragraph 2 to a defamation case, Judgment 25 March 1983, A 62, para 28.

15 Harris, O’Boyle and Warbrick, p. 241–242, where reference is made to *Engel and others v Netherlands* (Application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72), Judgment 8 June 1976, A 22-A, para 90.

16 Aall, p. 255, and van Dijk and van Hoof, p. 461.

concerning criminal conduct of which they were accused; that is, involvement in terrorist acts in Ireland. The Court concluded that this constituted a violation of their rights pursuant to Article 6, Paragraphs 1 and 2 of the Convention. In the Court's premises, it is stated that the right not to incriminate oneself is based on the point of view that the prosecution (and the police) may not utilise evidence in order to prove the guilt of an accused person if that evidence has been obtained by compulsion or coercion. However, the Court emphasised that this does not include coercive measures used for the purpose of gathering evidence such as documents or blood samples, which have an existence independent of the will of the accused.¹⁷

In conformity with this last statement by the Court, the organs in Strasbourg have, on several occasions, dealt with the issue whether certain measures used by the police under investigation are in breach of Article 6, Paragraph 2 of the Convention. The conclusion has most often been that this is not the case.¹⁸

4 The Burden of Proof Rests with the Prosecution

As has been stated previously, the Human Rights Court has taken the view that Article 6, Paragraph 2 of the Convention means that the burden of proof in criminal cases shall rest with the prosecution and that, moreover, any and all doubt must be interpreted in favour of the accused (*in dubio pro reo*).

It is blatantly contrary to the human sense of justice that an innocent person should be found guilty and required to submit to punishment. Thus these two above-mentioned rules, which are actually two aspects of the same principle, have long been inextricably linked to people's ideas concerning states governed by the rule of law, if for no other reason than that an individual who is accused of a crime often has difficulty proving his or her innocence.¹⁹ Neither may it be ignored that the purpose of the rules of human rights is to protect citizens, not only against violations of those rights by governmental authorities, but also against violations by other persons. As a result, it is important not only to prevent the conviction of innocent persons, but also to ensure that those who have committed criminal acts are found guilty and subjected to the legally prescribed sanctions. Though considerations for the rights of the defendant necessitate making stringent demands with regard to proof in criminal cases, it

17 Judgment 21 December 2000, para 40.

18 Harris, O'Boyle and Warbrick, p. 242. One example is the decision by the Court on 15 June 1999 in *Tirado Ortiz and Lozano Martin v Spain* (Application no. 43486/98). Both applicants had been required to take a breathalyser test due to suspicion of drunk driving, on the one hand, and because of a traffic accident, on the other. They refused to take the test and were penalised under Spanish law as a result. The Court took the view that entailed neither a breach of Article 6, Paragraph 2, nor a violation of Article 8 of the Convention, and declared the application inadmissible.

19 It is, of course, cause for concern if, in a state governed by the rule of law, it is declared publicly that a person who has been acquitted of charges against him is nonetheless guilty. The provisions in Article 6, Paragraph 2 of the Convention do not apply, however, unless such assertions of guilt can be traced to the authorities in the Contracting State in question.

is also necessary to avoid going too far in this direction because excessive demands for proof could make the battle waged by the police and other authorities against crime an extremely difficult one.²⁰

In its judgment in *Barberà and others v Spain*, the Human Rights Court came to the following conclusion:

Paragraph 2 [of Article 6] embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; 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 him.²¹

These words reflect several of the fundamental principles that the Strasbourg organs have considered to apply to evidence according to Article 6, Paragraph 2 of the Convention. First, the judges must assess the probative value of the evidence presented in criminal cases in an objective manner and without any prejudice against the accused. Second, it is the role of the prosecution — and therefore not of the judges — to produce evidence in criminal cases. Third and last, the burden of proof resides with the prosecution in such cases, and all doubt must be interpreted in favour of the defendant.

The first two principles are closely linked to the principle of an independent and impartial tribunal, enshrined in Article 6, Paragraph 1 of the Convention. Furthermore, it is one of the basic elements of a fair trial that proof must be based only on evidence that is formally submitted before a court. In other respects, the organs have stated repeatedly 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.²² This is addressed in greater detail in Section 5.

5 Contracting States' Margin of Appreciation with Respect to Admissibility and Assessment of Evidence

Article 6, Paragraph 2 of the Convention requires that the guilt of a person accused of criminal conduct be proven “according to law.” These last words cannot be interpreted as meaning that the Contracting States are free to stipulate

20 Aall, p. 283–285.

21 Judgment 6 December 1988 (Application no. 10590/83), A 146, para 77.

22 See, for example, the Human Rights Court’s judgment 9 June 1998 in *Teixeira de Castro v Portugal* (Application no. 25829/94), Reports 1998-IV, Vol 77, para 34. See also Aall, p. 285–286, Lorenzen and others, p. 334, Harris, O’Boyle and Warbrick, p. 244, and van Dijk and van Hoof, p. 459–460.

how such proof shall be provided in criminal cases; instead, they must take into account certain fundamental principles related thereto.²³

5.1 *Evidence Obtained in an Unlawful Manner*

It is worth considering whether it is appropriate to interpret the words “according to law” in Article 6, Paragraph 2 of the Convention as prohibiting the use of illegally obtained evidence for the purpose of proving the guilt of the accused. Though various considerations support such an interpretation, especially the respect for the individual’s right to liberty and security, the Human Rights Court has taken the view that convicting a person on the basis of such evidence does not constitute a breach of Article 6 unless the methods used have been particularly reprehensible.²⁴

In *Schenk v Switzerland*, a man who maintained that the applicant had asked him to kill his wife tape-recorded a telephone conversation between himself and the applicant and delivered the tape to the police. Following this, the applicant was charged with and sentenced for attempted murder. The tape recording of the conversation was among the evidence presented before the court with the aim of proving his guilt. At that point, he had the opportunity to verify the authenticity of the recording and to lodge a protest against its admissibility as evidence in the case. The Court’s judgment states the following:

While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. – The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk’s trial as a whole was fair.²⁵

The Court came to the conclusion that the trial had been fair in the sense of Article 6, Paragraph 1, with consideration given to the circumstances of the case, including the fact that the tape recording was not the only evidence upon which the conviction was based.²⁶

The applicant also claimed that, owing to the use of the unlawfully obtained recording, he had not been proven guilty “according to law” within the meaning

23 Lorenzen and others, p. 334, where reference is made to the following statement by the Human Rights Court’s judgment 7 October 1988 in *Salabiaku v France* (Application no. 10519/83) A 141-A, para 28: “Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words ‘according to law’ were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 which, by protecting the 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 law . . .”

24 Kjølbro, Jon Fridrik, *Den Europæiske Menneskerettighedskonvention - for praktikere*, Copenhagen 2005, p. 332–335.

25 Judgment 12 July 1988 (Application no. 10862/84), A 140, para 46.

26 *Ibid.*, para 47–49.

of Article 6, Paragraph 2. The Court handled that part of the application in the following manner:

In the Court's opinion, the record of the hearings ... and the judgment ... contain nothing to suggest that the ... Criminal Court treated Mr. Schenk as if he were guilty before it convicted him. The mere inclusion of the cassette in the evidence cannot suffice to support the applicant's allegation, with the result that there was no breach of the Convention here either.²⁷

The circumstances were quite different in *Teixeira de Castro v Portugal*, where two plain-clothes police officers went to the home of the applicant because two men whom the police had used as decoys had informed the officers that the applicant sold illegal drugs. The policemen said they wished to purchase 20 grams of heroin from the applicant and produced a packet of banknotes, whereupon he agreed to procure the heroin. He went, together with one of the decoys, to meet with a man who acted as an intermediary in procuring the drugs for him. Having done this, the applicant and the decoy went to meet with the policemen, where the applicant was arrested. In the wake of these events, he was accused and convicted of selling illegal drugs.

The Human Rights Court's judgment states, *inter alia*, that though the battle against organised crime such as drug trafficking calls for the use of appropriate measures, it does not justify convicting a person based on evidence obtained at the instigation of the police. With reference to the circumstances of the case, the Court considered not only that the police officers had acted as undercover agents or *agents provocateurs*, but also that they had transgressed the boundaries of that role with their behaviour. In support of this conclusion, the judgment states that the police officers' actions had not been a part of more extensive measures to combat drug trafficking, nor had the authorities had substantiated reasons to believe that the applicant, who had not previously come to the attention of the police, was otherwise engaged in the sale of drugs. Furthermore, the police did not know the applicant but became acquainted with him because of the involvement of persons who acted as decoys for the police. Nothing indicated that the applicant was guilty of the sale of drugs apart from this one occasion, which arose at the incitement of the police. He had then been sentenced, primarily on the basis of the police officers' testimony in court. Given all these considerations, the Court found that his rights according to Article 6, Paragraph 1 had been violated.²⁸

In a newly rendered judgment in *Jalloh v Germany*, the Human Rights Court also came to the conclusion that methods used by the police to obtain evidence in order to prove the guilt of the applicant constituted an infringement of Article 6 of the Convention. The circumstances of the case were that the applicant was suspected of having swallowed a tiny plastic bag (a so-called "bubble") containing illegal drugs. For this reason, he was taken to the hospital. When he refused to take the medication necessary to induce vomiting, he was held down by four police officers while a physician forcibly administered a salt solution

²⁷ *Ibid.*, para 51.

²⁸ Judgment 9 June 1998, para 36–39.

and a certain emetic to him through a tube introduced to his stomach through the nose. In addition, the doctor injected him with another emetic. As a result, the applicant regurgitated one bubble containing cocaine. He was later convicted of drug trafficking, partly because of the bubble in question.

The Court considered that the above-described treatment of the applicant had been inhuman and degrading and therefore constituted a breach of Article 3 of the Convention. The application was also based on the grounds that, by resorting to these measures, which had imperilled the health of the applicant, for the purpose of obtaining evidence against him, the German authorities had violated Article 6. The Court's judgment states the following, *inter alia*, concerning this point:

It is ... not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the ‘unlawfulness’ in question and, where violation of another Convention right is concerned, the nature of the violation found ... – The Court reiterates ... that Article 3 enshrines one of the most fundamental values of democratic societies. 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 victim's conduct. – The Court has consistently held ... that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing ...²⁹

In view of this general interpretation of Article 6, and considering Article 3, the Court took the stance that the applicant's rights according to Article 6, Paragraph 1 had been violated, including his right to remain silent and his right not to incriminate himself.³⁰

It is worth mentioning that the Court draws attention to the fact that the bodily search or investigation that was performed on the applicant did not constitute a violation of German law as it has been interpreted by the German courts. Nonetheless, the Court states:

... that even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which

²⁹ Judgment by a Grand Chamber 11 July 2006 (Application no. 54810/00), para 95, 99 and 102.

³⁰ *Ibid.*, para 103–123.

breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction ...

Therefore, the Court took the position that this method represented a breach of the Convention, though it did not constitute a violation of the laws of the Contracting State in question.³¹

Neither in *Teixeira de Castro* nor in *Jalloh* did the Human Rights Court address the issue of whether the use of evidence obtained in an unlawful or improper manner represents a violation of Article 6, Paragraph 2 of the Convention. The Court did so, however, in its judgment in *Heaney and McGuinness v Ireland*, which is discussed above in Section 3.³² Thus it is unclear whether this issue will, in future, be examined in view of Paragraph 1 alone, or whether Paragraph 2 will be invoked simultaneously.³³

5.2 Assessment of Evidence

The organs in Strasbourg have, in general, allowed the national courts to decide when they consider the evidence presented sufficient to convict the accused in a criminal case. The Human Rights Court's judgment in *Barberà and others v Spain*, which is cited above, states as follows:

As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce ... The Court must, however, determine ... whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 Paragraph 1.³⁴

In *John Murray v United Kingdom*, the Court came to the conclusion that the right of an accused person to remain silent concerning the criminal charges against him, which is secured by the provision of fair hearing in Article 6, Paragraph 1 of the Convention, does not mean that it is prohibited to interpret that silence against him; rather, this is a matter to be determined by the circumstances in each given case. The Court's judgment includes the following statements:

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the

31 *Ibid.*, para 107 and 108.

32 Judgment 21 December 2000.

33 Aall, p. 301–303.

34 Judgment 6 December 1988, para 68.

aims of Article 6 ... – On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. – It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him.³⁵

Furthermore, it has not been considered a breach of Article 6, Paragraph 2 when the criminal record of the accused is brought to the notice of the court, despite the fact that it could affect the assessment of the evidence.³⁶

On the other hand, a confession by the accused cannot be used as evidence in a criminal case if that confession is obtained by compulsion or other unlawful means. In its report in *X v United Kingdom*, the Commission has rendered the opinion that a judge must ascertain whether such a confession is credible if a conviction is to be based on it.³⁷

In keeping with their above-mentioned stance in allowing the national courts a relatively wide margin of appreciation in the assessment of evidence, the Strasbourg organs have taken the view, as to the standard of proof, that Article 6 of the Convention does not set forth specific requirements concerning the degree of probative value of evidence.³⁸ In the Commission's report in *Austria v Italy*, which is discussed in further detail in Section 6.1, Article 6, Paragraph 2 is interpreted as meaning that a court "can find him [i.e., the accused] guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt."³⁹ According to this, it has been established that Article 6, Paragraph 2 does not prevent the conviction of a defendant on the basis of indirect evidence; that is, a reference to statements concerning facts that are not directly related to that which is to be proven.⁴⁰

If at all possible, it is preferable to base a conviction on direct evidence such as the testimony of eyewitnesses to criminal act. On the other hand, in instances where such direct evidence is insufficient — as happens, for example, in sexual offence cases, where the testimony of the victim and the testimony of the

35 Judgment 8 February 1996 (Application no. 18731/91), Reports 1996-I, Vol. 1, para 45 and 47.

36 Aall, p. 176–179, Lorenzen and others, p. 336, and van Dijk and van Hoof, p. 461.

37 Report 23 March 1972 (Application no. 5076/71), Collection of Decisions 40, p. 64.

38 Harris, O'Boyle and Warbrick, p. 244, van Dijk and van Hoof, p. 460 and Kjølbro, p. 331. Reference is made there, *inter alia*, to the Human Rights Court's decision 24 April 2000 (Application no. 47457/99 and 47458/99) in *Tiemann v France and Germany*, which actually concerned a civil case.

39 Report 31 March 1963 (Application No 788/60), Yearbook VI (1963), p. 740 (784).

40 Harris, O'Boyle and Warbrick, p. 244. See also the Human Rights Court's judgment 7 October 1988 in *Salabiaku v France* (Application no. 10519/83), A 141-A., para 27 and 28, which is discussed further in Section 6.1.

accused contradict one another — other measures must be adopted, including the use of indirect evidence, in order to come to a conclusion concerning acquittal or conviction. Otherwise the outcome would automatically be acquittal of the accused in such instances, if he steadfastly maintains his innocence.

In a sexual offence case of this type that was recently brought before the Supreme Court, the judges were in disagreement as to whether convicting the accused on the basis of indirect evidence constituted a violation of his rights according to Article 70, Paragraph 2 of the Constitution, and Article 6, Paragraph 2 of the Convention.

The circumstances of the case were that a man was accused of violating Act no. 19/1940, the Icelandic General Penal Code (hereinafter referred to as the Penal Code), by having sexually abused the daughter of his domestic partner. According to the indictment, there were three charges consisting of numerous violations committed over a period of several years.

The accused maintained that he was innocent of the charges. Despite this, he was convicted of two of the three charges, first by the District Court (three judges) and then by the Supreme Court (four out of five judges), cf. the Supreme Court judgment of 20 October 2005 (Case no. 148/2005). The conviction was based on the following premises: first, the testimony of the victim was considered more credible than that of the accused; second, three witnesses — i.e., one male friend of the victim and two of her female friends — testified that she had confided to them at the time of the offences that the accused had abused her sexually; and third, in a statement submitted in evidence, a psychologist who had interviewed the victim concluded that her testimony was credible. The psychologist appeared as witness before the District Court and confirmed this opinion.

One of the Supreme Court judges did not agree with the other judges and wished to acquit the accused of two of the three charges due to lack of evidence. His dissenting opinion states, *inter alia*:

The accused has denied his guilt. According to Article 70, Paragraph 2 of the Constitution, everyone charged with criminal conduct shall be presumed innocent until proven guilty. The same rule is so worded in Article 6, Paragraph 2 of the Convention ...— [The conviction by the District Court was based solely] on the testimony of the alleged victim. The grounds of the Court are that the testimony is credible and that nothing has been revealed that disproves that testimony. Furthermore, it is stated there that, during the proceedings in the case, nothing has emerged that gives a viable reason to suppose that these grave accusations can be explained in any other way than that the accused has abused the girl in the manner that she maintains.— Implied in this resolution is that, in an instance where an alleged victim accuses a man of a violation of the sort under scrutiny here, and where he denies his guilt, the only prerequisite for a conviction is that the person who presses charges be considered credible by the judges. One may, then, simply reverse the burden of proof and impose on the accused man the onus of disproving the testimony. Most likely, it is difficult to find examples of courts' having convicted accused men of criminal acts on such premises in other categories of crimes. What appears to govern the matter is the fact that production of evidence is, in general, difficult in cases of this sort, and that the violations, if proven, are considered, beyond any doubt, disgraceful in

the eyes of the public because they involve a grave breach of faith against a child with whose upbringing the respective defendant has been entrusted. This situation cannot justify depriving a defendant of the human rights that the above-cited provisions concerning production of proof in criminal cases are designed to guarantee him. It is entirely unauthorised to allow these circumstances to create a situation where the burden of proof is treated as the District Court has done in this case: it has reversed that burden of proof and required that the accused disprove the testimony of the person against whom he is accused of behaving in a criminal manner.— It cannot be of any independent probative value in a criminal case if the person who presses charges has told people other than the police of the violations leading to the accusations, except in unusual circumstances, especially if a long time has passed since the alleged violations took place. In the appealed judgment, it is mentioned that, no later than the year 1997, the person told two of her female friends about the accused's sexual offences. . . Even though it were agreed that the production of evidence in a criminal case could be carried out in this manner, testimony such as this cannot be considered meaningful, nor can the District Court judge's assessment of its credibility, as there is no substantive reason to dispute it. It is merely hearsay, a recounting of another person's account, and therefore has no significance in proving the charges. The same can be said of a letter that the person pressing the charges says that she wrote to a named male friend. . . In none of these accounts is it maintained that she described the accused's having sex with her. They can never, no matter what the circumstances, be used in support of a conviction for the conduct described in item 2 of the indictment, as was done in the District Court.— On behalf of the accused, various points have been mentioned, which he considers to undermine the credibility of the person pressing charges ...— It is possible to agree with the accused, that these are all points that the District Court judge should have considered in his assessment of her credibility. For these reasons, it is unavoidable to assume that the District Court's conclusion concerning the probative value of her testimony in court could be wrong to some material extent, as is stated in Article 159, Paragraph 5 of Act no. 19/1991. Therefore, the Supreme Court could, based on this legal provision, invalidate the District Court's judgment and the proceedings to such a degree that new verbal evidence would be presented as needed and the matter addressed once again. On the other hand, considering the above statement — that a conviction in a criminal case may not be based solely on the testimony of the party who presses charges juxtaposed with a denial by the accused — I see no reason for this conclusion in the case.— With reference to all that is recounted above, I consider it unproven that the accused is guilty of the violations with which he is charged according to items 1 and 2 of the indictment, and that it is necessary to acquit him of those charges.

Article 47 of the Act on Criminal Procedure is worded as follows: “A judge shall assess, as appropriate, the probative value of facts that are not directly linked to the issue that is to be proven, but from which facts it may be possible to draw conclusions about that issue.” Despite the fact that, according to this provision, the Act assumes the use of indirect evidence as a supplement to direct evidence in criminal cases, the judge who delivered the dissenting opinion rejected the idea that the testimony of the victim's female friends had any probative value in the case, as is stated in his opinion: “It [the testimony] is merely hearsay, a recounting of another person's account, and therefore has no

significance in proving the charges.” The judge considered the same to apply to the testimony of the victim’s male friend. It is worth noting that the dissenting opinion does not make any mention of the statement by the psychologist, which indicates that, under the circumstances, the dissenting judge did not consider that report to have any probative value in the case either.

The Human Rights Court has not addressed the issue of whether it shall be considered a violation of Article 6, Paragraph 2 of the Convention to base a conviction in a sexual offence case on evidence such as that mentioned above. On the other hand, the Court has, on more than one occasion, addressed the issue of whether the production of evidence and method of proof in cases of sexual offences against children is consistent with Article 6, Paragraphs 1 and 3 (d).

One recent example is *S.N. v Sweden*. The circumstances of the case were that, despite his denial of guilt, the applicant was convicted by the District Court and the Court of Appeal for having sexually abused a ten-year-old boy. The conviction was based almost solely on the testimony of the victim, who had given statements to the police on two occasions. The first statement was tape-recorded, and the second was videotaped, but neither the accused nor his defence counsel was present on either occasion. The applicant considered that this represented a violation of his rights pursuant to Article 6, Paragraphs 1 and 3 (d) of the Convention. The Human Rights Court came to the conclusion that, under the circumstances, the applicant’s rights had not been violated. The Court’s judgment states the following, among other things:

In regard to the circumstances of the present case, the Court observes that the statements made by M [i.e., the victim] were virtually the sole evidence on which the courts’ findings of guilt were based. The witnesses heard by the courts – M’s mother and his schoolteacher – had not seen the alleged acts and gave evidence only on the perceived subsequent changes in M’s personality. The District Court stated that the outcome of the case was entirely dependent on the credibility of M’s statements and the Court of Appeal considered that this was of decisive importance in determining the applicant’s guilt. It must therefore be examined whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention in respect of the evidence given by M. – The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence ...”⁴¹

41 Judgment 2 July 2002 (Application no. 34209/96), para 46 and 47.

With reference to these statements by the Human Rights Court and to the Commission's Report in *Austria v Italy*, mentioned above, it can be concluded that the conviction by the Icelandic courts in the sexual offence case described above was consistent with the provisions of Article 6 of the Convention, as these have been interpreted by the Strasbourg organs. On the other hand, considering Article 6, Paragraph 2, it must be borne in mind that the courts must treat indirect evidence with care in order to avoid convicting a person who in fact is innocent of the charges against him or her.

6 Do Reversal of the Burden of Proof and Objective Criminal Liability *Per se* Violate Article 6, Paragraph 2 of the Convention?

On several occasions, the Strasbourg organs have addressed the question of whether reversal of the burden of proof and objective criminal liability are contrary to Article 6, Paragraph 2 of the Convention. It can prove difficult to distinguish between these two closely related issues, as is revealed in *Janosevic v Sweden*, which is discussed below.⁴² Objective criminal liability of an individual refers to the possibility of punishing a person for an act without his or her having committed that act through intent or negligence; for example, punishing the director of a company for a criminal act committed by his employee.⁴³ When the burden of proof is reversed, a person accused of criminal conduct is put in a position of having to prove that he or she is not guilty of that conduct or that the conduct is, in fact, not criminal under the circumstances.

6.1 Reversal of the Burden of Proof

In *Austria v Italy*, wherein Austria maintained that the Italian authorities had violated Article 6 of the Convention in a court case against six young Austrians charged with intentional homicide, the Commission interpreted Article 6, Paragraph 2 in the following manner:

“This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgement they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.”⁴⁴

42 Judgment 23 July 2002 (Application no. 34619/97).

43 Þórmundsson, Jónatan: *Afbrot og refsíðbyrgð II*, Reykjavík 2002, p. 33–36.

44 Report 31 March 1963, p. 740 (782 and 784).

According to this, Article 6, Paragraph 2 of the Convention prohibits the reversal of the burden of proof in a manner relieving the prosecution of the onus of proving the guilt of the accused and requiring instead that the accused prove his innocence.

In *Telfner v Austria*, a man had been hit by a motor vehicle in a small village and sustained minor injuries to his arm. He reported the incident to the police and identified the type and registration number of the car involved, but he had not been in a position to identify the driver of the car. Thereafter, the applicant was charged with and later convicted of having, through negligence, caused injury to another person, despite the fact that he steadfastly denied having driven the vehicle on the occasion in question. It was revealed in the case that the applicant's mother was the registered owner of the automobile. The conviction by the District Court was based not least on its being "common knowledge that the vehicle in question was mainly driven by the applicant." The judgment by the Regional Court, which upheld the District Court judgment, states the following, *inter alia*:

It is the case that the person claiming damages in criminal proceedings was only able to identify the car and could not describe the occupant or occupants of the vehicle. From the evidence it is established, however, that the car, registered in the name of the accused's [i.e., the applicant's] mother, is mainly used by the accused, even if it is also occasionally used by others, such as the accused's sister. It would have been open to the accused to give a contrary version of events which conflicted with the charges and to put in relevant evidence without thereby at the same time having to name another person as the driver ...⁴⁵

In its judgment, the Human Rights Court points out that the applicant had conceded that, under Austrian law, the courts have the power in general to assess freely the evidence before them. However, in the present case he maintained that they had transgressed the limits of that power. The Court's judgment then states *verbatim*:

Article 6 Paragraph 2 requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused ... Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence ... – It is true, as the Government pointed out, that legal presumptions are not in principle incompatible with Article 6 ...; nor is the drawing of inferences from the accused's silence ... – However, the present case does not concern the application of a legal presumption of fact or law, nor is the Court convinced by the Government's argument that the domestic courts could legitimately draw inferences from the applicant's silence. The Court recalls that the above-mentioned John Murray judgment concerned a case in which the law allowed for the drawing of common-sense inferences from the accused's silence, where the prosecution had established a case against him, which called for an explanation.

45 Judgment 20 March 2001 (Application no. 33501/96), para 11 (English translation of the Regional Court's judgment).

Considering that the evidence adduced at the trial constituted a formidable case against the applicant, the Court found that the drawing of such inferences, which was moreover subject to important procedural safeguards, did not violate Article 6 in the circumstances of the case ... The Court considers that the drawing of inferences from an accused's silence may also be permissible in a system like the Austrian one where the courts freely evaluate the evidence before them, provided that the evidence adduced is such that the only common-sense inference to be drawn from the accused's silence is that he had no answer to the case against him. – In the present case, both the District Court and the Regional Court relied in essence on a report of the local police station that the applicant was the main user of the car and had not been home on the night of the accident. However, the Court cannot find that these elements of evidence, which were moreover not corroborated by evidence taken at the trial in an adversarial manner, constituted a case against the applicant which would have called for an explanation from his part. In this context, the Court notes, in particular, that the victim of the accident had not been able to identify the driver, nor even to say whether the driver had been male or female, and that the Regional Court, after supplementing the proceedings, found that the car in question was also used by the applicant's sister. In requiring the applicant to provide an explanation although they had not been able to establish a convincing *prima facie* case against him, the courts shifted the burden of proof from the prosecution to the defence. – In conclusion, the Court finds that there has been a violation of Article 6 Paragraph 2 of the Convention.⁴⁶

The idea that individual Contracting States can stipulate by law that, under specified circumstances, the burden of proof shall be reversed and transferred to the accused seems, at the outset, incompatible with the fundamental principle that the burden of proof shall reside with the prosecution. In *Salabiaku v France* this issue was put to the test.

The circumstances of the case were that illegal drugs were found in a large trunk that the applicant, Salabiaku, had received from abroad. After retrieving the trunk, he took it through customs without specifying that it contained illegal or dutiable goods. Thereafter the applicant was arrested and later charged with drug violations and violations of customs legislation; that is, with having imported illegal goods to the country. He denied the charges and claimed not to have known what was in the trunk. Nonetheless the applicant was found guilty of both charges in the court of first instance, though he was acquitted of the drug violation on appeal. The appellate court, however, confirmed the lower court's decision to sentence him for violations of customs legislation. In support of this, the court made reference to a provision in French customs law, stating that should a person be found to be in possession of goods that he has brought into the country without declaring them, that person would be considered liable before the law for the importation of those goods unless he could provide proof to the contrary. In this context, the law only made specific reference to events classifiable as *force majeure*. Before the Human Rights Court, the French Government based its case on the view that the legal provisions in question did

46 Judgment 20 March 2001, para 15–18 and 20.

not constitute a declaration of guilt but rather a declaration of the liability of the person involved.

In its rationale for the judgment in *Salabiaku v France*, the Human Rights Court stated that Contracting States can, within certain limits, find a party criminally liable for an act even though that act is neither intentional nor a result of negligence. Before the French courts, the applicant was found guilty not of possession of illegal goods but of importation of those goods to the country without having declared them; that is, for conduct that can be presumed based on a fact that, in and of itself, is not in dispute. In its judgment, the Court then says *verbatim* :

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If ... Paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in Paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the 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 law ... – Article 6 Paragraph 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.⁴⁷

After having come to the conclusion that the French courts had, in general, interpreted this controversial legal provision in a manner that allowed the applicant to present an appropriate defence, and having found that the courts that adjudicated in the applicant's case had actually assessed the evidence presented in the case before finding him guilty, the Court reached the conclusion that Article 6, Paragraph 2 had not been violated in this instance.⁴⁸

Though the Human Rights Court determined, in *Salabiaku*, that the legislature is authorised to presume the guilt of the accused by means of statute law in certain instances, one must not draw far reaching conclusions from that judgment. On the contrary, one must conclude that this should be done only in clearly defined instances, provided that there is an appropriate cause-and-effect relationship between the fact that is established and the conduct that may be presumed to be proven by that fact. The prosecution must, as always, prove the guilt of the accused, even though it can derive support from legal provisions of this sort. Furthermore, the courts shall have the last word on what is deemed proven and unproven in any case under scrutiny. Moreover, the accused must

47 Judgment 7 October 1988, para 28.

48 *Ibid.*, para 29–30.

have the possibility of presenting a defence with the aim of proving his innocence; cf. Article 6, Paragraphs 3 (b) and (d) of the Convention.⁴⁹

A similar issue was dealt with in *Janosevic v Sweden*, wherein the applicant maintained, *inter alia*, that he had been forced to prove his innocence and that his rights pursuant to Article 6, Paragraph 2 had therefore been violated. The circumstances of the case were that the applicant had been required to pay tax surcharges because information provided to the tax authorities concerning the revenues earned by his private company proved incorrect. According to Swedish tax law concerning such surcharges, there was no requirement that it be proven that the taxpayer had provided incorrect information to the tax authorities through intent or negligence. On the other hand, it was assumed that the surcharges would be revoked or eventually reduced if the taxpayer could demonstrate that the information provided was indeed correct, or that the submittal of incorrect information was excusable.

In its judgment, the Human Rights Court came to the following conclusion after having cited the *Salabiaku* judgment:

Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. – In assessing whether, in the present case, this principle of proportionality was observed, the Court acknowledges that the applicant was faced with a presumption that was difficult to rebut. However, he was not left without any means of defence ... it was open to the applicant to put forward grounds for a reduction or remission of the surcharges and to adduce supporting evidence. Thus, he could have claimed, as an alternative line of defence, that, even if he was found to have furnished incorrect information to the Tax Authority, it was excusable in the circumstances or that, in any event, the imposition of surcharges would be manifestly unreasonable. – The Court also has regard to the financial interests of the State in tax matters, taxes being the State's main source of income. A system of taxation principally based on information supplied by the taxpayer would not function properly without some form of sanction against the provision of incorrect or incomplete information, and the large number of tax returns that are processed annually coupled with the interest in ensuring a foreseeable and uniform application of such sanctions undoubtedly require that they be imposed according to standardised rules.⁵⁰

With particular reference to these issues, the Court did consider that the presumptions applied in Swedish law with regard to surcharges were confined within reasonable limits. For this reason, among others, the Swedish authorities were found not to be in violation of Article 6, Paragraph 2 of the Convention.⁵¹

Article 45 of the Act on Criminal Procedure states *verbatim*: “The burden of proof of a defendant's guilt and of events that are detrimental to his case shall

49 Aall, p. 290–291.

50 Judgment 23 July 2002, para 101–103.

51 *Ibid.*, para 104 and 110.

rest with the prosecution.” This provision has been interpreted by the Supreme Court, in its judgment of 2 November 2000 (Case no. 248/2000), as meaning that the burden of proof shall not be placed on the prosecution with respect to events that could result in acquittal such as his having acted in self-defence.

The circumstances of this case were that a man was charged with assault for having broken the finger of another man in a night-time fight between the two of them in downtown Reykjavík. The accused maintained, with reference to Article 70, Paragraph 2 of the Constitution and Article 6, Paragraph 2 of the Convention, that the prosecution must present proof that the assault with which he was charged had not been an act of self-defence. In its judgment, the Supreme Court said the following *verbatim* about this argument:

According to Article 45 of Act no. 19/1991, the prosecution bears the burden of proof of a defendant’s guilt and of events that are detrimental to his case. From these words, it can be presumed that it is not the prosecution’s role to disprove the accused’s statements concerning events that could provide him with impunity. The reverse can be construed neither from Article 70, Paragraph 2 of the Constitution, cf. Article 8 of the Constitutional Act, no. 97/1995, nor from Article 6, Paragraph 2 of the Convention, cf. Act no. 62/1994 ... as this has been implemented.” With reference to the evidence presented in the case, the Supreme Court confirmed the District Court’s conclusion that the accused was guilty of intentional assault on the occasion in question.⁵²

It cannot be seen that the organs in Strasbourg have, as yet, dealt with an issue like this one. It can be said, however, that the Supreme Court’s conclusion is based on the premises of the Human Rights Court in the *Salabiaku* case, where it is stated, *inter alia*, that Article 6, Paragraph 2 of the Convention does not prevent the presumption of guilt based on facts that are considered established in a criminal case. A conclusion to the contrary could result in its being extremely difficult for the prosecution to prove guilt in assault cases resulting from fights involving two or more individuals.

As is stated above, Article 6, Paragraph 2 of the Convention covers private criminal cases, including defamation cases, at least in instances where a claim for punitive measures is made. In such cases, it has been customary in the Contracting States that the defendant must prove that the defamatory statements are true and are based on rational considerations.

In *BT v Norway*, the applicant took the view that his rights pursuant to Article 6, Paragraphs 1 and 2 of the Convention had been violated because he, as the defendant in a defamation case, had been required to prove that statements that were made by him and were considered to represent criminal insinuations against another man were true. The Commission’s report contained the following comment:

The Commission recalls that in Norway the burden of proof in defamation proceedings lies, as in other Convention States, with the person who makes the defamatory statements. In this way the law intends to compel the author of such statements to make sure in advance that what is being said can also be proven as

52 Supreme Court Reports 2000, p. 3412.

true, i.e. it imposes a particular standard of care on these persons. The reputation of the victim is protected in this way not only against untrue statements but also against allegations the truth of which cannot be proven ... – The Commission does not find that this system runs counter to the Convention as such.”⁵³

The Commission considered that the applicant was provided under domestic legislation with the possibility of exculpating himself, and furthermore, it found that the Norwegian courts enjoyed genuine freedom of assessment on the basis of the evidence adduced. In these circumstances the Commission found no appearance of a violation of Article 6, Paragraphs 1 and 2.⁵⁴

In a defamation case decided by the Supreme Court on 19 December 2000 (Case no. 272/2000), the Court stated that it should not be the role of the defendant to prove the truth of the statements that gave rise to the case, “as it could prove inordinately difficult for him,” as is stated in the Court’s judgment.⁵⁵ It can be said that this view taken by the Supreme Court takes into account Article 6, Paragraph 2 of the Convention, as well as Article 70, Paragraph 2 of the Constitution.

6.2 *Objective Criminal Liability*

The statement “until proved guilty according to law,” which is contained in Article 6, Paragraph 2 of the Convention, has not been interpreted as a prohibition against individuals’ or legal entities’ bearing objective criminal liability according to the statute laws of the Contracting States. This is stated specifically in the premises of the Human Rights Court’s judgment in the *Salabiaku* case and is reiterated in the Court’s decision in *Hansen v Denmark*.

The circumstances of the *Hansen* case were that the applicant, as the managing director of a transport company, was required to pay a fine because of a violation, committed by one of the company’s drivers, of an EU Regulation concerning driving time and rest periods for drivers of transport vehicles. The applicant claimed acquittal and maintained, *inter alia*, that the objective criminal liability stipulated in the pertinent Danish legislation was contrary to Article 6, Paragraph 2 of the Convention. This objection was not accepted by the Danish courts.

Before the Human Rights Court, the applicant complained, *inter alia*, of the fact that he had been sentenced to pay a fine although the offence committed could not be imputed to an intentional act or negligence on his part and, in the circumstances under scrutiny, this had been contrary to Article 6, Paragraph 2. In its ruling, the Human Rights Court made reference to the judgment in the *Salabiaku* case in the following manner:

The Court recalls that in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of

53 Report 1 April 1992 (Application no. 16269/90).

54 *Ibid.*

55 Supreme Court Reports 2000, p. 4506.

the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence ... – However, in such circumstances the Contracting States must remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence ...⁵⁶

The Court then states:

In the present case the Court recalls that the Order ... was introduced to secure the fulfilment of EU regulations on the harmonisation of certain social legislation relating to road transport. More specifically the offence at issue related to road safety and the Order in addition aims at eliminating the financial incitements which may exist in disregarding the rules. The Court considers that this is an area where the Contracting States are well within the ‘reasonable limits which take into account what is at stake’. – Furthermore, even though the applicant did not as such commit the punishable act this does not mean that he was left entirely without a means of defence. Not only was it necessary for the trial court to establish the employer/employee relationship between the applicant and the driver but it was also necessary to establish that the driver was driving in the interest of the employer. There is nothing indicating that the courts in fulfilling their functions started from the assumption that the applicant was liable pursuant to the Ministerial Order. – Finally, the Court considers that the fines imposed do not appear disproportionate having regard to the aim pursued. – In these circumstances the Court finds that the national courts did not fail to respect the presumption of innocence. Thus, the Court has found no appearance of a violation of Article 6 Paragraph 2 of the Convention.⁵⁷

The Commission had previously come to the conclusion, in *Duhs v Sweden*, that it was not an infringement of Article 6, Paragraph 2 of the Convention if the owner of a motor vehicle were required to bear objective criminal liability for that vehicle’s being parked illegally. Under Swedish law, the registered owner of the vehicle was responsible for the payment of fines for such offences unless that vehicle had been taken from his possession in a criminal manner. In the case under consideration, the applicant had sold the automobile, and the purchaser had parked it illegally while the applicant was still its registered owner. In the opinion of the Commission, there was no violation of the applicant’s rights according to Article 6, Paragraph 2, even though he had been required to pay fines for the offence in question.⁵⁸

In *Falk v Netherlands*, the Human Rights Court addressed the question of whether it were consistent with Article 6, Paragraph 2 of the Convention if the owner of an automobile were required to pay fines for a traffic violation demonstrably committed by another person. According to Dutch law, this sort of liability was placed on the registered owner of the vehicle but with certain

56 Decision 16 March 2000 (Application no. 28971/95).

57 *Ibid.*

58 Report 7 December 1990 (Application no. 12995/87), Decisions and Reports 67, p. 204.

qualifications, including that the registered owner be able to demonstrate that his or her vehicle was used by another person against his or her will and that he or she was unable to prevent that use.

In its decision, the Court made reference to the points of view that appear in the cases of *Salabiaku* and *Hansen*, both of which are discussed above, including that:

... in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim pursued ...⁵⁹

Concerning the actual issue under examination, the Court went on to state:

In assessing whether, in the present case, this principle of proportionality was observed, the Court understands that the impugned liability rule was introduced in order to secure effective road safety by ensuring that traffic offences, detected by technical or other means and committed by a driver whose identity could not be established at the material time, would not go unpunished whilst having due regard to the need to ensure that the prosecution and punishment of such offences would not entail an unacceptable burden on the domestic judicial authorities. It further notes that a person fined under [the relevant law provision] can challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the person concerned is not left without any means of defence ...⁶⁰

In accordance with these observations, the Human Rights Court came to the conclusion that, under the circumstances, there had been no violation of Article 6, Paragraph 2.

Icelandic legislation contains several examples of stipulations concerning objective criminal liability. Most of these involve imposing objective criminal liability on legal entities. Though some of the Convention's provisions could apply to legal entities, it must be considered questionable, based on the wording and purpose of Article 6, Paragraph 2, that they should enjoy the legal protection contained therein.⁶¹

On the other hand, it is seldom stipulated in Icelandic statute law that individuals should bear objective criminal liability.⁶² In practise, provisions of this sort have been put to the test primarily in cases involving violations of fisheries management and customs legislation.

In the Supreme Court judgment of 2 March 1970 (Case no. 200/1969), a ship's captain was sentenced to pay a fine for violations of the then-current law prohibiting fishing with bottom trawlers and trawl floats, without his being

59 Decision 19 October 2004 (Application no. 66273/01).

60 *Ibid.*

61 Aall, p. 295–298.

62 Spanó, Róbert R., *Um vansvefta skipstjóra og afladrjúga stýrimenn*, Tímarit lögfræðinga 1999, Volume 1, p. 28.

personally guilty of the offence. One of the judges delivered a dissenting opinion stating that nowhere was it stated clearly in the law that a captain should bear objective criminal liability for violations of the law and that such liability therefore did not exist. It is interesting to note that, in support of this conclusion, the judge made reference not only to Article 18 of the Penal Code, which states that a person shall only be made criminally responsible if his or her offence was intentionally or negligently committed, but also to Article 108 of the then-current Act on Criminal Procedure, cf. Article 45 of the current Act on Criminal Procedure, and to Article 6, Paragraph 2 of the Convention, despite the fact that the Convention had not been incorporated into Icelandic law at that time.⁶³

The conclusion of the majority of the Supreme Court in this judgment of 2 March 1970 set the precedent for the following decades, until the Supreme Court handed down a judgment in a similar case on 14 December 1995 (Case no. 342/1995).⁶⁴

The District Court judgment in that case states *verbatim*:

In special criminal statutes in Iceland there can still be found rules stipulating objective criminal liability of individuals. It has happened that ship's captains have been sentenced to the payment of fines for violations of legal provisions similar to those to which reference is made in this case, despite the fact that their guilt was not proven. These judgments were handed down prior to the incorporation of the Convention [into Icelandic law] this past spring, but it is necessary to consider the provisions of Article 6, Paragraph 2 and Article 7, Paragraph 1 of the Convention in coming to a conclusion in the present case.— A penalty may never be imposed unless provided for clearly by statute. According to Icelandic law, the fundamental principle in interpretation of criminal law is that the accused must reap the benefit of any doubt concerning criminal liability for his conduct (*in dubio mitius*). Though Act no. 81/1976 on Fishing within Icelandic Territorial Waters can be construed as meaning that no sailor other than the captain can be prosecuted for fishing offences, nowhere in the law is it stated clearly and directly that the captain shall bear objective criminal liability. According to the foregoing, it must be concluded that criminal liability pursuant to Act no. 81/1976 can be based solely on guilt, and the accused shall, for this reason alone, be acquitted of the prosecution's charges in this case.

The Supreme Court upheld the District Court judgment with reference to Article 69, Paragraph 1 of the Constitution, which states that no one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed. Furthermore, the Supreme Court added the following rationale for its conclusion:

As is stated in the District Court judgment, the fact that the accused was not guilty of the conduct for which charges were brought in the case, and which are described in the judgment, is not in dispute. For this reason, and pursuant to the

63 Supreme Court Reports 1970, p. 212.

64 Spanó, p. 20.

cited Constitutional provision, he shall not be punished for that conduct. With reference to this, the conclusion of the District Court is confirmed and the accused acquitted of the charges brought against him by the prosecution.⁶⁵

Given the scanty reasoning provided by the Supreme Court, this judgment has been interpreted and, at the same time criticised, as indicating that objective criminal liability of individuals is contrary to Icelandic law.⁶⁶

The Supreme Court has taken the initiative, however, in stating that this judgment should not be interpreted in that manner; cf. the Supreme Court judgment of 27 January 2000 (Case no. 442/1999). In that case, a ship's captain was charged with violations of the provisions of the then-current Customs Act, no. 58/1998. The Supreme Court came to the conclusion that the accused should be acquitted, as the respective provisions of the law were not clear enough to authorise convicting him for customs violations in which his participation had not been established.

The judgment states *inter alia* the following:

The first sentence of Article 69, Paragraph 1 of the Constitution states as follows: 'No one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed, or is totally analogous to such conduct.' –The first sentence of Article 7, Paragraph 1 of the Convention, cf. Act no. 62/1994, states the following: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.' The above rules shall be interpreted as meaning that exceptions to the fundamental principle that criminal liability shall be based only on the guilt of the offender must be clearly stated in statute law, cf., *inter alia*, the Supreme Court judgment in the Court Reports 1995, p. 3149. The requirement for clarity with respect to criminal liability, prescribed by law, does not, however, rule out objective criminal liability of individuals.⁶⁷

6.3 Conclusion

On occasion, Article 6, Paragraph 2 of the Convention has been misunderstood as ruling out the reversal of the burden of proof but not objective criminal liability. As has been explained above, the position taken by the Human Rights Court has been that Article 6, Paragraph 2 does not exclude either reversal of the burden of proof or objective criminal liability; rather, it places limitations on them: first, that these exceptions to the main principle of Article 6, Paragraph 2 be provided for by national law, and second, that they meet certain requirements. Furthermore, it can be understood from the Court's decisions that the national courts must proceed with caution in implementing provisions of this sort. Considering this, it can be said that the conclusions of the Supreme Court

65 Supreme Court Reports 1995, p. 3149.

66 Þórmundsson, Jónatan, *Afbrot og refsíðbyrgð I*, Reykjavík 1999, p. 162–163.

67 Supreme Court Reports 2000, p. 280.

in its judgments of 14 December 1995 and 27 January 2000 are consistent with this view, even though the Supreme Court does not make specific reference to Article 6, Section 2 in those judgments.

The above-described position taken by the Human Rights Court appeared clearly in *A.P. and others v Switzerland*. The circumstances of the case were that the applicants, who were the heirs of a deceased man, had been required to pay fines for tax evasion that the deceased was considered to have committed prior to his death. In its judgment, the Court specifies that it is appropriate to demand payment of a tax debt by the estate or the heirs of a deceased person; however, finding them also criminally liable for violations committed by the deceased is another matter. The Court then states as follows:

It is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act ... – In the Court's opinion, such a rule is also required by the presumption of innocence enshrined in Article 6 Paragraph 2 of the Convention. Inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law. There has accordingly been a violation of Article 6 Paragraph 2.⁶⁸

68 Judgment 29 August 1997 (Application no. 19958/92), para 48.