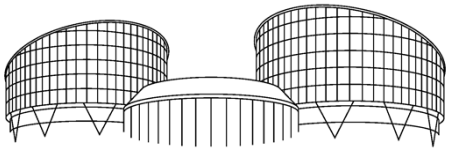

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CORREIA DE MATOS v. PORTUGAL

(Application no. 56402/12)

JUDGMENT

STRASBOURG

4 April 2018

This judgment is final but it may be subject to editorial revision.

In the case of Correia de Matos v. Portugal,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Helena Jäderblom,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Aleš Pejchal,
Krzysztof Wojtyczek,
Iulia Motoc,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak,
Lətif Hüseynov, *judges,*

and Françoise Elens-Passos, *Deputy Registrar,*

Having deliberated in private on 8 February 2017 and on 20 November 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

11. The case originated in an application (no. 56402/12) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr Carlos Correia de Matos ("the applicant"), on 4 August 2012.

2. The applicant was granted leave by a decision of the President of the Grand Chamber of 14 November 2016 to present his own case (Rules 71 § 1 and 36 §§ 2 and 3 of the Rules of Court). The Portuguese Government ("the Government") were represented by their Agent, Ms M.F. da Graça Carvalho, Deputy Attorney-General.

3. The applicant alleged that the decisions of the domestic courts refusing him leave to conduct his own defence in the criminal proceedings against him and requiring that he be represented by a lawyer had violated Article 6 § 3 (c) of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 18 September 2014 the Government were given notice of the application. It was subsequently allocated to the Fourth Section. On 13 September 2016 a Chamber of that Section, composed of András Sajó, President, Vincent A. De Gaetano, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Iulia Motoc, Gabriele Kucsko- Stadlmayer and Marko Bošnjak, judges, and Marialena Tsirli, Section Registrar, decided to relinquish jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention).

6. The applicant and the Government each filed a memorial on the admissibility and merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 February 2017 (Rules 71 and 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms M.F. DA GRAÇA CARVALHO, Deputy Attorney-General, *Agent*,
Mr L.E. PEREIRA DE AZEVEDO, Public Prosecutor, *Adviser*;

(b) *for the applicant*
Mr C. CORREIA DE MATOS, *Applicant*.

The Court heard addresses by Ms da Graça Carvalho and Mr Correia de Matos and their replies to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1944 and lives in Viana do Castelo (Portugal).

A. Background to the case

9. The applicant is a lawyer by training and an auditor by profession. From 1993 onwards, he was no longer authorised to practise as a lawyer. By a decision of the Bar Council of 24 September 1993, the applicant was

suspended from the roll, as the exercise of the profession of lawyer was considered to be incompatible with his practising as an auditor. This decision was published in the Official Gazette in June 2000. When the applicant ceased his activity as an auditor in April 2016, he continued to be suspended from the Bar Council's roll until at least the end of 2016 as the result of a disciplinary sanction imposed on him for having practised as a lawyer while not being authorised to do so.

10. On 28 February 2008, in the context of a set of civil proceedings in which he was nevertheless acting as a lawyer, the applicant criticised the decisions taken by the judge hearing the case, saying that they were not worthy of a judge and that a judge could not lie or omit the truth in the exercise of his functions. The judge in question filed a complaint for insult with the public prosecutor's office. It is not clear from the material before the Court on what basis the applicant was acting as a lawyer in the context of those proceedings given the suspension from the roll referred to above.

B. The proceedings at issue

1. The investigation proceedings

11. On 10 February 2010 the public prosecutor's office at the Baixo-Vouga District Court filed the prosecution's submissions against the applicant on a charge of insulting a judge. As the applicant had not instructed a lawyer, the public prosecutor's office appointed counsel on the basis of Article 64 of the Code of Criminal Procedure (CCP) to conduct the applicant's defence.

12. On 12 March 2010 the applicant lodged a request with the Baixo-Vouga Criminal Investigation Court for the opening of adversarial investigation proceedings (*abertura de instrução*; see paragraph 39 below). He also sought leave to replace his officially appointed defence counsel and represent himself.

13. In an order of 7 September 2010 the court agreed to open the investigation but dismissed the request for officially appointed defence counsel to be replaced and for the applicant to conduct his own defence. It held that the applicant was not entitled to act in the proceedings without the assistance of defence counsel. The court held that under the provisions of Portuguese law, in particular Article 32 of the Constitution and Articles 64 § 3 and 287 § 4 of the CCP (see paragraphs 28, 33 and 40 below), the defendant had the right to be represented by independent counsel, a right which would not be made effective if self-representation were to be allowed. Referring to the Constitutional Court's case-law on the subject, the court found that a defendant who was a lawyer could therefore not act in proceedings as his own counsel.

14. The applicant lodged an appeal with the Coimbra Court of Appeal against the order of 7 September 2010, challenging the decision not to allow him to represent himself in the criminal proceedings.

15. On 21 December 2010 the Coimbra Court of Appeal dismissed the applicant's appeal. It considered the appeal to be admissible despite the fact that it had been lodged by the applicant in person, as it concerned the very issue whether the applicant, as the defendant, was entitled to conduct his own defence. The Court of Appeal stressed that Portuguese law on criminal procedure did not allow the procedural status of defendant to be combined with that of defence counsel in the same proceedings. It required that the defendant be assisted by defence counsel at the hearing before the investigating judge and at the trial in all cases where the proceedings concerned could give rise to a custodial sentence or a public-safety detention order. This reflected the premise that the accused would be better defended when the defence was conducted by a legal professional trained in advocacy. The latter, unencumbered by the emotional burden weighing on a defendant, could provide a lucid, dispassionate and effective defence. The law on criminal procedure was thus intended not to place limits on the defence's action, but to support the proper defence of the accused.

16. On 11 May 2012 the Constitutional Court decided that it was not necessary to adjudicate on the constitutional appeal lodged by the applicant in person, in which he had complained about the lower courts' refusal to grant him leave to represent himself. The Constitutional Court found that the appeal had been neither signed nor endorsed by court-appointed defence counsel. The latter had not replied to the Constitutional Court's query of 11 April 2012 as to whether she endorsed the constitutional appeal signed by the applicant himself.

17. On 20 September 2012 the Baixo-Vouga investigating judge held a hearing (*debate instrutório*), of which the applicant had been notified in person. The judge had previously refused to adjourn the hearing at the applicant's request, finding that the Court of Appeal had already given a final ruling on the applicant's application to represent himself. The applicant failed to attend the hearing, at which his court-appointed counsel was present. The investigating judge confirmed the charge against the applicant and referred the case for trial (*despacho de pronúncia*) before the Baixo-Vouga Criminal Court.

2. The trial proceedings

18. On 12 December 2013 the Baixo-Vouga Criminal Court, following a hearing which the applicant again did not attend but at which his court- appointed defence lawyer was present, found the applicant guilty of aggravated insult (see paragraph 50 below) and ordered him to pay 140 day-fines of nine euros (EUR) each as well as the costs of the proceedings.

19. The applicant, who at no point requested legal aid to cover the cost of his trial, court-appointed counsel or counsel of his own choosing, was ordered, in particular, to pay costs amounting to EUR 150 for his representation by court-appointed counsel. He did not pay these costs and the execution of the cost order was later discontinued for lack of assets which could be seized.

20. In an order dated 1 May 2014 the Baixo-Vouga Criminal Court rejected an appeal by the applicant against the judgment as inadmissible, on the ground that the appeal had not been signed by court-appointed defence counsel or by a lawyer instructed by the applicant. It confirmed that, as had previously been decided in a final decision, the applicant, as the defendant, did not have the right to represent himself in the proceedings.

21. By an order dated 18 November 2014 the Porto Court of Appeal, acting through its President, dismissed a complaint lodged by the applicant in person against the order of the Baixo-Vouga Criminal Court.

22. The Court of Appeal reiterated that, according to Portuguese law and well-established case-law, defendants in criminal proceedings, even if they were themselves lawyers, could not represent themselves but had to be assisted by defence counsel. It stressed that, as had also been argued by the General Council of the Bar Association in Opinion No. E-21/97 (see paragraphs 59-60 below), the provision of a criminal defence constituted a public-order interest. Therefore, the right to a defence could not be waived, even if this meant imposing a defence lawyer on the accused. Moreover, in adversarial proceedings the powers vested by law in the defence were incompatible in many situations with the position of the defendant. This was also clearly the case at the trial, taking into account, for example, the places to be occupied in the courtroom, the wearing of a gown and the cross-examination of witnesses.

23. The Court of Appeal noted that the Constitutional Court had repeatedly confirmed, in particular in judgments nos. 578/2001 and 196/2007 (see paragraphs 52-55 below), that this interpretation and the corresponding legislation – including Article 64 § 1 (d) of the CCP, which stipulates that only defence counsel can lodge appeals (see paragraph 33 below) – was in keeping with the Constitution. Likewise, this approach was not in breach of the International Covenant on Civil and Political Rights (ICCPR) or of the Convention. In Portugal, the accused had an array of procedural rights which went beyond the minimum standards guaranteed by these international instruments.

24. The Court of Appeal explained that Portuguese law on criminal procedure granted accused persons ample opportunity to defend themselves in person. The defendant had a very comprehensive right to intervene in person at any time in the proceedings in order to make requests, offer points of clarification, reply, explain or submit statements (see, in particular, Articles 61 § 1 (b), 98 § 1, 272 § 1, 292 § 2, 332, 341(a) and 343 §§ 1 and 2

of the CCP; paragraphs 30, 42 and 44 below). He also had the right to be the last person to address the court, immediately following the pleadings and before delivery of the judgment (see Article 361 § 1 of the CCP, paragraph 45 below). There was a distinction between, and a dual safeguard emanating from, the mandatory instruction of a lawyer to ensure the accused's "technical" defence and the possibility for the accused to be present and to intervene in the proceedings.

25. Lastly, the Court of Appeal noted that, having no valid reasons to depart from an interpretation rooted in case-law and legal literature, Portugal had not amended its law in this regard either before or after the Views adopted in 2006 by the United Nations Human Rights Committee (see paragraphs 63 et seq. below).

26. As the applicant had not appointed counsel following his application to have the order of 18 November 2014 quashed, the Baixo-Vouga Criminal Court's judgment of 12 December 2013 became final on 6 January 2015.

27. According to the material before the Court, the applicant did not call into question the qualifications or quality of the court-appointed lawyer at any stage in the proceedings before the domestic courts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions on defence in criminal proceedings

1. The Constitution

28. Article 32 of the Constitution of the Portuguese Republic, entitled "Safeguards in criminal proceedings", in so far as relevant, provides:

> "1. Criminal proceedings shall provide all the necessary safeguards of the defence, including the right to appeal. ...
>
> 3. The defendant shall have the right to choose counsel and to be assisted by him in relation to every procedural act. The law shall specify those cases and stages of the proceedings in which the assistance of a lawyer is mandatory. ..."

2. The Code of Criminal Procedure

(a) General provisions on defendants and defence counsel

29. Articles 57 et seq. of the Code of Criminal Procedure (CCP) lay down provisions regarding defendants and their defence counsel. The relevant provisions, in the version in force at the relevant time, are set out below.

30. Article 61 of the CCP on procedural rights and duties provides:

> "1. Unless otherwise provided for by law, the defendant shall, at all stages of the proceedings, have the right to:
>
> (a) be present for all procedural acts that directly affect him;

(b) be heard by the court or by the investigating judge whenever these render a decision that personally affects him;

(c) be informed of the charges against him prior to making any statements before an authority;

(d) refuse to answer any questions put by an authority concerning the charges against him and the substance of his statements in that regard;

(e) choose a lawyer or ask the court to appoint defence counsel to represent him;

(f) be assisted by defence counsel in all procedural acts in which he takes part ...;

(g) take part in the investigation and examination of the case, adduce evidence and request any necessary measures;

(h) be informed of his rights by the judicial authority or police body before which he is required to appear;

(i) appeal, under the law, against any decisions to his detriment. ..."

31. Article 62 of the CCP on defence counsel reads as follows:

"1. The defendant may instruct counsel at any stage of the proceedings. ..."

32. Article 63 of the CCP on the rights of defence counsel provides:

"1. Defence counsel shall exercise the defendant's statutory rights, save those reserved for the defendant himself.

2. The defendant may revoke any measure carried out on his behalf by defence counsel, provided that he does so by means of an explicit statement before any decision has been taken in respect of the measure in question."

33. Rules on compulsory assistance are laid down in Article 64 of the CCP which, prior to its amendment by Law no. 20/2013 of 21 February 2013, provided:

"1. Assistance by defence counsel shall be compulsory:

(a) during the questioning of a defendant who has been arrested or detained;

(b) during the hearing before the investigating judge (*debate instrutório*) and the court hearings, except in proceedings which cannot result in a custodial sentence or a preventive measure entailing detention (*medida de segurança de internamento*);

(c) in any procedural acts other than the person's formal declaration as a defendant, and in cases where the accused has any visual, hearing or speaking impairment or is illiterate, cannot understand Portuguese, is less than 21 years old, or where the issue of his exclusion from or diminished criminal responsibility has been raised;

(d) in the event of an ordinary or extraordinary appeal; ...

(f) where the trial takes place in the absence of the defendant;

(g) in the other cases determined by law.

2. In cases other than those referred to above, the court may appoint defence counsel for a defendant, at the court's or the defendant's request, where the specific circumstances of the case demonstrate that it is necessary or appropriate for the defendant to be assisted.

3. Subject to the provisions of the preceding paragraphs, if the defendant does not have a lawyer or officially appointed defence counsel, the appointment of counsel shall be compulsory from the point at which the person is formally charged. ...

4. In the cases provided for by paragraph 3 above, the defendant shall be informed, in the document setting out the charges, that, if found guilty, he must pay defence counsel's fees except if he is granted legal aid, and that he may replace defence counsel by a lawyer of his own choosing."

34. Since its amendment by Law no. 20/2013 of 21 February 2013, Article 64 § 1 of the CCP reads as follows:

"1. Assistance by defence counsel shall be compulsory:

(a) during the questioning of a defendant who has been arrested or detained;

(b) during questioning by a judicial authority;

(c) during the hearing before the investigating judge and the court hearings;

(d) ..."

The further sub-paragraphs (d) to (h) of the amended Article 64 § 1 essentially reproduce the text of sub-paragraphs (c) to (g) in the previous version of Article 64 § 1.

35. As regards the evolution of the rules on compulsory assistance in Portuguese law, it is apparent from Article 22 § 1 of the CCP of 1929 (adopted by Legislative Decree no. 16489 of 15 February 1929) that there were already certain situations at that time in which assistance by a lawyer was compulsory. Following the adoption of the Portuguese Constitution in 1976, the CCP of 1987 (adopted by Legislative Decree no. 78/87 of 17 February 1987 further to Law no. 43/86 of 26 September 1986 authorising the Government to approve a new CCP) established an adversarial criminal procedure and reinforced the legal position of the public prosecutor's office, but also that of the accused, in order to ensure effective equality of arms and to avoid all measures which could prejudice the accused's personal dignity (see point III.10 of the Preamble to the CCP of 1987 and point 3 of section 2 of Law no. 43/86). Article 64 § 1 of the CCP, as amended in 1987, provided for compulsory assistance by defence counsel notably during the first judicial questioning of the defendant and during the hearing before the investigating judge and the court hearings, except in proceedings which could not result in a custodial sentence or a preventive measure entailing detention. Assistance by counsel was also compulsory in appeal proceedings. Law no. 59/98 of 25 August 1998, as well as Law no. 48/2007 of 29 August 2007 and Law no. 20/2013 of 21 February 2013 maintained the requirement of mandatory assistance in criminal proceedings and extended it to other procedural acts (see paragraphs 33 and 34 above and 36 and 37 below). According to the information available to the Court when Article 64 of the CCP was examined in 2007, three different proposals were submitted to Parliament by the Government and other political groups. The Government proposal,

which was ultimately approved by a majority, indicated that one of the goals of the reform was to extend compulsory representation by a lawyer.

36. Section 1(10) of the Lawyers Act (Law no. 49/2004) of 24 August 2004, which was applicable at the material time, further provided:

> "Where the Code of Criminal Procedure requires the defendant to be assisted by defence counsel, that function shall be carried out by a lawyer under the terms of the law."

37. The Portuguese courts interpret Law no. 49/2004 of 24 August 2004 to the effect that a defendant who is a registered lawyer may never represent himself in criminal proceedings and must be represented by another registered lawyer. They consider the practice of advocacy to be incompatible with any duties or activities – such as those which result from being a defendant in criminal proceedings – which might impair the independence and dignity of the profession (see, for instance, Supreme Court case no. 279/96, judgment of 1 July 2009).

38. Article 66 of the CCP on court-appointed defence counsel further provides:

> "1. Where defence counsel is appointed by the court, the defendant shall be notified thereof if he was not present at the material time. ...
>
> 3. The court may replace court-appointed defence counsel at any time on an application by the defendant that contains a valid ground. ...
>
> 5. Court-appointed counsel shall perform his duties for remuneration, the amount and terms of which shall be decided by the court within the limits set by the scale fixed by the Ministry of Justice ... The payment shall be made, depending on the case, by the defendant, the party assisting the public prosecutor (*assistente*), the civil parties or the Ministry of Justice."

39. Furthermore, the provisions relating to the investigation proceedings contain further general rules on defendants and counsel. The investigation stage (*instrução*) comprises the adversarial judicial supervision of the prosecution's investigation by the investigating judge, as explained in Article 286 of the CCP:

> "1. The investigation stage aims to ensure judicial scrutiny of a decision to prefer charges (*acusar)* or to discontinue an investigation (*arquivar)*, with the aim of deciding whether or not to refer the case for trial.
>
> 2. The investigation stage is optional. ..."

40. Article 287 of the CCP lays down rules on the application for opening of the investigation stage. It provides in paragraph 4:

> "In making the order opening the investigation stage, the investigating judge shall appoint defence counsel in cases where the defendant is not represented by a lawyer or court-appointed defence counsel."

(b) Further relevant provisions concerning the conduct of criminal proceedings and the respective roles of the defendant and counsel therein

(i) The defendant's position

41. In criminal proceedings, the defendant may at any time address the court, file observations, statements and requests with a view to protecting his fundamental rights, and may be the last person to address the court prior to its deliberations (see Articles 61 § 1 (b), 98 § 1, 272 § 1, 292 § 2, 332, 341 (a), 343 §§ 1 and 2 and 361 § 1 of the CCP). The relevant provisions, in so far as they have not been set forth above, provide as follows.

42. Article 98 § 1 of the CCP on observations, statements and requests provides:

> "The defendant ... may file observations, statements and requests at every stage of the proceedings, even if these are not signed by counsel, provided that they are relevant to the subject-matter of the proceedings or are aimed at protecting his fundamental rights. These observations, statements and requests shall always be included in the case file."

43. It is stressed in the domestic courts' case-law that the right under Article 98 § 1 of the CCP "is a practical expression of the constitutional right of petition enshrined in Article 52 of the Constitution" (see Supreme Court of Justice, no. 2300/08, judgment of 25 September 2008, Paragraph I). However, it is not designed to allow the defendant to take the place of defence counsel. The defendant must be assisted by defence counsel during all the procedural acts in which he participates, and especially those which require legal rigour (see Supreme Court of Justice, no. 2300/08, judgment cited above, which the Coimbra Court of Appeal followed, referring to previous case- law, in its judgment of 3 June 2015 (no. 2320/12.2TALRA A.C1)).

44. As to the defendant's right to address the court, Article 272 § 1 of the CCP provides that if an investigation is pending against a specific person in respect of whom there are reasons to suspect that he committed a criminal offence, that person must be questioned as a defendant. Under Article 292 § 2 of the CCP, the investigating judge must question the defendant as soon as he considers it necessary and each time the latter requests it. The presence of the defendant is required save in exceptional cases specified by law (Article 332 § 1 of the CCP). The examination of the evidence at the trial starts with the defendant's statements (Article 341 (a) of the CCP). The presiding judge informs the defendant that he has the right to make statements at any time during the trial, provided that they are relevant to the object of the proceedings, and that he has the right to remain silent (Article 343 § 1 of the CCP). If the defendant agrees to make statements, the court must hear his account in its entirety, subject to the provisions of the preceding paragraph (Article 343 § 2 of the CCP).

45. After the oral pleadings of the public prosecutor's office and defence counsel in particular, the presiding judge asks the defendant whether he wishes to make any other statements in his defence and listens to whatever he has to say in his favour (Article 361 § 1 of the CCP; for the interpretation of that provision by the domestic courts see paragraph 24 above).

(ii) Defence counsel's position

46. As to the role of defence counsel, Article 302 §§ 2 and 4 of the CCP, on the conduct of the hearing before the investigating judge, provides that the judge gives the public prosecutor's office, the lawyer of the prosecuting authority's assistant (*assistente*) and defence counsel the opportunity to request the taking of additional evidence and to summarise their conclusions as to the sufficiency of the evidence gathered and the questions of law which arise.

47. Under the CCP, at the trial the statement as to which facts the defence intends to prove in the proceedings may be presented only by the defendant's lawyer (and not by the defendant in person) (Article 339 § 2). Furthermore, only defence counsel may request that statements be made by the prosecuting authority's assistant (Article 346 § 1) or by the victim (Article 347 § 1), and examine witnesses (Article 348) or suggest questions to be put to witnesses (Article 349) or to experts and technical advisers (Article 350 § 1).

48. Moreover, only defence counsel is given the floor by the presiding judge, following the taking of evidence and the pleadings of the public prosecutor's office in particular, in order to address the court in oral pleadings setting forth the conclusions, in fact and in law, to be drawn from the evidence produced (Article 360 § 1 of the CCP).

B. The Criminal Code

49. Almost all offences laid down in the Portuguese Criminal Code carry the possibility of a custodial sentence, either in combination with or as an alternative to a fine. In exceptional cases, minor offences may be punishable by a fine only (see, for instance, the offences of falsification of or using falsified sealed or stamped items under Article 268 §§ 3 and 4 of the Criminal Code, or the offence of simulation of an administrative offence under Article 366 § 2 of the Criminal Code).

50. Under Articles 181 § 1, 182 and 184, read in conjunction with Article 132 § 2 (l) of the Criminal Code, the offence of aggravated insult, proffered against a judge in the exercise of his functions, is punishable by a maximum term of imprisonment of four months and fifteen days or a maximum of 180 day-fines.

C. Provisions on legal aid

51. The granting of legal aid (see also paragraph 33 above) is governed by Law no. 34/2004 of 29 July 2004 (as amended by Law no. 47/2007 of 28 August 2007). Under section 8(1) of Law no. 34/2004, legal aid is granted to persons who lack the financial resources to meet the costs of the civil or criminal proceedings before a court in which they are involved. In accordance with section 16(1) of that Law, legal aid can take, *inter alia*, the following forms: (1) appointment of a legal representative and payment of his costs, (2) payment of the fees of defence counsel already appointed by a court, and/or (3) full or partial exemption from court fees and other procedural costs. In cases in which legal aid is granted in the form of the appointment of a legal representative, the Bar Association will be responsible for choosing and appointing a lawyer, in accordance with its statutes and rules (see sections 30(1) and 45 of Law no. 34/2004). The recipient of legal aid may, in any proceedings, request the Bar Association to replace the appointed legal representative, giving reasons for the request (section 32(1) of Law no. 34/2004).

D. Domestic practice

1. The Constitutional Court's case-law

(a) Case-law on mandatory representation in criminal proceedings

52. In judgment no. 578/2001 of 18 December 2001 the Constitutional Court held, by three votes to two, that the legislative choice to require accused persons to be represented by defence counsel in criminal proceedings, even if they were themselves lawyers duly registered with the relevant Bar Association, was not incompatible with the Constitution and in particular with Article 32 thereof (see paragraph 28 above).

53. The Constitutional Court found that the statutory provisions in question (see Articles 61, 62 and 64 of the CCP, referred to in paragraphs 30, 31 and 33 above), interpreted to the effect that they made it mandatory, in criminal proceedings, for a lawyer to be appointed for the defendant, had the advantage of guaranteeing that the latter's interests were defended in a dispassionate manner. The court considered that the defendant would lack the disinterested and dispassionate approach necessary for the proper conduct of the proceedings even if, in his naturally subjective view, he felt that his defence was better secured if he conducted it in person in the capacity of "counsel for himself". It further referred to the series of statutory procedural rights granted to the defendant, notably in Article 61 § 1 and Article 63 § 2 of the CCP (see paragraphs 30 and 32 above), the latter giving the defendant the power to invalidate procedural measures taken by defence counsel in his name.

54. Having regard to the case-law of the European Court of Human Rights and the legal literature, the Constitutional Court further found that Article 6 § 3 (c) of the Convention did not prevent States Parties from imposing, by law, an obligation for the defendant to be represented by a lawyer. It was for the States Parties to choose the defendant's means of defence.

55. The Constitutional Court subsequently confirmed that case-law (see, *inter alia*, judgment no. 461/2004 of 23 June 2004, paragraph 5, and judgment no. 196/2007 of 14 March 2007, paragraph 3). In other decisions, the court further explained that the requirement to instruct a lawyer was based on compelling substantive reasons aimed not only at protecting public order, and in particular the interest in the implementation of justice and the law, but also at protecting the interests of the persons represented by counsel (see judgment no. 252/97 of 18 March 1997, paragraph 11). Representation by counsel in criminal proceedings was designed to ensure the participation of qualified professionals capable of ensuring the requisite technical preparations and observance of the ethical principles governing the profession (see judgment no. 461/2004, cited above, paragraph 5).

(b) Case-law on representation before the Constitutional Court

56. In judgment no. 599/2000 of 21 December 2000 the Constitutional Court declared admissible the constitutional appeal of an appellant who was not represented by a lawyer but was a lawyer himself. The court found that Articles 61, 62, 63 and 64 of the CPP were not applicable to constitutional appeals and that there was no other provision which could be invoked to argue that lawyers (*advogados)* could not intervene in person (*advogar em causa própria*) in constitutional appeal proceedings, in which representation by a lawyer was mandatory.

2. The Supreme Court's case-law

57. According to the established case-law of the Supreme Court, a defendant in criminal proceedings cannot represent himself even if he is a lawyer or a judge. The Supreme Court considered that the statutory provisions authorising judges and lawyers to represent themselves before the courts were inapplicable in criminal cases (case no. 1501/97, judgment of 19 March 1998; case no. 3347/01, judgment of 6 December 2001; see also case no. 7/14.0TAVRS.S1, judgment of 20 November 2014, paragraph IV). It further found that the rules of domestic law allowed accused persons to prepare their defence together with defence counsel; they could also submit observations, statements and requests which did not raise questions of law (case no. 7/14, cited above, paragraph XI). The Supreme Court stressed in that context that the dispassionate conduct of a case was a necessary additional safeguard in criminal proceedings (see case no. 7/14.0YGLSB.S1, judgment of 12 June 2014, paragraph B.3). In the

situations covered by Article 64 § 1 of the CCP, the legislature presumed that the accused's personal defence was weakened, thus increasing the need for technical assistance, which the accused could not refuse (see case no. 3236/04, judgment of 7 April 2005, paragraph IV). In criminal proceedings the responsibilities of defence counsel were incompatible with the status of an accused (see, for instance, case no. 3347/01, judgment of 6 December 2001, paragraph I).

3. Case-law of the Courts of Appeal

58. Different Courts of Appeal have reiterated the reasons given by the Constitutional Court and the Supreme Court for requiring defendants to be represented by defence counsel in criminal proceedings even if they were themselves lawyers (see, for instance, Porto Court of Appeal, no. 0240116, judgment of 5 June 2002, and Guimarães Court of Appeal, no. 390/04-2, judgment of 3 May 2004, paragraphs IV-VI).

4. The Portuguese Bar Association's view

59. The General Council of the Portuguese Bar Association, in Opinion No. E-21/97 of 4 May 1999 issued at a lawyer's request, found that the acknowledged right of lawyers to plead on their own behalf in accordance with the provisions of the Statute of the Bar Association did not extend to criminal proceedings in which the lawyer was the defendant.

60. The General Council of the Bar Association argued that under the Portuguese Constitution criminal defence represented a public-order interest in the sense of a guarantee safeguarding the human dignity of all citizens including accused persons. The right to a defence could not, therefore, be waived and defence counsel could be imposed on defendants, exclusively in their interests. Moreover, in adversarial proceedings, the powers attributed by law to defence counsel could not, in many situations, be reconciled with the status of defendant. Under Portuguese law on criminal procedure a defendant in criminal proceedings, even if he was a lawyer, therefore had to be represented by a lawyer of his own choosing or by court-appointed defence counsel.

5. The domestic courts' practice concerning the authorisation of self-representation

61. Notwithstanding its request to that effect, the Court has not been provided by the parties with any example of a case in which a Portuguese court, since the entry into force of the Code of Criminal Procedure in 1987, authorised a defendant in criminal proceedings before it to conduct his or her own defence; likewise, it has not learnt of any such example from other sources. It emerges from the Portuguese courts' judgments (see in particular the judgments cited in paragraph 57 above) that a number of requests of this

nature were received and refused by the Portuguese criminal courts; the Court does not possess information on the exact number of requests of this nature refused by the domestic courts.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The International Covenant on Civil and Political Rights

62. Article 14 § 3 of the ICCPR, in so far as relevant, reads as follows:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. ..."

B. Communication No. 1123/2002 submitted by the applicant to the United Nations Human Rights Committee (HRC) and General Comment No. 32 of the HRC

1. The Views adopted by the HRC

63. On 1 April 2002 the applicant submitted a communication (No. 1123/2002) concerning Portugal to the United Nations Human Rights Committee (HRC) under the Optional Protocol to the ICCPR. He complained that in a set of criminal proceedings in 1996 before the Ponte de Lima District Court for insulting a judge he had not been permitted to conduct his defence himself and had been assigned a lawyer to represent him against his will, in breach of Article 14 § 3 (d) of the ICCPR.

64. The communication was based on the same facts as those at issue in an application previously lodged by the applicant with this Court on 17 April 1999. In its decision of 15 November 2001 (*Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII) a Chamber dismissed the application as manifestly ill-founded, finding that the applicant's defence rights under Article 6 §§ 1 and 3 (c) of the Convention had not been breached (for further details see paragraphs 111-13 below).

65. In its Views adopted on 28 March 2006, the HRC found, by twelve votes to four, that the applicant's right to defend himself in person under Article 14 § 3 (d) of the ICCPR had not been observed. It argued, in essence, that the clear wording of the said provision provided for a defence to be conducted in person "or" through legal assistance of one's own choosing, taking as its point of departure the right to conduct one's own defence. The right to conduct one's own defence, which was a cornerstone

of justice, could be undermined when a lawyer whom the accused did not trust was imposed against the wishes of the accused. The latter might then no longer be able to defend himself effectively as such counsel would not be his assistant (see paragraph 7.3 of the HRC's Views).

66. In the HRC's view, the right to defend oneself without a lawyer was not absolute. The interests of justice could require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of the trial, or facing a grave charge but being unable to act in his own interests, or where it was necessary to protect vulnerable witnesses from further distress caused if the accused were to question them himself. However, any restriction on the accused's wish to defend himself had to have an objective and sufficiently serious purpose and could not go beyond what was necessary to uphold the interests of justice (see paragraph 7.4 of the HRC's Views). The assessment whether in a specific case the assignment of a lawyer was necessary in the interests of justice had to be made by the competent courts (see paragraph 7.5 of the HRC's Views).

67. In the case before it, the HRC noted that under the Portuguese legislation and the case-law of the Supreme Court an accused could never be released from the requirement to be represented by counsel in criminal proceedings, even if he was a lawyer himself. It further observed that the law took no account of the seriousness of the charges or the behaviour of the accused. Moreover, Portugal had not provided any objective and sufficiently serious reasons to explain why, in the relatively simple case concerned, the absence of a court-appointed lawyer would have jeopardised the interests of justice (see paragraph 7.5 of the HRC's Views). The HRC found that Portugal should amend its laws to ensure conformity with Article 14 § 3 (d) of the ICCPR (see paragraph 8 of the HRC's Views). The majority of the HRC did not explicitly address the Court's reasoning in its decision of 15 November 2001 concerning application no. 48188/99.

2. General Comment No. 32 of the HRC

68. The HRC reiterated its Views in respect of communication No. 1123/2002 in General Comment No. 32 entitled "Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial", adopted at its 90th session (9 to 27 July 2007) (see document CCPR/C/GC/32, paragraph 37).

69. In that same General Comment, the HRC also stated, by reference to communication No. 450/1991, *I.P. v. Finland* (paragraph 6.2 of the decision on admissibility adopted on 26 July 1993), that the "right of equal access to a court, embodied in article 14, paragraph 1, concern[ed] access to first instance procedures and [did] not address the issue of the right to appeal or other remedies."

3. Subsequent developments in Portugal

70. The Portuguese legislature has not amended the Portuguese legislation to date in order to provide for the possibility for defendants, in certain circumstances, to defend themselves in person, in accordance with the Views adopted by the HRC. In their fourth periodic report submitted under Article 40 of the ICCPR in January 2011, the Portuguese authorities referred to the "very awkward position regarding the fulfilment of [Portugal's] international human rights obligations" caused by the differences between the case-law of this Court and the decision of the HRC in respect of the same case (see document CCPR/C/PRT/4 of 25 February 2011, paragraphs 272 to 275).

71. The HRC, in its concluding observations on the said report adopted at its 106th session (15 October to 2 November 2012), considered that Portugal should implement the recommendation contained in its Views in respect of communication No. 1123/2002, make the current rule of obligatory representation by a lawyer less rigid and consider the compulsory provision of back-up counsel to advise defendants who defended themselves (see document CCPR/C/PRT/CO/4 of 23 November 2012, paragraph 14).

72. The Portuguese Supreme Court, in its judgment of 20 November 2014 (cited above at paragraph 57), adopted in a different set of proceedings brought by the applicant in the present case, took note of the decision rendered by this Court in application no. 48188/99 and of the Views adopted by the HRC in communication No. 1123/2002 (see paragraphs 63-67 above). It found that the implementation of the said Views by means of amendment of the domestic law, which prohibited self-representation by defendants in criminal proceedings, would break with a legal tradition and cause innumerable and foreseeable disturbances. For that reason, the Portuguese legislation had not been changed to give effect to the HRC's Views (see paragraphs VI-IX of the judgment).

C. Rules of international criminal tribunals

73. Article 67 § 1 (d) of the Statute of the International Criminal Court (ICC) and Article 21 § 4 (d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provide for the right of an accused to conduct his defence in person or through legal assistance of his own choosing. A number of accused before the ICTY in particular have availed themselves of the right, as interpreted by that court, to conduct their defence without the assistance of counsel. In 2008 the ICTY adopted Rule 45*ter* of the Rules of Procedure and Evidence with a view to codifying its case-law. The relevant provision states that the Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign counsel to represent the interests of the accused.

D. Recommendation No. R(2000)21

74. Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies, in so far as relevant, provides:

> "The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, ...
>
> Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law, in which lawyers take part, ...
>
> Principle III – Role and duty of lawyers
>
> 1. Bar associations or other lawyers' professional associations should draw up professional standards and codes of conduct and should ensure that, in defending the legitimate rights and interests of their clients, lawyers have a duty to act independently, diligently and fairly. ...
>
> 4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. ...
>
> Principle V – Associations
>
> ... 4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to: ...
>
> b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity; ..."

75. The Council of Bars and Law Societies of Europe ("the CCBE") has adopted two foundation texts: the Code of Conduct for European Lawyers, which dates back to 28 October 1988 and has undergone a number of amendments, and the Charter of Core Principles of the European Legal Profession, which was adopted on 24 November 2006. The Charter contains a list of ten core principles common to the national and international rules regulating the legal profession, amongst which the following principles are enumerated:

> "... (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; ...
>
> (h) respect towards professional colleagues;
>
> (i) respect for the rule of law and the fair administration of justice; and
>
> (j) the self-regulation of the legal profession."

IV. RELEVANT EUROPEAN UNION LAW

76. Article 47(2) of the Charter of Fundamental Rights of the European Union (EU) on the right to an effective remedy and to a fair trial provides:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ... Everyone shall have the possibility of being advised, defended and represented."

According to the explanations referred to in Article 52(7) of the Charter, the second paragraph of Article 47 corresponds to Article 6 § 1 of the Convention. The explanations state that, in all respects other than their scope, the guarantees afforded by the Convention apply in a similar way to the Union.

77. Article 48(2) of the Charter of Fundamental Rights on the presumption of innocence and the rights of the defence provides:

> "Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

According to the aforementioned explanations, Article 48 is the same as Article 6 §§ 2 and 3 of the Convention.

78. Article 52(3) of the Charter of Fundamental Rights on the scope and interpretation of rights and principles reads as follows:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

79. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, which entered into force in November 2013 (see OJ 2013 L 294, pp. 1 to 12) and was to be transposed by the EU Member States by 27 November 2016, provides as follows in its 53rd recital:

> "Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case-law of the European Court of Human Rights."

80. The Directive further provides, in particular:

Article 3

The right of access to a lawyer in criminal proceedings

> "1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.
>
> ...
>
> 4. ... Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise

effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9."

Article 9

Waiver

"1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 ...:

(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and

(b) the waiver is given voluntarily and unequivocally.

..."

Article 14

Non-regression clause

"Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection."

V. RELEVANT COMPARATIVE-LAW MATERIALS

81. According to the material before the Court, out of thirty-five Contracting Parties to the Convention other than Portugal, thirty-one (Austria, Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Republic of Moldova, Monaco, Montenegro, the Netherlands, Poland, Romania, the Russian Federation, Slovakia, Slovenia, Sweden, Turkey, Ukraine and the United Kingdom) have established the right to conduct one's own defence in criminal proceedings as a general rule, whereas four States (Italy, Norway, San Marino and Spain), as a general rule, prohibit self-representation. However, irrespective of whether these States allow or prohibit the conduct by defendants of their own defence as a general rule, almost all of them provide for a number of exceptions to the rule.

82. Twenty-nine out of the thirty-one Contracting Parties in which self-representation is, as a general rule, allowed restrict self-representation to a greater or lesser extent on the basis of criteria relating to the particular circumstances of the case. Only Ireland and Poland do not provide for such exceptions and permit defendants to conduct their own defence if they so wish, regardless of any further factors. The criteria which are, alternatively or cumulatively, taken into account by domestic legislation and/or the domestic courts in the said twenty-nine member States for restricting the right to conduct one's own defence include the level of jurisdiction

concerned, the complexity of the case, the severity of the offence the defendant is charged with and the defendant's capacity to conduct his own defence [including factors such as his presence or absence at the trial and his willingness not to disturb its good order, the defendant's age (under age/of age) and mental health, and his ability or otherwise to speak the language of the trial]. Many of these States prescribe, in particular, mandatory legal assistance before the higher courts where legal arguments have to be presented and in cases in which the defendant is charged with a more serious offence that is punishable by imprisonment for a certain minimum period.

83. The four member States in which there is a general prohibition on self-representation also provide for exceptions dependent on, alternatively or cumulatively, the level of jurisdiction concerned, the complexity of the case, the severity of the offence the defendant is charged with and the defendant's capacity to conduct his or her own defence. Italy and Spain, in particular, permit defendants to conduct their own defence in criminal proceedings concerning minor offences.

84. As regards the rules on self-representation for defendants in criminal proceedings who have legal training, twenty-nine out of the thirty-five member States surveyed (that is, all except Greece, Italy, Luxembourg, the Netherlands, Poland and Spain) make no specific provision for this group of persons. Out of the six Member States which have specific rules in this regard, five allow defendants who are lawyers entitled to plead before the courts greater freedom to conduct their own defence compared with those without legal training or those who belong to a different legal profession. Spain, for instance, which as a general rule prohibits defendants from conducting their own defence, permits lawyers to do so. Only in Luxembourg is the right to conduct one's own defence more restricted for lawyers than for certain other defendants belonging to a different legal profession.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

85. The applicant complained of the decisions of the domestic courts refusing him leave to conduct his own defence in the criminal proceedings against him and requiring that he be represented by a lawyer. He relied on Article 6 § 3 (c) of the Convention. Article 6, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ..."

86. The Government contested that argument.

A. Admissibility

87. In the Government's submission, the application was inadmissible as being manifestly ill-founded, as the applicant's defence rights under Article 6 §§ 1 and 3 (c) of the Convention had not been breached. The applicant contested that view.

88. The Court, having regard to the material before it, finds that the present application raises an issue in respect of the observance by the respondent State of the applicant's right to defend himself in person under Article 6 §§ 1 and 3 (c) of the Convention. It is therefore not manifestly ill- founded within the meaning of Article 35 § 3 (a) of the Convention.

89. The application is likewise not inadmissible on any other grounds. The Court reiterates in this context that the protection afforded by Article 6 §§ 1 and 3 applies to a person subject to a "criminal charge", which exists, in particular, from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 249, ECHR 2016, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, ECHR 2017 (extracts), with further references). Therefore, no issue arises in respect of the applicability of Article 6 in the present case in so far as the applicant complained of a breach of his defence rights including during the investigation proceedings.

90. The Court further observes that the Government did not raise any other plea of inadmissibility in accordance with Rules 54 and 55 of the Rules of Court. The application must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

91. In the applicant's view, the impugned decisions of the Portuguese courts prohibiting him from conducting his own defence without the assistance of a lawyer in the criminal proceedings against him violated Article 6 §§ 1 and 3 (c) of the Convention.

92. The applicant submitted that the said decisions failed to comply with Article 6 §§ 1 and 3 (c) in two respects. Firstly, they prevented him as a citizen from conducting his own defence. Secondly, they prevented him as a lawyer from appointing the lawyer of his own choosing in the proceedings, namely himself. He claimed in this context that his suspension from the Portuguese Bar since 1993 owing to the alleged incompatibility of his functions as a lawyer and as an auditor was null and void.

93. The applicant considered the Court's case-law on self-representation, and in particular the decision in application no. 48188/99, previously brought by him before this Court (see *Correia de Matos*, cited above; see also paragraphs 111-13 below), to be incompatible with the text of Article 6 §§ 1 and 3 (c) of the Convention. The latter decision therefore had to be declared void. He argued that the appointment by the courts of defence counsel was intended to provide for legal assistance, but had developed into a broad power on the part of the courts to appoint a lawyer for the defendant, whereas this should be left to the defendant's discretion.

94. According to the applicant, in the Portuguese legal system the right to legal assistance had been converted into an absolute obligation to be assisted by a lawyer, which negated the right to conduct one's own defence. He stressed that Article 64 of the CCP (see paragraph 33 above) required persons charged with an offence to be represented by counsel at all stages of the proceedings including the investigation proceedings, without any reasons needing to be given for not permitting self-representation.

95. In view of the lack of provision of reasons under Portuguese law, there were neither relevant nor sufficient grounds, as required by this Court's case-law, to exclude self-representation, the exclusion of which was not in the interests of all defendants. It could not be decided by law in a general and abstract manner whether, in a particular case, self-representation or representation by counsel would result in a more effective defence. The Portuguese courts did not have any margin of appreciation in this regard. A lawyer-defendant had to be considered capable of properly assessing his own interests and of conducting his defence effectively. Even in a simple case, it was inexplicable why an advocate who was less experienced and less familiar with the case would be in a better position to conduct the defence effectively than a trained lawyer- defendant who had prepared his defence over a long period.

96. As to the possibilities for defendants under Portuguese law to participate in the proceedings against them, the applicant submitted that, in theory, the defendant could intervene during the proceedings and submit statements or evidence and request procedural steps he or she deemed necessary (Articles 61 § 1 (g) and 98 § 1 of the CCP, see paragraphs 30 and 42-43 above). However, the domestic courts would not take any action in response to the defendant's statements and requests unless counsel ratified the proceedings, as the defendant's rights were exercised by defence

counsel (Article 63 § 1 of the CCP, see paragraph 32 above). Moreover, defendants could not plead orally (Article 302 § 2 of the CCP, see paragraph 46 above), but could only add any further points in their defence following counsel's pleadings (Article 361 § 1 of the CCP, see paragraph 45 above), when, according to the applicant, they were already virtually convicted, and could only proceed with an appeal with the assistance of defence counsel (Article 64 § 1 of the CCP). Finally, under Article 64 of the CCP, it was for convicted defendants to pay the fees of officially appointed defence counsel unless they had been granted legal aid.

97. The applicant claimed that in the impugned criminal proceedings before the domestic courts, he had not had the opportunity to present his defence. He argued that a court-appointed lawyer from a small village, who was probably inexperienced and who had sought to be exempted from the appointment, had defended him against his express will, had failed to submit an essential document at the trial proving his innocence and had failed to sign and endorse his appeals. It had not been in the interests of justice for him to be defended by that lawyer, a situation which had prevented him from conducting his defence in the way he wished, and to be charged for the associated costs. He had therefore not communicated with his court-appointed counsel.

(b) The Government

98. The Government took the view that the criminal proceedings against the applicant, in which he had been prohibited from conducting his own defence without the assistance of defence counsel, had complied with Article 6 §§ 1 and 3 (c) of the Convention.

99. In the Government's submission, the Court had established the principles applicable to a case like the present one, in particular in its decision in the previous, similar application lodged by the applicant (*Correia de Matos*, cited above) and in the case-law cited therein. There were no compelling reasons to amend these principles, which complied with the principle of subsidiarity. It was clear, having regard to the wording of Article 6 § 3 (c), which gave the accused the right "to defend himself in person or through legal assistance of his own choosing", that the accused did not have an absolute right to conduct his or her own defence.

100. Under the Court's well-established case-law in respect of Article 6 §§ 1 and 3 (c), it fell within the national authorities' margin of appreciation to define the manner in which criminal procedure should provide for the defence of the accused. It was for the domestic authorities to decide whether, having regard to the interests of justice, the defence in criminal proceedings could be conducted by the defendant in person, in particular where the latter was a lawyer, or whether a lawyer other than the defendant should be appointed.

101. In the Government's view, the reasons why Portuguese law provided for compulsory representation by a lawyer at certain stages of the criminal proceedings were relevant and sufficient, as required by the Court's case-law. They explained that under Article 64 § 1 of the CCP the assistance of defence counsel was not mandatory at all stages of the proceedings, but only for specific situations and procedural acts of particular importance for the outcome of the proceedings, notably if a deprivation of liberty was at stake, for certain procedural acts of a particularly technical nature such as appeals, or where the defendant was particularly vulnerable.

102. The requirement under the Code of Criminal Procedure for defendants to be legally represented by counsel in these circumstances reflected a long-standing domestic legal tradition which was very widely accepted in the legal literature, by the Bar, and in the case-law of the Portuguese courts including the Constitutional Court. It was aimed at securing the defendant's fundamental right to an effective defence. It thus served an important public interest, the interest in the proper administration of justice and in ensuring a fair trial that safeguarded the principle of equality of arms as well as the interests of the accused. It contributed to the objective and dispassionate conduct of the proceedings, which the defendant himself was not in a good position to ensure. It further guaranteed respect for the dignity of the defendant in the proceedings and ensured that all elements which were favourable to the defendant's legal position were brought before the court. Therefore, the defendant could not waive his or her right to legal assistance in the situations covered by Article 64 § 1 of the CCP. Portuguese law thus did not restrict the accused's rights of defence; if anything, it protected those rights excessively, but this approach could not entail a breach of the right to a fair trial.

103. Moreover, the Government explained that specific circumstances relevant to the authorisation or prohibition of self-representation (such as the complexity of the case and the gravity of its implications for the defendant, the latter's personality, vulnerability or special needs and the stage of the proceedings) had been taken into account by the legislature in determining, in a general and abstract manner, the circumstances in which self-representation was prohibited.

104. The Government further argued that under Portuguese law on criminal procedure, defence counsel was not only a representative of the defendant. Counsel was an autonomous organ of the administration of justice whose task was to conduct an effective technical defence of the accused. The status and role of counsel could not, therefore, be merged with that of the defendant, even if the latter was a lawyer by profession.

105. The technical defence reserved for counsel, which included, for instance, the cross-examination of witnesses or experts and the lodging of appeals, co-existed with the personal defence conducted by the defendant

himself. Defendants had ample rights to intervene in person in the proceedings against them. They had the right to be present at all stages of the proceedings which affected them, to make statements or remain silent concerning the substance of the charge; they could submit observations, statements and requests which, without having to be signed by counsel, were added to the case file (Article 98 § 1 of the CCP), could revoke any measure carried out on their behalf by counsel under the circumstances set out in Article 63 § 2 of the CCP, and were the last persons to address the court prior to the delivery of the judgment (Article 361 § 1 of the CCP).

106. The Government also explained that the provisions of Portuguese law requiring a defendant in criminal proceedings to be assisted, at certain points in the procedure, by defence counsel, had not been amended following the Views adopted by the HRC on 28 March 2006 concerning communication No. 1123/2002 (see paragraphs 63 et seq. above). Being confronted with two contradictory decisions by two international supervisory bodies, they noted that only this Court had judicial powers and that its decisions had the force of *res judicata*. This Court, in its prior decision on the application brought by the same applicant concerning the same facts (*Correia de Matos*, cited above; see paragraphs 111-13 below), had taken the view that the domestic legal approach was not in breach of the applicant's defence rights.

107. As to the applicant's defence in the criminal proceedings at issue, the fact that the applicant had not conducted his own defence had to be attributed to his choice not to be present at the key stages of the proceedings. Article 6 §§ 1 and 3 (c) did not require that defendants be allowed to conduct their own technical defence where, as under Portuguese law, they could present their personal defence alongside counsel.

108. Moreover, the applicant had refused in the proceedings before the Portuguese courts to be defended by counsel and had demonstrated thereby that he lacked the objective and dispassionate approach necessary to conduct his own defence.

2. The Court's assessment

(a) Preliminary remarks concerning the content and context of the applicant's complaint

109. The Court observes at the outset that there are two aspects to the applicant's complaint about the domestic courts' decision refusing him leave to conduct his own defence in the criminal proceedings against him and requiring that he be represented by defence counsel despite the fact that he was a trained lawyer himself. The applicant mainly complained that, despite his legal training, he had not been allowed to defend himself in person, for the purposes of the first alternative of Article 6 § 3 (c), without any legal assistance by counsel. He further claimed that he had not been

able to defend himself through legal assistance of his own choosing, for the purposes of the second alternative of Article 6 § 3 (c), namely by choosing to act as his own counsel in the criminal proceedings against him.

110. The Court considers, in the light of the parties' arguments, that the thrust of the case before it concerns the scope of the right for defendants with legal training to defend themselves in person. It observes, however, that the applicant had been suspended from the Bar Council's roll at the time of the impugned proceedings before the domestic courts and that he could not, therefore, have acted as counsel in his own case irrespective of the rules of Portuguese law on criminal procedure regarding mandatory representation (see paragraph 9 above).

111. Furthermore, as indicated in paragraph 64, the applicant had previously lodged an application with this Court following his conviction in 1998 in criminal proceedings before the Ponte de Lima District Court for insulting a judge. In that application, lodged in 1999, he also complained under Article 6 § 3 (c) that he had not been permitted to conduct his own defence and that he had been assigned a lawyer to represent him against his will.

112. In its decision of 15 November 2001 (*Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII) a Chamber of this Court held as follows:

> "... in this area it is essential for applicants to be in a position to present their defence appropriately in accordance with the requirements of a fair trial. However, the decision to allow an accused to defend himself or herself in person or to assign him or her a lawyer does still fall within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.
>
> It should be stressed that the reasons relied on for requiring compulsory representation by a lawyer for certain stages of the proceedings are, in the Court's view, sufficient and relevant. It is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests. The domestic courts are therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer.
>
> The fact that the accused is himself also a lawyer, as is the case here – even if the applicant's name has been temporarily removed from the Bar Council's roll – does not in any way undermine the preceding observations. Although it is true that, as a general rule, lawyers can act in person before a court, the relevant courts are nonetheless entitled to consider that the interests of justice require the appointment of a representative to act for a lawyer charged with a criminal offence and who may therefore, for that very reason, not be in a position to assess the interests at stake properly or, accordingly, to conduct his own defence effectively. In the Court's view, the issue again falls within the limits of the margin of appreciation afforded to the national authorities.
>
> The Court considers that in the instant case the applicant's defence was conducted appropriately. It points out in that connection that the applicant did not allege that he had been unable to submit his own version of the facts to the courts in question and

that he was represented by an officially assigned lawyer at the hearing of 15 December 1998."

113. The Chamber therefore dismissed the application as manifestly ill- founded, finding that the applicant's defence rights under Article 6 §§ 1 and 3 (c) of the Convention had not been breached.

114. The same facts formed the basis for the communication concerning Portugal subsequently submitted to the HRC and detailed in paragraphs 63- 67 above.

(b) General principles

(i) Nature and scope of the Court's assessment

115. The Court reiterates at the outset that the Convention does not provide for the institution of an *actio popularis*. Under the Court's well- established case-law, in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law *in abstracto*. Instead, it must determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see, variously, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014; *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015 (extracts); and *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, and the authorities cited therein).

116. The Court next draws attention to the fundamentally subsidiary role of the Convention system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, among other authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012; and *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017).

117. Where the legislature enjoys a margin of appreciation, the latter in principle extends both to its decision to intervene in a given subject area and, once having intervened, to the detailed rules it lays down in order to ensure that the legislation is Convention compliant and achieve a balance between any competing public and private interests. However, this does not mean that the choices made and solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to

determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by those legislative choices (see, *mutatis mutandis*, *S.H. and Others v. Austria* [GC], no. 57813/00, § 97, ECHR 2011; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts); and *Garib*, cited above, § 138).

118. When examining the applicant's complaint about the refusal of the domestic courts pursuant to domestic law to grant him leave to conduct his own defence in the criminal proceedings against him, the Court will thus have regard to its well-established case-law on the scope of the right to defend oneself pursuant to Article 6 of the Convention and to the margin of appreciation the Convention has traditionally afforded member States in that regard. It will also examine the legislative framework in Portuguese law requiring mandatory representation of defendants in almost all criminal proceedings and the specific application of that legislation in the present case, by the domestic courts, in the light of the requirement to ensure the fairness of the proceedings as a whole.

(ii) The scope of the right to defend oneself in person

119. According to the Court's well-established case-law, the guarantees contained in paragraph 3 of Article 6 are specific aspects of the general concept of a fair trial set forth in paragraph 1. The various rights, of which a non-exhaustive list appears in paragraph 3, reflect certain of the aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots. The Court therefore considers complaints under Article 6 § 3 under paragraphs 1 and 3 of Article 6 taken together (see, *inter alia*, *Meftah and Others v. France* [GC], nos. 32911/96 and 2 others, § 40, ECHR 2002-VII, with further references).

120. The minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases, are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others*, cited above, § 251 with further references).

121. Article 6 § 3 (c) confers on a person charged with a criminal offence the right "to defend himself in person or through legal assistance of his own choosing". Notwithstanding the importance of the relationship of confidence between a lawyer and his client, the latter right is not absolute. The Court has held that it is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them (see *Dvorski v. Croatia* [GC], no. 25703/11, § 79, ECHR 2015 and the authorities cited therein).

122. According to the long-established case-law of both the Commission and the Court, Article 6 §§ 1 and 3 (c) thus guarantees that proceedings against the accused will not take place without adequate representation for the defence, but it does not necessarily give the accused the right to decide himself in what manner his defence should be assured (see *Correia de Matos*, cited above; *Mayzit v. Russia*, no. 63378/00, § 65, 20 January 2005; and *Breukhoven v. the Czech Republic*, no. 44438/06, § 60, 21 July 2011). The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court (see *X. v. Norway*, no. 5923/72, Commission decision of 30 May 1975, Decisions and Reports (DR) 3, p. 44; *Thorgeirson v. Iceland*, no. 13778/88, Commission decision of 14 March 1990; *Correia de Matos*, cited above; *Mayzit*, cited above, § 65; *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 95, 2 November 2010; and *Breukhoven*, cited above, § 60).

123. The decision whether to allow an accused to defend himself or herself in person without the assistance of a lawyer or instead to assign a lawyer to represent him or her falls within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence (see, *inter alia*, *Weber v. Switzerland*, no. 24501/94, Commission decision of 17 May 1995; *Correia de Matos*, cited above, with further references; and, as a more recent example, *X v. Finland*, no. 34806/04, § 182, ECHR 2012 (extracts)).

124. Furthermore, the Court's case-law has recognised that requiring compulsory representation by a registered lawyer is a measure taken in the interests of the accused, and is designed to ensure the proper defence of his or her interests in the criminal proceedings. The Court has held that the domestic courts are therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer (see *Correia de Matos*, cited above, and *X v. Finland*, cited above, § 182). In coming to that conclusion, the Court has regard to the aforementioned margin of appreciation and may also take into account the terms of the relevant domestic legislation, which may empower or oblige the competent court to appoint a lawyer, even against the accused's wishes (compare, *mutatis mutandis*, *Croissant v. Germany*, 25 September 1992, § 27, Series A no. 237-B).

125. The Court observes that these general principles laid down prior to application no. 48188/99, applied therein and reapplied subsequently (see paragraphs 122-24 above) thus recognise the margin of appreciation accorded to the Contracting States in determining how the defence of an accused who wishes to defend himself in person is to be assured. However,

as is also apparent from this well-established case-law, the margin of appreciation is not unlimited.

126. The Court has made clear that when exercising the choice which Article 6 §§ 1 and 3 (c) confers on them, the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Dvorski*, cited above, § 79 and the case-law cited therein). In the Court's view, this requirement entails an examination of the relevant and sufficient grounds provided by the domestic legislature and, when applying the relevant provisions of domestic law in the specific case of the applicant, by the domestic courts. At the level of the legislature, the legal standards and developments in other Council of Europe member States, in European Union law and international law more generally may be of some relevance. As regards the application of the impugned domestic legislation by the domestic courts, an examination of the relevance and sufficiency of the reasons provided will essentially form part of the Court's evaluation of the overall fairness of the criminal proceedings. Indeed, as the Court has repeatedly held, the intrinsic aim of the minimum rights guaranteed by Article 6 § 3 is to contribute to ensuring the fairness of the criminal proceedings as a whole, which is the Court's primary concern under Article 6 § 1 (see, in this regard, *Ibrahim and Others*, cited above, §§ 250- 51, and *Simeonovi*, cited above, § 113).

(iii) Limits on the margin of appreciation

127. The Court's case-law provides examples demonstrating that the States' margin of appreciation is not unlimited in the context of Article 6 §§ 1 and 3 (c).

128. The fact that States cannot be automatically considered to have complied with the defence rights of a person charged with a criminal offence where they decide to choose one of the two alternatives under Article 6 §§ 1 and 3 (c) is illustrated, *inter alia*, by other case-law under Article 6 § 1, not least that relating to the validity of a defendant's waiver of his Article 6 rights. If a waiver authorised by domestic law is to be effective for Convention purposes, it must be established in an unequivocal manner, must not run counter to any important public interest and must be attended by minimum safeguards commensurate with its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II; *Dvorski*, cited above, §§ 100-01, ECHR 2015; and *Simeonovi*, cited above, § 115). The States' margin of appreciation to authorise the accused's defence in person alone is thus not unfettered in this context either and its limits are linked to the protection of the accused and the public interests at stake.

129. As indicated previously (see paragraph 118 above), the Court has repeatedly held that the choices made by the legislature are not beyond its

scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. It has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty of litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (compare *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts), with further references).

130. Although the Contracting Parties to the Convention may choose, in accordance with the margin of appreciation afforded by the Court's well- established case-law (see paragraphs 119-26 above), whether to provide for mandatory legal representation, when assessing the relevance and sufficiency of the grounds supporting such a choice and whether a State has remained within the bounds of that margin the Court may have regard to how other States have exercised their choice and the criteria they rely on, as well as to developments in international and, where relevant, EU law.

131. The Court observes in this context that the comparative-law material before it shows that the Contracting Parties to the Convention surveyed – irrespective of whether they allow or prohibit the conduct by the accused of his or her own defence as a general rule – have a tendency to permit the accused's defence in person without assistance by counsel in a more individualised manner. Regard is had to such factors as the level of jurisdiction concerned, the severity of the offence and the capacity of the accused to conduct his or her own defence (see, in detail, paragraphs 81-84 above).

132. The Court observes that it has taken into consideration similar factors in the context of its examination of the compliance of State measures with the other requirements of Article 6 § 3 (c), notably in determining whether the interests of justice require that free legal assistance be granted to the applicant. This is to be judged by reference to the facts of the case as a whole, having regard, *inter alia*, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the applicant (see *Quaranta v. Switzerland*, 24 May 1991, §§ 32-36, Series A no. 205; *Güney v. Sweden* (dec.), no. 40768/06, 17 June 2008; *Zdravko Stanev v. Bulgaria*, no. 32238/04, § 38, 6 November 2012; *Mikhaylova v. Russia*, no. 46998/08, § 79, 19 November 2015; and *Jemeļjanovs v. Latvia*, no. 37364/05, § 89, 6 October 2016).

133. With regard to public international law, the Court observes that the wording of Article 14 § 3 (d) of the ICCPR corresponds to Article 6 § 3 (c)

of the Convention. However, the HRC, in its General Comment No. 32 adopted in July 2007 (see paragraph 68 above), which reflected the Views expressed by the HRC in March 2006 in communication No. 1123/2002 brought by the applicant before it (see paragraphs 63-67 above), found that under Article 14 § 3 (d) any restriction of the accused's wish to defend himself in person had to have an objective and sufficiently serious purpose and could not go beyond what was necessary to uphold the interests of justice. The interests of justice could require mandatory representation by counsel in cases of defendants obstructing the proper conduct of the trial, facing a grave charge but being unable to act in their own interests, or where it was necessary to protect vulnerable witnesses. However, the law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel, notably in relatively simple cases concerning less serious charges and where the defendant was capable of properly conducting his own defence.

134. The Court observes in this context that, when interpreting the provisions of the Convention, it has had regard, on a number of occasions, to the Views adopted by the HRC and its interpretation of the provisions of the ICCPR (see, *inter alia*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 114 and 124, ECHR 2005-I; *Nada v. Switzerland* [GC], no. 10593/08, §§ 188 and 194, ECHR 2012; and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 140-41 and 143, ECHR 2016). The Convention, including Article 6, cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights (compare *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 35, ECHR 2001-XI (extracts); *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and *Magyar Helsinki Bizottság*, cited above, § 138). Indeed, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.

135. However, even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the HRC and by this Court may not always correspond. This is illustrated, for instance, by the interpretation of the scope of the right of access to court by the HRC and by this Court. The HRC considers that the right of access to court under Article 14 § 1 ICCPR concerns access to first-instance procedures and does not address the issue of the right to appeal (see paragraph 70 above). In its well-established case-law, the Court, for its part, has held that while Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, where such courts exist, the guarantees of Article 6

must be complied with, for instance by guaranteeing litigants an effective right of access to court (see, *inter alia*, *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 37, *Reports of Judgments and Decisions* 1997-VIII, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 97, ECHR 2009 with further references).

136. As regards EU law, the terms of the Charter of Fundamental Rights of the European Union, the explanatory notes which accompany it and Directive 2013/48/EU suggest that the rights guaranteed by Articles 47, second paragraph, and 48(2) of the Charter correspond to those in Article 6 §§ 1, 2 and 3 of the Convention. As for the Directive, which does not appear to have been the subject of an interpretation by the Court of Justice of the European Union to date, both Articles 3(4) ("Notwithstanding the provisions of national law concerning the mandatory presence of a lawyer ..."), and 9(1) ("Without prejudice to national law requiring the mandatory presence or assistance of a lawyer ..."), appear to leave the choice regarding whether or not to opt for a system of mandatory legal representation to individual Member States.

137. In sum, the Court considers that the standards adopted by other Contracting Parties to the Convention and the international developments outlined above should be considered both by the Contracting Parties when carrying out the parliamentary review referred to above and by the Court when it exercises its supervisory function. However, given the considerable freedom in the choice of means which the Court's well-established case-law has conferred on those States to ensure that their judicial systems are in compliance with the requirements of the right to defend oneself "in person or through legal assistance" in Article 6 § 3 (c) (see paragraphs 123-26 above), and given that the intrinsic aim of the latter provision is to contribute to ensuring the fairness of the criminal proceedings as a whole (see paragraphs 120 and 126 above), those standards are not determinative. Indeed, were they determinative, the member States' freedom regarding the choice of means and the margin of appreciation afforded to them when exercising that choice would be excessively reduced. The Court observes that an absolute bar against the right to defend oneself in person in criminal proceedings without the assistance of counsel may, under certain circumstances, be excessive. That being said, while there may be a tendency amongst the Contracting Parties to the Convention to recognise the right of an accused to defend him or herself without the assistance of a registered lawyer, there is no consensus as such and even national legislations which provide for such a right vary considerably in when and how they do so.

(iv) The role of courts and lawyers in the administration of justice

138. As the present application derives from the prosecution of the applicant for insulting a judge (see paragraph 10 above), it is worth briefly

recalling the Court's case-law on the role of courts and lawyers in the administration of justice.

139. The Court reiterates the most important role played by lawyers in the administration of justice. It has frequently referred to the fact that the specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts and has pointed to the fact that, for members of the public to have confidence in the administration of justice, they must have confidence in the ability of the legal profession to provide effective representation (see *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 173-75, ECHR 2005-XIII; *Morice v. France* [GC], no. 29369/10, § 132, ECHR 2015 with further references; and *Jankauskas v. Lithuania (no. 2)*, no. 50446/09, § 74, 27 June 2017).

140. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct, which must be discreet, honest and dignified (see *Morice*, cited above, § 133, and *Jankauskas (no. 2)*, cited above, § 75, with further authorities).

141. In Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer (see paragraph 74 above), the Committee of Ministers of the Council of Europe emphasised that the profession of an advocate must be exercised in such a way that it strengthens the rule of law. Furthermore, the principles applicable to the profession of advocate contain such values as the dignity and honour of the legal profession, the integrity and good standing of the individual advocate, respect towards professional colleagues as well as respect for the fair administration of justice (see the Charter of the CCBE, paragraph 75 above, and *Jankauskas (no. 2)*, cited above, § 77).

142. While the Court has consistently held that freedom of expression is applicable also to lawyers, lawyers cannot make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis (see *Karpetas v. Greece*, no. 6086/10, § 78, 30 October 2012, and *Morice*, cited above, § 139), nor can they proffer insults (see *Coutant v. France* (dec.), no. 17155/03, 24 January 2008, and *Morice*, ibid.).

(v) The relevant test

143. In sum, in examining the compliance of cases of mandatory legal assistance in criminal proceedings with Article 6 §§ 1 and 3 (c) of the Convention the following principles have to be applied: (a) Article 6 §§ 1 and 3 (c) does not necessarily give the accused the right to decide himself in what manner his defence should be assured; (b) the decision as to which of the two alternatives mentioned in that provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends, in principle, upon the applicable domestic legislation or

rules of court; (c) Member States enjoy a margin of appreciation as regards this choice, albeit one which is not unlimited. In the light of these principles, the Court has to examine, first, whether relevant and sufficient grounds were provided for the legislative choice applied in the case at hand. Second, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of the fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient grounds for their decisions. In the latter connection, it will be relevant to assess whether an accused was afforded scope in practice to participate effectively in his or her trial.

(c) Application of these principles to the present case

(i) Examination of the relevance and sufficiency of the grounds supporting the Portuguese legislation applied in the present case

144. As to the legislation on mandatory legal representation applied by the domestic courts in the present case, the Court observes that the domestic courts based their decision on Article 32 of the Constitution and Article 64 of the CCP as interpreted in the well-established case-law of the Constitutional and Supreme Courts (see paragraphs 52-57 above). Under Article 64 § 1 (b) of the CCP in particular, in the version applicable at the relevant time, assistance by defence counsel was mandatory at the hearing before the investigating judge and during court hearings unless the proceedings could not result in a custodial sentence (see paragraphs 15 and 33 above). However, under the Portuguese Criminal Code almost all offences can, in principle, lead to a custodial sentence as this Code provides for the possibility of imposing a prison sentence even for most minor offences (see paragraph 49 above). Having regard also to the practice of the Portuguese courts (see paragraph 61 above), representation by legal counsel appears to be mandatory at all key stages of the criminal proceedings. Thus, none of the factors relied on in many other Contracting Parties to the Convention (see paragraphs 81-84 above), indicating that the assistance of defence counsel in criminal proceedings might be dispensed with, have to be addressed by the domestic courts when applying the relevant legislation. There is therefore no doubt that Portuguese law on criminal procedure is particularly restrictive when it comes to the possibility for accused persons to conduct their own defence without legal assistance if they wish to do so. The question whether Portuguese law is also restrictive when it comes to accused persons participating actively in their own defence is examined below (see paragraphs 156-59).

145. As indicated previously (see paragraph 129 above), the relevance and sufficiency of the grounds for mandatory legal representation also depend on the quality of the parliamentary and judicial review conducted in Portugal. As is apparent from the Preamble to the CCP of 1987, the

provisions of the new CCP, including Article 64 § 1, were aimed at reinforcing the legal position of the accused and ensuring effective equality of arms with the public prosecutor's office, whose own legal position was reinforced (see paragraph 35 above). Furthermore, it was considered that measures which could prejudice the accused's personal dignity should be prevented (see paragraph 35 and 57 above).

146. The Court further notes that the Portuguese legislature reviewed certain questions relating to the mandatory assistance in criminal proceedings laid down in Article 64 § 1 of the CCP. In particular, in the revision of that provision by Law no. 59/98 of 25 August 1998 and Law no. 48/2007 of 29 August 2007, the legislative choice of this legal defence mechanism remained unchanged, the latter following confirmation by the Constitutional Court of its compatibility with the Constitution and the Convention in 2001 (see paragraphs 35 and 52 to 55 above).

147. As regards the quality of the judicial review of the impugned requirement, the Constitutional Court has held that the legislative choice reflected in Articles 61, 62 and 64 of the CCP, requiring accused persons to be represented by defence counsel in criminal proceedings even if they are themselves lawyers duly registered with the relevant Bar association, and even more so when they are not, is not incompatible with the Portuguese Constitution. Those rules seek to guarantee that the accused's interests are defended in a dispassionate manner. They are also offset by the power of the defendant to revoke any measure carried out on his behalf by defence counsel, and supported by the further possibilities for the accused to intervene in person at any time in the proceedings. In other rulings, the Constitutional Court has referred to the need to protect the implementation of justice and the law as well as the interests of the accused and the need to ensure the participation of qualified professionals capable of ensuring the requisite technical preparations and observance of the ethical principles governing the profession (see paragraphs 52-55 above).

148. In a series of Supreme Court judgments, that court further explained the philosophy behind the restriction on conducting one's defence alone, and the aims which the provision of mandatory legal representation sought to achieve, in the following terms: the need to ensure an equitable practice allowing the accused to prepare his defence together with defence counsel but preserving for him the right to submit requests, written pleadings and notes that did not raise issues of law; the need to provide for the dispassionate conduct of a case as an additional safeguard in criminal proceedings; the need to ensure that the accused had technical assistance so that his or her case was not weakened; and the existence of an incompatibility, procedural or otherwise, or tension between the status of an accused person and the responsibilities of defence counsel (see paragraph 57 above). The Supreme Court further outlined the procedural tools at the disposal of an accused during trial, which that court has regarded as "a

practical expression of the constitutional right to petition enshrined in Article 52 of the Constitution" (see paragraph 43 above). These tools are important both in the context of the examination of the pertinence and sufficiency of the reasons underlying the legislative choices made and in the context of the assessment of the fairness of the proceedings as a whole (see paragraph 156 below).

149. In their judgments, the Courts of Appeal have reiterated these justifications for the impugned Portuguese rule on mandatory legal representation (see paragraphs 58 and 43 above).

150. The Court, for its part, attaches considerable weight to these reviews. The legislature repeatedly maintained the requirement of compulsory assistance in criminal proceedings. The Portuguese courts, notably the Supreme Court and the Constitutional Court, for their part, in their extensive and well-established case-law on the subject-matter, gave very thorough reasons why they considered the relatively strict rule of mandatory legal representation constitutional and necessary both in the accused's and the public interest.

151. The Court would stress in that context that the central question as regards the impugned measure is not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the requirement of mandatory legal representation, an accused's defence rights could never be guaranteed. Rather the core issue from the perspective of the provision of relevant and sufficient grounds for the choice exercised is whether the legislature acted within the margin of appreciation afforded to it (see also paragraphs 118 and 129 above).

152. The Court further observes that the domestic courts in the instant case reflected faithfully the reasoning followed by the Portuguese Constitutional Court, Supreme Court and Courts of Appeal for many years (see paragraphs 13, 15 and 20-25 above). They stressed that the rules on compulsory legal assistance in criminal proceedings applied by them were designed not to limit the defence's action but to protect the accused by securing an effective defence (see paragraph 15 above). The domestic courts further held that the accused's defence in criminal proceedings was in the public interest and the right to defence by counsel could not therefore be waived (see paragraph 22 above). The relevant provisions of the CCP reflected the premise that an accused was better defended by a legal professional trained in advocacy who was unencumbered by the emotional burden weighing on the defendant and could offer a lucid, dispassionate and effective defence (see paragraphs 15 and 53 above).

153. The decision of the Portuguese courts requiring the applicant to be represented by counsel was thus the result of comprehensive legislation seeking to protect accused persons by securing an effective defence in cases where a custodial sentence is possible. The Court can accept that a member State may legitimately consider that an accused, at least as a general rule, is

better defended if assisted by a defence lawyer who is dispassionate and technically prepared, a premise reflected in the relevant provisions of Portuguese law on which the impugned decisions in the present case were based. It further accepts that even a defendant trained in advocacy, like the applicant, may be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case.

154. The legitimacy of such considerations applies even more forcefully where, as here, a defendant was suspended from the Bar, was not therefore a duly registered lawyer and was excluded from providing legal assistance to third persons. Furthermore, in the case of the applicant, it is clear from the case file that he had nevertheless acted as defence counsel despite his suspension and had already been charged with insulting a judge in those proceedings (see the domestic court proceedings at issue in his previous application no. 48188/99, cited above). In view of the special role of lawyers in the administration of justice, recognised in this Court's well- established case-law and, in that context, their duties particularly in regard to their conduct (see paragraphs 74-75 and 138-42 above), there were reasonable grounds to consider that the applicant may have lacked the objective and dispassionate approach considered necessary under Portuguese law to conduct his own defence effectively.

155. Moreover, the Court must not lose sight of the procedural context as a whole in which the requirement of mandatory representation had to be and was applied in the instant case. The particularly restrictive nature of the Portuguese legislation from the perspective of an accused like the applicant does not mean that he was deprived of all means by which to choose how his defence was conducted and to participate effectively in his own defence. While under Portuguese law on criminal procedure the technical legal defence was reserved for counsel, the relevant legislation conferred on an accused several means by which to participate and intervene in person in the proceedings.

156. The accused had the right to be present at all stages of the proceedings which affected him or her, to make statements or remain silent concerning the substance of the charge and to submit observations, statements and requests, in which he could address questions of law and facts and which, without having to be signed by counsel, were added to the case file (see paragraphs 30 and 41-45 above). Furthermore, he or she could revoke any measure carried out on his or her behalf under the circumstances set out in Article 63 § 2 of the CCP (see paragraph 32 above). Moreover, Portuguese law provided that the accused was the last person who could address the Court after oral pleadings had ended and prior to the delivery of the judgment (Article 361 § 1 of the CCP; see paragraphs 24 and 45 above and further below for the assessment of the overall fairness of the trial).

157. Lastly, if the accused was not satisfied with court-appointed defence counsel, he or she could request a change of counsel on a valid

ground (see Article 66 § 3 of the CCP, paragraph 38 above). Accused persons were also free, under the relevant provisions of Portuguese law (see in particular Article 64 § 4 of the CCP, paragraph 33 above) to instruct a lawyer of their own choosing, whom they trusted and with whom they could agree on a defence strategy in their case. It is true that accused persons, if convicted, had to bear the costs of mandatory representation. However, they could request legal aid if they were unable to pay those costs (see paragraphs 33, 38 and 51 above). The Court observes in this context that the applicant was charged the relatively modest sum of EUR 150 for his representation by court-appointed counsel (see paragraph 19 above) and that this sum was never paid following the discontinuance of the enforcement order due to lack of seizable assets.

158. The Court considers that despite the requirement to be assisted by counsel, a relatively broad scope remained in practice for an accused like the applicant to influence how his defence was to be conducted in the criminal proceedings against him and to participate actively in his own defence (see, in a similar vein, *Croissant*, cited above, § 31).

159. In the light of the foregoing, the Court observes that the essential aim of the Portuguese rule of mandatory legal representation in criminal proceedings is to ensure the proper administration of justice and a fair trial respecting the right of the accused to equality of arms. Having regard to the procedural context as a whole in which the requirement of mandatory representation was applied, and bearing in mind the margin of appreciation enjoyed by the member States as regards the choice of means by which to ensure that an accused's defence is secured, the Court considers that the reasons provided for the requirement of compulsory assistance overall and in the present case were both relevant and sufficient.

(ii) Overall fairness of the trial

160. It remains for the Court to assess whether the criminal proceedings involving the applicant, in which the domestic courts applied the impugned rule of compulsory assistance, could be considered fair as a whole.

161. The Court observes that the applicant's defence was assured at the hearings before the investigating judge and the trial court by his court- appointed defence counsel.

162. The applicant, for his part, did not attend these hearings and deliberately decided not to avail himself of the possibility of participating effectively in his defence together with his counsel. He did not communicate with his counsel and did not attempt to instruct her and determine with her how his defence should be conducted. In the proceedings before this Court he explained that he did not have a relationship of trust with his counsel and suspected her of being inexperienced because she came from a small village (see paragraph 97 above). However, he does not appear to have challenged the qualifications or quality of the court-appointed

lawyer in the proceedings before the domestic courts. Neither did he request the domestic courts to appoint a different lawyer to represent him as he was entitled to do if he had valid grounds to support his request (see paragraph 38 above). Likewise, he did not make use of the possibility under domestic law of appointing counsel of his own choosing (see paragraph 33 above) with whom he could have agreed on a defence strategy leaving him broad scope to intervene in the proceedings while nevertheless being assisted by counsel.

163. Moreover, as shown above (see paragraphs 30 and 41-45), the applicant had the right to be present and intervene at the hearings and, in particular, to present the domestic courts with his own version of the events leading to the charges against him, but did not avail himself of any of these possibilities. The applicant never alleged before the Court that he had been unable to present his own version of the facts or his own interpretation of the relevant legal provisions to the courts.

164. The Court cannot but note in this context that the applicant chose not to participate in the hearings before the investigating judge and the trial court although he did not have confidence in the ability of his counsel to properly defend him, and takes note of the reasons advanced by him as to why she lacked that ability. However, the applicant did not allege that any procedural mistakes were made by his counsel. The mere fact that she did not respond to the Constitutional Court's inquiry regarding the endorsement and signature of his constitutional appeal, written by himself, cannot, as such, be considered a mistake.

165. Moreover, the applicant had been charged, for a second time, with insulting a judge. In view of the special role of lawyers in the administration of justice, recognised in this Court's well-established case-law (see paragraphs 138-42 above), such a repeat offence, which could have led to a custodial sentence of four months and fifteen days, cannot be considered as minor. It was not unreasonable, given the circumstances and the nature of the offence with which he was charged, for the domestic courts to consider that the applicant lacked the objective and dispassionate approach considered necessary under Portuguese law to effectively conduct his own defence.

166. The Court, having regard to the material before it, does not discern any cogent reasons to doubt that the applicant's defence by court-appointed counsel was conducted properly in the circumstances of the case or to consider that the conduct of the proceedings by the domestic courts was in any way unfair.

167. Indeed, it appears from the applicant's observations and his repeated applications to this Court concerning the requirement of compulsory assistance in criminal proceedings that the applicant's main concern was not the particular criminal proceedings which gave rise to the present case but his desire to pursue his principled stance against mandatory

legal assistance under Portuguese law. Beyond his general opposition to this mandatory requirement, the applicant did not put forward any valid argument pointing to the incorrectness or the unfairness of the criminal proceedings against him.

168. In view of the foregoing, the Court concludes that there is no basis on which to hold that the criminal proceedings involving the applicant in which the domestic courts applied the impugned requirement of compulsory legal assistance were unfair.

(iii) Conclusion

169. There has accordingly been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by nine votes to eight, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 April 2018.

Françoise Elens-Passos	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge Sajó;

(b) joint dissenting opinion of Judges Tsotsoria, Motoc and Mits;

(c) dissenting opinion of Judge Pinto de Albuquerque joined by Judge Sajó;

(d) joint dissenting opinion of Judges Pejchal and Wojtyczek;

(e) dissenting opinion of Judge Bošnjak.

G.R.
F.E.P.

DISSENTING OPINION OF JUDGE SAJÓ

I consider that in this case the domestic authorities violated Article 6 of the Convention and therefore I respectfully dissent, joining the opinion of Judge Pinto de Albuquerque. I also agree with the criticism expressed in the dissent of Judges Wojtyczek and Pejchal as to the use of the margin of appreciation, and with the substantive arguments of Judge Bošnjak, who provides ample reasons for a right of self-representation. I have had the opportunity to express my reservations regarding the mechanical application of the "overall fairness of the trial" approach which seems to have prevailed in more recent judgments of the Grand Chamber, in disregard of a more nuanced previous line of case-law. Unfortunately, the present judgment reflects all the shortcomings of that approach, although as the joint dissenting opinion of Judges Tsotsoria, Motoc and Mits shows, even a strict application of this recently developed test of overall fairness points to a clear violation of the right to a fair trial.

JOINT DISSENTING OPINION OF JUDGES TSOTSORIA, MOTOC AND MITS

"Malgré mes préoccupations, j'étais parfois tenté d'intervenir et mon avocat me disait alors : « Taisez-vous, cela vaut mieux pour votre affaire. » En quelque sorte, on avait l'air de traiter cette affaire en dehors de moi. Tout se déroulait sans mon intervention. Mon sort se déroulait sans qu'on prenne mon avis. De temps en temps, j'avais envie d'interrompre tout le monde et de dire : « Mais tout de même, qui est l'accusé ? C'est important d'être l'accusé. »" Albert Camus, *L'Étranger*

I. General remarks

1. To our regret we cannot vote with the majority since we believe that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention. The evolution of the case-law of the Court, the practice of the member States and developments in public international law call for a refinement of the principles relating to the right to defend oneself in person. As a consequence, we find that the margin of appreciation is more limited than has been acknowledged by the majority and than it was almost seventeen years ago when the first decision was taken concerning the case of Mr Correia de Matos (see *Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII).

2. This case offered an opportunity for the Grand Chamber to contribute to the harmonisation of international human rights law by looking inside and outside the Convention regime for legal standards and reasoning that are embodied in both the universal and European human rights standards. Coordination between regional and universal human rights regimes is essential in order to ensure effective implementation of human rights – in the present case, the right to defend oneself in person. Indeed, the principle of harmonious interpretation is well established in the case-law of the Court (see some references in paragraph 7 below) and it is there to ensure coherence of international (human rights) law. The presumption against potential normative conflict is even stronger in the field of human rights.

3. In our dissenting opinion we will first examine what factors needed to be taken into account when establishing the scope of the margin of appreciation in the present case (Chapter II). Then we will look into what criteria the Court has applied in its case-law when assessing whether the rights of the defence have been complied with (Chapter III). The practice of the Council of Europe member States will be the next point of reference (Chapter IV). This will be followed by exploring the relevant developments in international criminal law and international human rights law (Chapter V). Finally, the principles identified will be applied to the facts of the case (Chapter VI), leading to a conclusion (Chapter VII).

II. The scope of the margin of appreciation

4. The question whether to allow an accused to defend him or herself in person or instead to assign a lawyer to represent him or her from the outset has been interpreted by the Court as falling within the margin of appreciation of the State. The domestic courts are entitled to consider that the interests of justice require the compulsory appointment of a lawyer (see paragraphs 123-24 of the judgment). In its 2001 *Correia de Matos* decision the Court found that there were relevant and sufficient reasons for compulsory representation, and it examined in principle whether the applicant's defence, resulting from the State's choice of means, had been conducted appropriately.

5. The idea has crystallised in the case-law of the Court that the primary concern under Article 6 §§ 1 and 3 (c) is to evaluate the overall fairness of the criminal proceedings (see, as the most recent authorities, *Dvorski v. Croatia* [GC], no. 25703/11, § 82, ECHR 2015; *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, ECHR 2016). The Court first examines whether the State has provided relevant and sufficient reasons for the means chosen by it to secure the defence rights of accused persons. Where such reasons have been established, a holistic assessment of the entirety of the proceedings is conducted to determine whether they were fair overall. Where no such reasons have been established, the Court applies a strict scrutiny to its fairness assessment. The failure of the respondent State to show relevant and sufficient reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c) (see, for a similar approach with respect to Article 6 §§ 1 and 3 (d), *Schatschaschwili*, cited above, § 113; and, with respect to Article 6 §§ 1 and 3 (c), *Ibrahim and Others*, cited above, §§ 263-65, and *Dvorski*, cited above, § 82).

6. Moreover, the Convention does not exist in a vacuum. When assessing the scope of the margin of appreciation, the Court must have regard to changing conditions in the member States and respond to any emerging consensus. Therefore, the existence or non-existence of common ground between the laws of the member States is one of the factors that may determine the scope of the margin of appreciation (see, for example, *Glor v. Switzerland*, no. 13444/04, § 75, ECHR 2009, and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 66, ECHR 2012).

7. With regard to legal standards and developments in public international law, the Court has on numerous occasions reiterated that the Convention cannot be interpreted in a vacuum and that it must take the relevant rules of international law into account (see *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 35, ECHR 2001-XI (extracts), and *Al-*

Adsani v. the United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI). As indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, account should be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see, *inter alia*, *Nada v. Switzerland* [GC], no. 10593/08, § 169, ECHR 2012, with further references). It follows that the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.

8. This means that the question whether the State remained within its margin of appreciation under Article 6 §§ 1 and 3 (c), in restricting the applicant's right to conduct his own defence by means of a requirement for compulsory representation by a lawyer, calls in the present case for an assessment as to whether the reasons adduced by the respondent State were relevant and sufficient and whether the criminal proceedings as a whole were fair. This must be done having due regard to the case-law of the Court, the practice in the Council of Europe member States and developments in public international law.

III. Criteria for assessing the State's choice of means by which to secure the rights of the defence

9. For the purposes of determining whether the State presented relevant and sufficient reasons for its choice of compulsory representation by a lawyer, the case-law of the Court offers indicators that are particularly helpful. Therefore, it is necessary to examine what criteria the Court assessed in the context of the State's choice of the means by which to secure the rights of the defence under Article 6 §§ 1 and 3 (c).

10. One such criterion is the level of jurisdiction concerned, in respect of which the respondent State has laid down provisions as to how the defence rights are to be secured, as well as the type of questions (of fact and/or of law) raised in the proceedings. The Court has repeatedly assessed this issue and accepted that a requirement for an appellant to be represented by a lawyer before higher domestic courts examining appeals on points of law is not in itself contrary to Article 6 (see, for instance, *Omerović v. Croatia (no. 2)*, no. 22980/09, §§ 38-39, 5 December 2013).

11. The severity of the offence at issue and of the sentence at stake (see, for instance, *Galstyan v. Armenia*, no. 26986/03, § 91, 15 November 2007, and *Jemeļjanovs v. Latvia*, no. 37364/05, § 89, 6 October 2016) and the complexity of the case or the procedure (see, *inter alia*, *Lagerblom v. Sweden*, no. 26891/95, § 51, 14 January 2003, and *Jemeļjanovs*, cited above, § 89) are further relevant considerations. The more serious the

offence at issue in the proceedings and the more complex those proceedings, the more legal representation will be called for in the interests of justice.

12. Moreover, the ability of the accused to properly conduct his or her defence is another relevant criterion in determining whether the State gave relevant and sufficient reasons. The accused's personal situation (see, for instance, *McVicar v. the United Kingdom*, no. 46311/99, §§ 50-62, ECHR 2002-III, and *Jemeljanovs*, cited above, § 89) and, in particular, his or her vulnerability (see, *inter alia*, *Megyeri v. Germany*, 12 May 1992, § 23, Series A no. 237-A, and *Blokhin v. Russia* [GC], no. 47152/06, §§ 205-10, ECHR 2016) or legal training (see *Melin v. France*, 22 June 1993, §§ 24-25, Series A no. 261-A, and *McVicar*, cited above, § 51) may thus be taken into account in determining whether or not legal representation can be dispensed with.

13. Furthermore, consideration may be given to the costs incurred by the defendant on account of the provisions laid down by the respondent State, in particular as a result of the assignment of officially appointed defence counsel (compare, for instance, *Croissant v. Germany*, 25 September 1992, §§ 35-38, Series A no. 237-B, and *Lagerblom*, cited above, § 53).

14. The above case-law demonstrates that the Court does not determine in the abstract whether the relevant measure chosen by the State to implement the applicant's right to defence complied with Article 6 §§ 1 and 3 (c); rather, it assesses the particular circumstances of each case, employing a wide range of criteria.

IV. Practice of the Council of Europe member States

15. The comparative research demonstrates that, out of thirty-five member States surveyed, thirty-one establish the right to conduct one's own defence as a point of reference. Importantly, with the exception of a few States which allow defendants to conduct their own defence without restrictions, all other States – irrespective of whether, as a general rule, they authorise or prohibit the conduct of one's own defence in proceedings before their domestic courts – allow accused persons to defend themselves in person in certain circumstances (see paragraphs 81 and 83 of the judgment).

16. Special attention should be paid to English law, where litigation *per se* has its roots. The right to defend oneself evolved as a combined proposition of "natural law" and the egalitarian concept of the human being. This concept inspired the American legal system and was further crystallised in the Sixth Amendment to the Constitution and in the US Supreme Court case of *Farreta v California,* no. 73-5772, 30 June 1975[1].

[1] In the majority opinion Judge Stewart stated as follows: " … the Star Chamber has, for centuries, symbolized disregard of basic individual rights. The Star Chamber not merely

17. It emerges from the comparative-law materials that the relevant criteria in the context of placing restrictions on the right to conduct one's own defence include the level of jurisdiction concerned, the complexity of the case, the severity of the offence at issue and the defendant's capacity to conduct his or her own defence (see paragraph 82 of the judgment). These criteria overlap with those assessed by the Court in its case-law (see Chapter III above).

18. It can be concluded that a clear trend exists among the member States towards allowing defendants to conduct their own defence, in certain circumstances, most often where less serious offences before the lower courts are concerned and where the accused's capacity to conduct his or her own defence is not curtailed. This clear trend must be taken into account when assessing the scope of the margin of appreciation. By contrast, the judgment mentions that there may be a trend amongst the States surveyed towards recognising the right of an accused to defend him or herself without the assistance of a lawyer, but that there is no consensus as such and that the standards adopted by the member States, as well as international developments, are not determinative, otherwise the margin of appreciation would be excessively reduced (see paragraph 137 of the judgment). This leads the majority to conclude that the margin of appreciation in this case can be assessed only on the basis of the "Court's well established case-law" and that other relevant developments cannot be taken into account if they reduce the margin of appreciation excessively. We do not see any justification for such an approach.

V. Developments in international law

A. International criminal law

19. Paragraph 73 of the judgment notes that both the Statute of the International Criminal Court and the Statute of the International Criminal Tribunal for the Former Yugoslavia provide for the right of an accused to conduct his or her defence in person and that a number of accused before the latter have availed themselves of this opportunity.

20. Thus, in the specialised area of public international law the point of departure is the same as in the absolute majority of the member States surveyed, namely the right to defend oneself without the assistance of a lawyer. While this point is well worth considering, the most important

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allowed, but required, defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed." See also paragraph 4 of the joint dissenting opinion of Judges Pejchal and Wojtyczek.

development has taken place in international human rights law and merits particular attention.

B. International human rights law

21. Article 14 of the International Covenant on Civil and Political Rights ("the Covenant") guarantees the right to equality before courts and tribunals and to a fair trial. In particular, Article 14 § 3 (d) of the Covenant reads, *inter alia*, as follows:

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing ..."

Specifically, the wording of the right to defend oneself in person or through legal assistance is identical to that of Article 6 § 3 (c) of the Convention.

22. The Human Rights Committee ("the HRC"), which monitors the implementation of the Covenant, held as follows in its latest General Comment on the right to equality before courts and tribunals and to a fair trial:

> "36. Article 14, paragraph 3(d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial ...
>
> 37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right as provided by Article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person 'or' with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of the accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel."

23. Paragraph 37 of the General Comment is based on the HRC's reasoning in the case concerning communication No. 1123/2002 brought by Mr Correia de Matos against Portugal before the HRC

(see paragraphs 63-67 of the judgment). In its decision, the HRC emphasised that the wording of the Covenant clearly provided for a defence to be conducted in person or with legal assistance of one's own choosing, taking as its point of departure the right to conduct one's own defence. In this connection the HRC held that the right to conduct one's own defence, which was a cornerstone of justice, might be undermined when a lawyer was imposed against the wishes of the accused. Nevertheless, the HRC considered that the right to defend oneself without a lawyer was not absolute and that the interests of justice might require the assignment of a lawyer against the wishes of the accused. However, any restriction of the accused's wish to defend himself had to have an objective and sufficiently serious purpose and not go beyond what was necessary to uphold the interests of justice. The HRC gave particular examples where the interests of justice might require the assignment of a lawyer against the wishes of the accused: in cases of persons substantially and persistently obstructing the proper conduct of trial; cases of persons facing a grave charge but being unable to act in their own interests; and where this was necessary to protect vulnerable witnesses from further distress if the accused were to question them himself. In the particular case at hand the HRC found that Portugal had not provided any objective and sufficiently serious reasons why, in such a relatively simple case, the absence of a court-appointed lawyer would have jeopardised the interests of justice.

24. Previous to communication No. 1123/2002, the HRC case-law under Article 14 § 3 (d) had mainly concerned complaints regarding situations where the author had been denied the right to be represented by a lawyer of his or her choice, had not been assigned a lawyer at all, or where the lawyer that had been assigned to him or her had failed to provide adequate legal assistance[2].

25. Following communication No. 1123/2002, in its concluding observations on the fourth periodic report of Portugal, dated 23 November 2012 (see paragraphs 70-71 of the judgment), the HRC noted with concern that, owing to mandatory representation by a lawyer, persons did not have the right to defend themselves in person in criminal proceedings. The HRC reiterated the principles established in communication No. 1123/2002 and also stated that Portugal should implement its recommendation contained in the said communication, make the legal rules less rigid and consider the compulsory provision of back-up counsel to advise defendants who defended themselves.

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[2] See, for example, *Delia Saldías de López v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984), § 13; *Domukovsky and Others v Georgia*, HRC Communications 623/1995, 624/1995, 626/1995, 627/1995, U.N. Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), § 18.9; and *Glenford Campbell v. Jamaica*, CCPR/C/44/D/248/1987 (1992), § 6.6.

26. Thus, there is an established standard regarding the right to defend oneself in person under Article 14 § 3 (d) of the Covenant which clearly goes further than that established under Article 6 § 3 (c) of the Convention. While the majority acknowledged that the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights (see paragraph 134 of the judgment), the Covenant standard was not taken into account when interpreting the scope of the rights under Article 6 § 3 (c) of the Convention, on the grounds that the member State's freedom regarding the choice of the means and its margin of appreciation in exercising that choice would otherwise be excessively reduced (see paragraph 137 of the judgment).

VI. Application of these principles in the present case

A. Relevant and sufficient reasons

27. The task of the Court is not to review the relevant legislation in the abstract. Instead, it must confine itself as far as possible to examining the issues raised by the case before it (see *Schatschaschwili*, cited above, § 109) and determining whether the manner in which the relevant law and practice affected the applicant gave rise to a violation of the Convention (see *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X). Therefore, in order to assess whether the reasons adduced were relevant and sufficient, it is necessary to examine the decisions of the domestic courts refusing the applicant leave to conduct his own defence.

28. The domestic courts observed that the applicant's representation by counsel in the proceedings before the investigating judge and during the trial was mandatory under Portuguese law on criminal procedure. That law was not designed in that regard to limit the defence's action, but to protect the accused by securing an effective defence to him. The accused's defence in criminal proceedings was in the public interest and the right to defence by counsel could not be waived. The relevant provisions of the Code of Criminal Procedure reflected the premise that an accused was better defended by a legal professional trained in advocacy who was unencumbered by the emotional burden weighing on the defendant and could offer a lucid, dispassionate and effective defence (see paragraphs 15, 22 and 53 of the judgment).

29. The aim of above reasons provided by the domestic courts was to ensure the proper administration of justice and a fair trial for the applicant. It can be concluded that these reasons were relevant.

30. Next it must be established whether the reasons were sufficient. At the outset it must be noted that the proceedings in which the applicant was charged with insulting a judge concerned a relatively minor offence, the

penalty in the particular case was not serious and the proceedings did not seem to be of any particular factual or legal complexity. Nevertheless, the applicant, who was himself a lawyer, was assigned defence counsel against his will.

31. All of the criteria mentioned in the previous paragraph were examined by the Court when it was called on to assess compliance with the rights of the defence under Article 6 §§ 1 and 3 (c) (see Chapter III above). However, none of them was assessed by the domestic courts in the applicant's case. This is not surprising since domestic law did not entitle the courts to carry out such an assessment.

32. Under Portuguese criminal law, in principle, all offences, even the most minor, can lead to a custodial sentence. Furthermore, according to the case-law of the Portuguese courts (see paragraphs 37 and 57 of the judgment), representation by counsel is mandatory at all key stages of the criminal proceedings, including before the investigative judge (see paragraph 144 of the judgment). This means that *de facto* the provisions of the Code of Criminal Procedure as applied by the domestic courts amounted to an absolute prohibition on conducting one's own defence. In this regard the Portuguese legislation is the most restrictive in the context of the Member States surveyed (see § 15 above).

33. It is true that the Code of Criminal Procedure allowed the applicant to perform a number of activities alongside counsel (see paragraphs 156-57 of the judgment). However, it is also true that all essential procedural acts were reserved for counsel, such as the examination of witnesses, the questions to be put to the experts, the oral pleadings and the lodging of appeals (see paragraphs 33 and 46-48 of the judgment). According to the established case-law of the Supreme Court the applicant could only submit observations, statements and requests which did not raise questions of law (see paragraph 57 of the judgment); hence, he could not address questions of law on his own (contrast with paragraph 156 of the judgment)[3].

34. In such circumstances the scope for the applicant to conduct his own defence was very limited and his defence depended on the discretion of the lawyer, as exemplified by the failure of the lawyer to endorse, in particular, the constitutional appeal written by the applicant, which was dismissed as a result (see paragraph 164 of the judgment).

35. The premise underlying the decisions of the domestic courts was that a lawyer, including one assigned against the wishes of the accused, will always provide a better defence than the accused in person, even if the accused is himself a lawyer. We are unable to accept such an abstract premise which leaves no scope for being assessed according to the circumstances of a case. Such a premise, if accepted uncritically by the Court, may even be dangerous in the broader context of situations where,

[3] See also paragraph 41 of the dissenting opinion of Judge Pinto de Albuquerque.

for example, the mandatory appointment of counsel may form part of limitations on the right to liberty and to a fair trial under Articles 5 and 6 of the Convention imposed by the authorities for purposes other than those permitted under the Convention, in violation of Article 18.

36. In view of the lack of assessment of such factors as the complexity of the case, the level of jurisdiction concerned, the training of the applicant, and the severity of the offence and of the penalty, all of which were pertinent to the case, the reasons given by the domestic courts, which were based on legal provisions without any degree of individualisation, cannot be considered sufficient.

B. Overall fairness of the trial

37. It must be reiterated that where a State has failed to provide sufficient reasons, this weighs heavily in the balance when assessing the overall fairness of the trial (see § 5 above). Moreover, the margin of appreciation in this particular case is limited, as demonstrated notably by the practice of member States and developments in international human rights law. This is the framework within which the overall fairness of the trial has to be assessed.

38. The applicant, after being refused permission to represent himself, did not attend the proceedings before the investigating judge and the trial court. He had expressly requested not to be defended by the court-appointed lawyer, whom he considered inexperienced and whose services he had to pay for. Moreover, the applicant did not have any relationship of trust with the appointed lawyer and did not communicate with her. The relationship of trust between the accused and his or her counsel is indispensable in order for the defence to be effective. In situations where the relationship of trust is broken the defence may be compromised and mandatory representation will fail to serve the interests of justice.

39. In the present case, in view of the absence of any communication with the applicant concerning the charges against him, the ability of the lawyer to submit all arguments before the domestic courts was limited, as was the possibility to conduct an effective defence. The lawyer failed to endorse the appeals lodged by the applicant – who was legally trained – both against his conviction by the court of first instance and before the Constitutional Court (see paragraphs 15 and 16 of the judgment).

40. The fact that the applicant did not attend the hearings before the investigating judge and the trial court cannot be held against him. This situation arose from the domestic legislation and its application by the domestic courts, resulting in the mandatory appointment of a lawyer against the applicant's will, with whom the applicant did not have a relationship of trust but who was the only person entitled to conduct his defence as to the substance.

41. As a consequence of the refusal to allow the applicant to conduct his defence in person, the defence in the criminal proceedings against him was not conducted appropriately. In view of the lack of sufficient reasons provided by the State and the limited margin of appreciation in the area in question, the trial cannot be considered to have been fair as a whole.

VII. Conclusion

42. The impugned decision by the domestic courts therefore exceeded the margin of appreciation enjoyed by States in their choice of the means by which to secure applicants' rights. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

43. We find it important to reiterate that the Convention does not exist in a vacuum. The Convention authorises an integrated approach to human rights, based on the consensual acts of States that have ratified treaties which include similar provisions, while also taking into account the institutional context and the need to comply with all the international norms. There is a presumption of normative integrity in international human rights law, to a certain extent reflected in the shared commitment to the Universal Declaration of Human Rights (see the Preamble to the Convention). As a consequence, an effort has to be made to apply human rights standards in a harmonised manner. This is particularly true in the present case, where the normative content of the rule which is binding upon one and the same subject of international law is worded identically in different international instruments.

44. The principles of subsidiarity and the margin of appreciation are important working tools for the Court, but not means in themselves. Neither are they static. The margin of appreciation in particular – a concept that has been developed in the European regional context – has to be open to and mindful of any relevant developments.

45. We agree that the particular circumstances of the case can be interpreted in different ways which might even lead to different conclusions as to the violation or otherwise of the Convention. What we cannot agree with is the fact that the Court's assessment is limited to the case-law of the Court developed in the past. Regrettably, in the present case this has not contributed to the harmonisation of international human rights law on the basis of identically worded rights under the Convention and the Covenant.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE SAJÓ

Table of contents

I. Introduction (§§ 1-3)

1. I cannot join the majority, because I find that the respondent State violated the applicant's right to conduct his own criminal defence, which is enshrined in Article 6 § 3 (c) of the European Convention on Human Rights ("the Convention"). My dissent has two parts.

2. In the first part, I analyse the reasoning of the majority, with special attention to its over-reliance on the margin of appreciation doctrine. Even if a margin of appreciation were to be conferred in the present case, the factors

that the majority claim to be taking into account to define it (international law and the European consensus) should have prompted them to find that this margin was very narrow indeed. The last section of my critique focuses on the way the margin of appreciation operates in the present judgment, the serious factual errors which vitiate its respective findings and the deficient review standards applied to the reasons provided for the existing general blanket prohibition in Portuguese law and the concrete prohibitive decision taken in the present case.

3. In the second part, I sketch the contours of the right to self-representation in criminal procedure under the Convention. First, I analyse the relevant case-law of the European Court of Human Rights ("the Court") on this topic. Then, I argue that the right to self-representation in criminal procedure is a self-standing, non-absolute right within the framework of the Convention for textual, teleological and systematic reasons. At this juncture, elements of comparative criminal procedure, international criminal law and international human rights law are discussed in the opinion in order to conclude that the right to self-representation may be restricted when there are adequate and sufficient reasons for doing so. Finally, I apply this standard to the case at hand.

First Part – The majority's *pro auctoritate* approach to the case (§§ 4-54)

II. The groundless margin of appreciation (§§ 4-12)

A. The "better placed" argument (§§ 4-9)

4. The majority devote a lot of argumentative effort to trying to show that the respondent State had a margin of appreciation in designing its procedural system and that the provision in issue[1] did not exceed that margin. I find this whole line of reasoning deficient. The majority confer a margin of appreciation on unsound grounds, fail to delimit the scope of such margin and, lastly, do not perform an evaluation of the reasons underlying the State's restriction of the right to self-representation. I will address these points successively.

5. If a margin of appreciation is to be recognised, there should be a strong reason for doing so. There has to be a reason why the Court considers that domestic authorities will perform some kind of assessment better than the Court itself. As the sole ground for justifying the margin of appreciation, the majority affirm:

[1] Article 64 of the Portuguese Code of Criminal Procedure ("the CCP").

> "the decision whether to allow an accused to defend himself or herself in person without the assistance of a lawyer or to instead to assign a lawyer to represent him or her falls within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence".[2]

Although it does cite two previous Court authorities referring to self-representation,[3] this assertion is in any event insufficient to fully support the effects to which it lays claim.

6. This Court has said on numerous occasions that domestic authorities are "better placed" (or "in a better position") than the Court to make certain assessments of facts or law. Already in *Handyside*, while discussing restrictions imposed by obscenity laws on freedom of speech, the Court famously stated:

> "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of [the requirements of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them".[4]

7. The phrase has become pervasive ever since and it is indeed sometimes used in connection with the conferral of a margin of appreciation. However, it should not be mistaken for carte blanche to rubber-stamp any policy adopted or decision taken by national authorities. Indeed, an overview of the usage of the phrase in the Court's history shows that when the Court has found domestic authorities to be "better placed" than itself, it has usually said why this is so. The absence of any explanation of the sort by the majority in the present case suggests that the utilisation of the margin of appreciation in the judgment is unwarranted. An exhaustive review of the Court's case-law will demonstrate this.

8. Most of the cases in which the Court has found domestic authorities to be "better placed" than itself to make certain assessments involve broader policy questions. The Court's formulaic statement is that domestic authorities, by reason of "their direct and continuous contact with the vital forces of their countries", are in principle "better placed than an international court to evaluate local needs and conditions" when it comes to the following four areas: moral, ethical and religious issues (a); use of public force and other punitive or preventive measures (b); public resources and expenditure (c); and the societal organisation of property, environment and migration (d). These are the specific issues included in the mentioned four areas:

a. "the requirements of morals", "sensitive moral or ethical issues" or "social issues on which opinions within a democratic society may

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[2] Judgment, § 123.

[3] *X v. Finland*, no. 34806/04, ECHR 2012, and *Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII .

[4] *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

reasonably differ widely", such as obscenity,[5] blasphemy,[6] adoption by homosexuals,[7] national language,[8] "questions concerning the relationship between State and religions" (for example, the use of veils or religious symbols in public places),[9] marriage,[10] hunting,[11] abortion[12], assisted reproduction[13] and incest;[14]

b. "responsibility for the life of the nation", in particular choices as to the presence of a public emergency,[15] "complex issues and choices of social strategy", such as choices concerning penal and prison law,[16] criminal procedure,[17] and other punitive or preventive measures to respond to "the difficulties faced in establishing and safeguarding the democratic order";[18]

c. "social and economic policies" such as social housing,[19] specially protected tenancies,[20] health care,[21] State pensions and social-insurance

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[5] Other than the above-mentioned landmark *Handyside* case, see *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133.

[6] *Otto-Preminger-Institut v. Austria*, 20 September 1994,§ 56, Series A no. 295-A, and *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V.

[7] *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I.

[8] *Mentzen v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII; *Kuharec alias Kuhareca v. Latvia* (dec.), no. 71557/01, 7 December 2004; and *Bulgakov v. Ukraine*, no. 59894/00, § 43, 11 September 2007.

[9] *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 121, ECHR 2005-XI; *S.A.S. v. France* [GC], no. 43835/11, §§ 129-30, ECHR 2014; and *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 112, ECHR 2016.

[10] *B. and L. v. the United Kingdom*, no. 36536/02, § 36, 13 September 2005.

[11] *Friend and Others v. the United Kingdom* (dec.), no. 16072/06, § 50, 24 November 2009.

[12] *A, B and C v. Ireland* [GC], no. 25579/05, § 232, ECHR 2010.

[13] *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011.

[14] *Stübing v. Germany*, no. 43547/08, § 60, 12 April 2012.

[15] *Ireland v. the United Kingdom*, 18 January 1978, § 207, Series A no. 25, confirmed by *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 43, Series A no. 258-B; *Aksoy v. Turkey*, 18 December 1996, § 68, *Reports* 1996-VI; and *A and Others v. the United Kingdom* [GC], no. 3455/05, § 173, 19 February 2009.

[16] Since *Handyside* and *Müller and Others* (both cited above), which both dealt with the criminalisation of obscenity, the Court has exercised some restraint with regard to other aspects of penal and prison law on the basis of the "better placed" argument. See *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; *Khoroshenko v. Russia* [GC], no. 41418/04, §§ 120-21, ECHR 2015; and *Meier v. Switzerland*, no. 10109/14, § 78, ECHR 2016.

[17] A telling example is *Armani da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 265- 68, ECHR 2016, on the threshold evidentiary test to bring someone to a criminal trial.

[18] *Ždanoka v. Latvia* [GC], no. 58278/00, § 134, ECHR 2006-IV.

[19] *Costache v. Romania* (dec.), no. 25615/07, § 23, 27 March 2012; *Strzelecka v. Poland* (dec.), no. 14217/10, § 52, 2 December 2014; and *Kashchuk v. Ukraine* (dec.), no. 5407/06, § 58, 10 May 2016.

[20] *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 192, 12 June 2014.

[21] The leading authority is now *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, ECHR 2017, which on this topic goes back to a specific line of the case-law derived from

benefits,[22] tax policy,[23] "laws to balance State expenditure and revenue" (so-called "austerity measures"),[24] and in general "any assessment of priorities in the context of the allocation of limited State resources";[25] and

d. "matters of general policy", such as "measures of deprivation and restitution of property[26] and "measures to be applied in the sphere of the exercise of the right of property",[27] housing control,[28] urban and regional planning,[29] access of disabled people to public buildings,[30] environmental issues,[31] and migration matters.[32]

Sentges v. the Netherlands (dec.), no. 27677/02, 8 July 2003; *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I; *Gheorghe v. Romania* (dec.), no. 19215/04, 22 September 2005; *Wiater v. Poland* (dec.), no. 42290/08, § 39, 15 May 2012; and *McDonald v. the United Kingdom*, no. 4241/12, § 54, 20 May 2014.

[22] The leading authority is *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 52 and 63, ECHR 2006-VI. See also, among other authorities, *Pearson v. the United Kingdom*, no. 8374/03, § 24, 22 August 2006; *Walker v. the United Kingdom*, no. 37212/02, § 33, 22 August 2006; *Barrow v. the United Kingdom*, no. 42735/02, § 35, 22 August 2006; *Andrejeva v. Latvia* [GC], no. 55707/00, § 83, ECHR 2009; *Cichopek and Others v. Poland* (dec.), no. 15189/10, §§ 132, 134 and 143, 14 May 2013; *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 113, ECHR 2016; and *Fábián v. Hungary* [GC], no. 78117/13, § 115, ECHR 2017.

[23] *N.K.M. v. Hungary*, no. 66529/11, § 49, 14 May 2013; *Gáll v. Hungary*, no. 49570/11, § 48, 25 June 2013; and *R.Sz. v. Hungary*, no. 41838/11, § 46, 2 July 2013.

[24] *Koufaki and ADEDY v. Greece* (dec.), nos. 57665/12 and 57657/12, §§ 37 and 39, 7 May 2013. See also *Da Conceição Mateus and Santos Januário v. Portugal* (dec.), nos. 62235/12 and 57725/12, § 22, 8 October 2013, and *Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, § 37, 1 September 2015.

[25] *O'Reilly and Others v. Ireland* (dec.), no. 54725/00, 28 February 2002; and *Wilk v. Poland* (dec.), no. 64719/09, § 49, 17 October 2017.

[26] The leading case is *James and Others v. the United Kingdom*, 21 February 1986, § 45, Series A no. 98. See, among other noteworthy cases, *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII; *Malama v. Greece*, no. 43622/98, § 46, ECHR 2001-II; *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67, ECHR 2002-IX; *Broniowski v. Poland* [GC], no. 31443/96, § 149, ECHR 2004-V; *Bäck v. Finland*, no. 37598/97, § 53, ECHR 2004-VIII; *Bečvář and Bečvářová v. the Czech Republic*, no. 58358/00, § 66, 14 December 2004; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI; and *Draon v. France* [GC], no. 1513/03, § 75, 6 October 2005.

[27] *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 165, ECHR 2006-VIII.

[28] *Gillow v. the United Kingdom*, 24 November 1986, § 56, Series A no. 109.

[29] *Chapman v. the United Kingdom* [GC], no. 27238/95, §§ 90-91, ECHR 2001-I; *Beard v. the United Kingdom* [GC], no. 24882/94, § 102, 18 January 2001; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 70, ECHR 2004-III; and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012.

[30] *Gherghina v. Romania* [GC] (dec.), no. 42219/07, § 114, 9 July 2015.

[31] The leading case is *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII.

[32] *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, §§ 90-91, ECHR 2007-I; and *El Majjaoui & Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 32, 20 December 2007.

9. Domestic authorities have also been found to be "better placed" than the Court or even "best placed" when assessing evidence[33] (for example, evidence on an applicant's state of health),[34] and interpreting domestic legislation,[35] treaty law in general[36] and European Union law in particular,[37] a private contract,[38] and a person's will.[39] By extension, the same presumption in favour of the domestic authorities is valid when they engage in assessments of interrelated facts and domestic law, for example when deciding whether an individual judge is able to sit in a particular case,[40] or assessing the need to restrict conduct by a member of Parliament causing disruption to the orderly conduct of parliamentary debates,[41] the suitability of alternative accommodation for an individual,[42] the prejudice caused to the applicant by non-disclosure of public interest immunity evidence,[43] the need for further detention of the applicant,[44] the conformity of the execution of judgments,[45] the "appropriate compensation" for expropriation or other

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[33] The "better placed" argument was first used with regard to evidence assessment in *X v. the United Kingdom*, 5 November 1981, § 43, Series A no. 46, on the basis of the reasoning in *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33. The "best placed" argument was first used in *Wilhelm v. Germany* (dec.), no. 34304/96, 20 April 1999, followed by *Johnson v. the United Kingdom* (dec.), no. 42246/98, 29 November 2001. For more recent cases see *Vaas v. Germany*, no. 20271/05, § 68, 26 March 2009; *Gorgievski v. the Former Yugoslav Republic of Macedonia*, no. 18002/02, § 53, 16 July 2009; *Tali v. Estonia*, no. 66393/10, § 77, 13 February 2014; and *Poletan and Azirovik v. the Former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 66, 12 May 2016.

[34] *Witek v. Poland*, no. 13453/07, § 46, 21 December 2010; *Biziuk v. Poland (no. 2)*, no. 24580/06, § 47, 17 January 2012; and *Koski v. Finland* (dec.), no. 53329/10, § 34, 19 November 2013.

[35] The most important authority is *Kotov v. Russia* [GC], no. 54522/00, § 122, 3 April 2012, following a line of case-law from *Quinn v. France*, 22 March 1995, § 47, Series A no. 311; *Pekinel v. Turkey*, no. 9939/02, § 53, 18 March 2008; and *Kuokkanen and Johannesdahl v. Finland* (dec.), no. 38147/12, § 27, 2 June 2015.

[36] *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X.

[37] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 143, ECHR 2005-VI, which also refers to the European Community's judicial organs.

[38] *De Diego Nafría v. Spain*, no. 46833/99, § 39, 14 March 2002; and *Transado- Transportes Fluviais do Sado, S.A. v. Portugal* (dec.), no. 35943/02, ECHR 2003-XII.

[39] *Pla and Puncernau v. Andorra*, no. 69498/01, § 46, ECHR 2004-VIII.

[40] *Šilih v. Slovenia* [GC], no. 71463/01, § 210, 9 April 2009.

[41] *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 143, ECHR 2016.

[42] *Garib v. the Netherlands* [GC], no. 43494/09, § 161, ECHR 2017.

[43] *Atlan v. the United Kingdom*, no. 36533/97, § 45, 19 June 2001.

[44] *Steel and Others v. the United Kingdom*, 23 September 1998, § 105, *Reports* 1998-VII, and *Mangouras v. Spain* [GC], no. 12050/04, § 85, ECHR 2010.

[45] *Stolboushkin v. Russia* (dec.), no. 11511/03, 6 July 2010; *Sobol and Others v. Russia* (dec.), no. 11373/03, 24 June 2010; and *Elinna Shevchenko v. Russia* (dec.), no. 1250/05, 14 October 2010.

damage,[46] the "appropriate response" to unlawful speech,[47] the best interests of a child[48] or the appropriate measures to maintain family ties.[49]

B. The self-restrained Court (§§ 10-12)

10. In view of the above, it is stating the obvious to say that there is no other fundamental rights court in the democratic world with such a self-restrained *Kompetenz-kompetenz*. As shown above, the Court does not feel at ease adjudicating in important areas of social life. As well as their "contact with the vital forces of the country", the "better position" of the domestic authorities has also been grounded in something as political as "direct democratic legitimacy",[50] as mundane as the knowledge of national language[51] or as philosophical as the "nature of things."[52] This is not the place to analyse the deference rationale underlying this self-imposed minimalistic approach to judicial power as if international judicature were a lesser kind of judicature and international law a lesser kind of law.

11. For the purposes of the present case, it suffices to identify the origins of this line of case-law, its intimate relationship with the margin of appreciation doctrine and its practical impact on limiting core adjudicatory functions of the Court, and therefore its statutory task of "ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols".[53] In particular, this approach has been observed in cases in which "a balance has to be struck" between conflicting private interests,[54] between opposing private and public interests[55] or

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[46] The leading case is *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102. For more recent cases, see *Musci v. Italy* [GC], no. 64699/01, § 95, ECHR 2006- V; *Burdov v. Russia (no. 2)*, no. 33509/04, §§ 65-70, ECHR 2009; *Altıntaş v. Turkey* (dec.), 31866/09, 24 August 2010; *Olymbiou v. Turkey* (just satisfaction), no. 16091/90, § 26, 26 October 2010; *Kirnis v. Latvia*, no. 34140/07, § 91, 12 January 2017; *Stamova v. Bulgaria*, no. 8725/07, § 67, 19 January 2017; and *Petrovi v. Bulgaria*, no. 26759/12, § 39, 2 February 2017.

[47] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 48, Series A no. 316-B.

[48] *A.L. v. Poland*, no. 28609/08, § 72, 18 February 2014; and *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003.

[49] *Gnahoré v. France*, no. 40031/98, § 63, ECHR 2000-IX.

[50] *Handyside*, cited above, § 48; *James and Others*, cited above, § 46; *Maurice v. France* [GC], no. 11810/03, § 117, ECHR 2005-IX; and *Fábián*, cited above, § 124.

[51] *Gündüz v. Turkey*, no. 35071/97, § 49, ECHR 2003-XI, and *Stjerna v. Finland*, 25 November 1994, § 42, Series A no. 299-B.

[52] *Winterwerp*, cited above, § 46.

[53] Article 19 of the Convention.

[54] *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 54, ECHR 2011; and *Bédat v. Switzerland* [GC], no. 56925/08, § 54, ECHR 2016.

[55] *Casado Coca v. Spain*, 24 February 1994, § 55, Series A no. 285-A; *Lindner v. Germany* (dec.), no. 32813/96, 9 March 1999; *Lešník v. Slovakia*, no. 35640/97, § 55, ECHR 2003- IV; and *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 63, ECHR

between competing public interests.[56] In these cases, it is usually noted, domestic authorities are better placed than the international judge to assess the existence of a "pressing social need"[57] that would justify restrictions on, and even derogations from rights.[58] Being conspicuously pragmatist and purposely minimalist, the Court does not even announce that it may split the baby in the manner of Solomon when presenting the case. It dooms the applicant's case from the outset, by either endorsing *a priori* the national authorities' position or at least presuming its rationality (non-arbitrariness), or even its proportionality.[59]

12. Be that as it may, none of the situations that allegedly make domestic authorities better placed than the Court obtains in the present case and the majority do not argue, let alone demonstrate, why this should be so. To state telegraphically in paragraph 123 of the judgment that the national authorities "are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence" assumes what is still to be demonstrated: that the national authorities have made the correct, the "appropriate" choice of means to guarantee the rights of the defence. This circular *pro auctoritate* reasoning reflects the general perspective from which the present case was approached. Once again, the maxim of experience proves to be right: a self-restrained fundamental rights court tends to be a *pro auctoritate* court.[60] The obvious risk is that judicial self-restraint in the field of fundamental rights morphs easily into agnosticism as to principles and values, political indulgence and, ultimately, abdication of judicial responsibility.

III. The factors that delimit the margin of appreciation (§§ 13-32)

A. Distorting the European consensus (§§ 13-20)

13. Before entering into the terrain of the "Limits on the margin of appreciation", the majority set the stage for their analysis. They affirm:

> "At the level of the legislature, the legal standards and developments in other Council of Europe member States, in European Union law and international law more generally may be of some relevance".[61]

2012.

[56] *P4 Radio Hele Norge ASA v. Norway* (dec.), no. 76682/01, ECHR 2003-VI; and *Szima v. Hungary*, no. 29723/11, § 26, 9 October 2012.

[57] *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III, and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II.

[58] *Ireland v. the United Kingdom*, cited above, § 207, and subsequent case-law cited above.

[59] An eloquent example can be seen in *Friend and Others*, cited above, § 50. In *Ždanoka*, cited above, § 134, both tests are equated.

[60] See for another patent example, *Muršić v. Croatia* [GC], no. 7334/13, ECHR 2016.

It would seem that, according to the majority, the European consensus and international law on the matter are to provide guidance on the "limits" for the margin of appreciation. However, the analysis that follows concludes:

> "In sum, the Court considers that the standards adopted by other Contracting Parties to the Convention and the international developments outlined above should be considered ... However, ... those standards are not determinative".[62]

14. This "non-determinative" character is puzzling: as demonstrated below, both the European consensus and the developments in international human rights law run counter to the majority's findings. If neither of those factors was in fact "determinative" in defining the "limits" of the margin of appreciation, we are left to wonder what can be determinative. To add to the obscurity of the majority's reasoning, the reader is left without a clue about the width of the margin of appreciation accorded to the respondent State, since the majority do not give a hint about how wide this margin is.

15. The majority start by announcing that "regard" is to be had to the ways Contracting States have dealt with the issue at hand.[63] Then they claim that they have found a "tendency to permit the accused's defence in person without assistance by counsel".[64] The majority explicitly refrain from calling this "tendency" a "consensus":

> "while there may be a tendency amongst the Contracting Parties to the Convention to recognise the right of an accused to defend him or herself without the assistance of a registered lawyer, there is no consensus as such and even national legislations which provide for such a right vary considerably in when and how they do so."[65]

This assertion is both descriptively and normatively wrong.

16. First, it suffices to look at the reconstruction that the majority themselves make of the law of member States to appreciate how strong this "tendency" is, and to wonder whether it would not be more appropriate to actually call it a consensus. Among the thirty-five States the Court surveyed, thirty-one[66] allow self-representation as a general rule. All of the remaining four, even though they establish mandatory legal counsel as a general rule, allow for sensible exceptions. In Italy and Spain, self-representation is allowed for minor offences. In San Marino, the accused is allowed to plead appeals for him or herself. In Norway, finally, judges are

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[61] Judgment, § 126, repeated in § 130.
[62] Judgment, § 137.
[63] Judgment, § 130.
[64] Judgment, § 131.
[65] Judgment, § 137.
[66] Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Republic of Moldova, Monaco, Montenegro, the Netherlands, Poland, Romania, the Russian Federation, Slovakia, Slovenia, Sweden, Turkey, Ukraine and the United Kingdom.

allowed to make a "holistic assessment" to allow a criminal defendant to waive his or her right to legal counsel.[67]

17. While it is true that the domestic practices in these States "var[y] considerably", there is one aspect that remains stable: *none* of the thirty-five member States surveyed impose a blanket prohibition on self-representation the way Portugal does. Whether this is enough to call it a consensus, or whether we should also check the practice of the remaining eleven member States, is anecdotal. The fact is that there is a strong indication that Portugal's blanket prohibition is an outlier within the Council of Europe.

18. Calling it a "tendency" rather than a "consensus", and thus pretending to wash away the effects of the large coincidence amongst countries within the Council of Europe, borders on wishful thinking. A lack of unanimity is not a barrier to assigning normative consequences to comprehensive transnational coincidences; whether or not to use the term "consensus" has never been paramount in the Court's history. In a subject as contentious as the legal recognition of perceived gender, the Grand Chamber overruled a previous precedent in the face of a "continuing international *trend* in favour of legal recognition ... of the new sexual identity of post-operative transsexuals".[68] It should be pointed out that on this topic the Court noted that "out of thirty-seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person's birth certificate".[69] The numbers are almost identical to the instant case, although they led to quite different conclusions. One is left to wonder why Portugal is being treated differently from the United Kingdom.[70]

19. A more suggestive quotation arises from *Bayatyan v. Armenia*, in which the Court noted:

> "almost all the member States of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a 'pressing social need'."[71]

In yet another case, the Court gave special consideration to the fact that

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[67] See below for a more detailed description of the practice within the Council of Europe.

[68] *Christine Goodwin v. the United Kingdom*, no. 28957/95, §§ 84-85, ECHR 2002-VI, my emphasis.

[69] Ibid., § 55.

[70] See the joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013, paragraph 10: "there can be no double standards of human rights protection on grounds of the 'origin' of the interference." The point is made precisely while criticising the distortion of a European consensus.

[71] *Bayatyan v. Armenia* [GC], no. 23459/03, § 123, ECHR 2011.

> "legislative attempts to eliminate entirely the use of closed-shop agreements in Denmark would appear to reflect the trend which has emerged in the Contracting Parties",[72]

which was one of the main factors that led it to conclude:

> "taking all the circumstances of the case into account and balancing the competing interests in issue, the Court finds that the respondent State has failed to protect the applicants' negative right to trade union freedom".[73]

20. In conclusion, by imposing a blanket ban on self-representation, Portugal is the sole outlier among the thirty-six countries that this Court has examined. I would not hesitate to call this a consensus, but this terminology is unsubstantial: in similar cases, the Court has consistently recognised findings of this kind as, at least, a significant "trend", with normative consequences. Moreover, self-representation does not seem to be a matter that could "give rise today to sensitive moral and ethical issues" or one that is subject to "fast-moving scientific developments", where the Court could possibly have reasons to be more cautious about extending the consensus to recalcitrant States.[74] In such cases, strong democratic support for a solution that runs counter to a European trend has been invoked as a solid ground for granting the country concerned a broader margin of appreciation.[75] No claim that this is one such case, or that Portuguese lawyers are somehow special regarding legal representation needs, has been made.

B. Fragmenting international law (§§ 21-32)

21. The other factor that the majority claim to have taken into consideration relates to "the developments in international law".[76] They observe:

> "when interpreting the provisions of the Convention, [the Court] has had regard, on a number of occasions, to the Views adopted by the HRC and its interpretation of the ICCPR."

Furthermore, they tell us:

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[72] *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 70, ECHR 2006-I,.
[73] Ibid., § 76.
[74] *S.H. and Others v. Austria* [GC], cited above, § 97.
[75] Ibid., § 96 (recognising that the existence of a "clear trend" did not "decisively narrow the margin of appreciation of the State" in a case concerning permission for some forms of assisted reproduction). But in *Société de Conception de Presse et d'Édition and Ponson v. France* (no. 26935/05, 5 March 2009), a general legislative ban was found to be proportionate precisely because of the uncontested European consensus on a general ban in respect of tobacco advertisements. No such consensus can be found in the present case.
[76] Judgment, § 130.

> "The Convention, including Article 6, cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights."[77]

Indeed, the majority cite important examples of effective convergence between the Court's case-law and general international human rights law, even to the point of departing from previous case-law.[78] In spite of all this, the majority in fact pay lip service to their alleged commitment to harmony in international law.

22. As important as these quotations may be as a declaration of principle, they are void if unaccompanied by either effective consistency with the solution adopted by other human rights bodies such as the Human Rights Committee ("the HRC"), or by the provision of strong reasons why the Court has decided not to join its colleagues in the international realm. Unfortunately, the majority remind us of the HRC's General Comment No. 32,[79] only to explain why it should not be followed in this case; the explanation given is clearly insufficient. It is illustrative that this General Comment draws on the HRC's Views on a previous case which the same applicant had brought before this Court and which, once his application was found to be inadmissible, he took to the HRC.[80]

23. Let us recall what the HRC affirmed:

> "[T]he wording of [Article 14.3.d of] the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person 'or' with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however, not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel."[81]

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[77] Judgment, § 134.

[78] In *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, ECHR 2005- I), the Court explicitly grounded its decision concerning interim measures on the findings of other human rights bodies, such as the HRC, the Inter-American Court of Human Rights and the Committee Against Torture (§§ 123-24). In *Nada v. Switzerland* ([GC], no. 10593/08, ECHR 2012), the Court found that even if a country had diverging obligations arising from different international commitments, it should do its best to harmonise its different duties (§§ 81, 170 and 197). Finally, in *Magyar Helsinki Bizottság v. Hungary* ([GC], no 18030/11, §§140-43, ECHR 2016), the Court relied heavily on an international consensus in finding a right to free access to information as enshrined in Article 10 of the Convention.

[79] HRC, General Comment No. 32, 23 August 2007.

[80] HRC, Communication No. 1123/2002, *Correia de Matos v. Portugal*, §§ 7.4-7.5.

24. There is no ambiguity in the HRC's words. When interpreting a provision substantially identical to Article 6 § 3 (c) of the Convention, the HRC affirmed that there was a right to self-representation, which could be restricted with good cause and to the minimum extent possible to uphold the interests of justice, and emphasised that absolute bars such as the Portuguese one should be avoided. As this is the only source in international law that the majority cite on the issue *sub judice*,[82] the majority judgment runs purposely counter to the "developments in international law".

25. The Court's long-standing practice, however, is more international law-friendly than the majority's opinion would suggest. In *Scoppola v. Italy (no. 2)*,[83] for example, an international consensus prompted the Court to explicitly depart from a previous decision of the Commission. In *X v. Germany* the Commission had declared that Article 7 of the Convention did not include the right to retroactivity of benign criminal law.[84] In *Scoppola*, the Court explicitly departed from that conclusion, taking the view that in the light of a "consensus" in international human rights law that had emerged after the adoption of *X v. Germany*,

> "*it is necessary* to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law".[85]

In *Bayatyan v. Armenia*, the Court also expressed similar considerations in order to justify a departure from its previous case-law concerning the applicability of Article 9 to conscientious objectors, which had been the subject of divergent solutions by the Commission and organs such as the HRC. The Court now said:

> "Since it is first and foremost a system for the protection of human rights, the Court *must have regard* to the changing conditions in Contracting States *and respond*, for example*, to any emerging consensus as to the standards to be achieved* ... Furthermore, in defining the meaning of terms and notions in the text of the Convention, the Court can and *must take into account* elements of international law other than the Convention and the interpretation of such elements by competent organs".[86]

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[81] HRC, General Comment No. 32, cited above, § 37.

[82] Other than the brief paragraph 73 of the judgment, the majority did not deal with the developments in international criminal tribunals, which also very solidly provide for the right to self-representation. But even that brief reference was ignored in the majority's reasoning.

[83] *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, 17 September 2009.

[84] *X v. Germany*, no. 7900/77, Commission decision of 6 March 1978, Decisions and Reports (DR) 13.

[85] *Scoppola*, cited above, § 109, emphasis added. This consensus was revealed through the adoption of the American Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the Statute of the International Criminal Court (ibid., §§ 105-06).

[86] *Bayatyan*, cited above, § 102, emphasis added.

I note that in both cases the Court's language was distinctively imperative, acknowledging that the development of international law had necessarily triggered the change in the Court's case-law.

26. As can be seen from these cases, it has been the firm practice of this Court not only to align with the HRC, but also to do so even when such an alignment implied a departure from previous case-law. As was noted in *Bayatyan*, changes in the Court's case-law arising from shifts in the international consensus cannot be considered unforeseeable for the States Parties to the Convention, especially when those States are themselves also parties to the International Covenant on Civil and Political Rights (ICCPR),[87] as Portugal is in the present case.

27. The majority claim that "even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the HRC and by this Court does not always correspond".[88] One sole example is cited. The majority say that, unlike this Court, which holds that "where [appeal and cassation] courts exist, the guarantees of Article 6 must be complied with, for instance by guaranteeing litigants an effective right of access to court", the HRC has found that the right of access to court under Article 14 § 1 of the ICCPR "does not address the issue of the right to appeal".[89] This is not convincing, for many reasons.

28. First, the majority overestimate the extent to which the HRC and the Court have indeed disagreed on this subject. In one of the cases the majority quote, the Court found no violation of Article 6 on account of the restrictions that Spanish procedural law placed on the right to appeal.[90] In the other case cited by the majority, the Court did find a violation of Article 6 because the applicant was not allowed to be present at her cassation hearing, and not simply because she was not allowed to appeal.[91] What the Court has consistently held is that *if* a State sets up courts of appeal or cassation, it is "required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6".[92] This means that there is no "right to appeal" as such, but a right to enjoy Article 6 guarantees during the entirety of the proceedings: not being arbitrarily deprived of a right to appeal that is statutorily established, not suffering from inequality of arms at a higher stage of the proceedings,

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[87] *Bayatyan*, cited above, §108.
[88] Judgment, § 135.
[89] Ibid.
[90] *Brualla Gómez de la Torre v. Spain*, 19 December 1997, *Reports* 1997-VIII. Spain had not yet ratified Protocol No. 7 to the Convention, which provides for the right to appeal in criminal matters.
[91] *Andrejeva*, cited above.
[92] *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11.

and so on. Once read in this way, the case-law of this Court on the matter is hardly contradictory with that of the HRC.

29. Indeed, the HRC has simply stated:

> "The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies."[93]

Nothing in this wording suggests that individuals do not enjoy Article 14 ICCPR rights in appeal proceedings and that, for example, the HRC would allow States to grant the right to appeal in a discriminatory manner and regulate it in an arbitrary manner. Moreover, a reading of the HRC's Views on Communication No. 450/1991 (*I.P. v. Finland*), which the HRC cites as the immediate source of the above quote, shows that the majority should have been more cautious when reading into the HRC's intentions. In those Views, the HRC stated:

> "As for the author's claim that he was denied the possibility of appeal, even were these matters to fall within the scope *ratione materiae* of article 14, the right to appeal relates to a criminal charge, which is not here in issue. This part of the communication is therefore inadmissible ..."[94]

As can be readily observed, all the HRC said is that the possibility of appeal in the tax proceedings in issue was not guaranteed by Article 14 of the ICCPR, a finding which is entirely consistent with the case-law of this Court. Moreover, the HRC was interpreting Article 14 § 5 of the ICCPR, which explicitly grants criminal defendants the right to appeal and which has no equivalent in the Convention. Furthermore, nothing in the author's claims in *I.P. v. Finland* suggests that the right of appeal was denied to him in a discriminatory or arbitrary way. In sum, nothing in *I.P. v. Finland* suggests that the author would have received a different response had he come to this Court.

30. The majority's misinterpretation of the HRC findings extends to another important point: the majority blame the HRC for not "explicitly address[ing] the Court's reasoning in its decision of 15 November 2001 concerning application no. 48188/99".[95] At least for the sake of international courtesy, if not of analytical rigour, it should be stressed that the majority's statement is not entirely correct. The HRC decision of 26 March 2006 did indeed address the Court's decision of 15 November 2001, and even explicitly referred to it in paragraph 3.2, as well as specifically addressing in paragraph 4.6 the central argument, put forward by the Court in 2001 and repeated by the Government in Geneva in 2006, that the applicant could not present a technical defence, but did have an opportunity to present a personal, non-technical defence.

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[93] HRC, General Comment No. 32, cited above, § 12.
[94] HRC, Communication No. 450/1991, *I.P. v. Finland*, § 6.2.
[95] Judgment, § 67.

31. It is also worth noting that General Comment No. 32 does not establish a hard line that would have forced the Court to perform unreasonable argumentative twists in order to be consistent with the rest of its case-law. Under a minimalist reading, General Comment No. 32 could be understood to only prohibit general bars on the exercise of the right to self-representation, thereby placing a burden on the State when restricting it. This could be supported by the use of the word "particularly" before the circumstances the HRC lists as allowing for such a restriction. The majority do not even attempt to engage in a dialogue with the HRC, for example arguing that this list should be enlarged, or its burden of proof be softened. In other words, the majority's plea for fragmentation of international law is a regrettable development, in fact a retrogression, to which I cannot subscribe.

32. There is one final consideration that should not have been neglected in the majority's reflections. Whereas the Court "shall not deal with any application submitted under Article 34 that ... is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation...",[96] the HRC cannot consider communications only when they are "being examined under another procedure of international investigation".[97] That is to say, once the Court has pronounced its final decision or judgment concerning an application, unsatisfied applicants can bring their complaints before the HRC. The applicant has already done this in the past, and there is no reason to think he will not do it again. While this does not imply a hierarchical relationship between the two bodies, it does signal that the Court should be extremely careful when being less protective of fundamental rights than the HRC is.

IV. The perversion of the margin of appreciation (§§ 33-54)

A. The review of the general blanket prohibition (§§ 33-45)

33. The majority announce that the "relevant test" to be applied to find out whether the Portuguese authorities remained within their margin of appreciation consists of the following:

> "the Court has to examine, first, whether relevant and sufficient grounds were provided for the legislative choice at hand. Second, even if relevant and sufficient grounds were provided, it is still necessary to examine, in the context of the overall assessment of the fairness of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided for relevant and sufficient grounds for their decisions."[98]

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[96] Article 35 § 2 (b) of the Convention.
[97] Article 5 § 2 (a) of the Optional Protocol to the ICCPR, ratified by Portugal.
[98] Judgment, § 143.

The majority consider, as I do, that both the general provision and its particular application should contain sufficient and relevant reasons to justify a restriction on the right of self-representation such as the one in the instant case. However, in my view they fail to show that the domestic authorities have indeed deployed such reasons.

34. The first stage of the majority's assessment is to verify whether the legislative choice of mandating legal representation in all kinds of cases is justified:

> "[The Court] has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination ..."[99]

35. However, the generality or specificity of rules is a matter of perspective. A rule allowing self-representation only for people with legal training, for example, is certainly more specific than the blanket prohibition in place in Portugal, but it is also more general than a rule that would only allow registered lawyers, or lawyers with experience in criminal procedure, to represent themselves. Logically, one cannot assess the net benefits of the generality of a rule if one does not identify the kinds of situations that remain over- or under-included by the rule; only then can one balance the benefits of generality against the potential unfairness of some of its applications.

36. It is clear that the factors to be taken into account to assess the possible over-inclusiveness of a rule are not always self-evident. However, in this case, the majority seem to have a precise idea of at least one relevant factor: it is the majority themselves who announce from the outset the opinion that "the thrust of the case before [the Court] concerns the scope of the right for defendants with legal training to defend themselves in person".[100] In other words, and always following the majority's reasoning, the general rule in need of justification in this case is not the general prohibition on self-representation in criminal procedure, but the rule that prevents defendants with legal training from representing themselves. Therefore, by their own account, what the majority should have evinced as a logically necessary consequence is that the domestic authorities considered either that there were good reasons for imposing legal counsel *specifically* on defendants with legal training, or that the benefits of having a more general rule against self-representation offset the potential harm to some of these defendants. They do neither.

37. Furthermore, the majority say that "[i]t falls to the Court to examine carefully the arguments taken into consideration during the legislative process"[101] and that "the relevance and sufficiency of the grounds for

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[99] Judgment, § 129.
[100] Judgment, § 110.

mandatory legal representation also depend on the quality of the parliamentary and judicial review conducted in Portugal".[102]

38. They fail to fulfil what they promise. In effect, rather than a thorough examination of the reasons given during the debate, what we find is a very synthetic enumeration of some of the legislative steps through which the CCP went. If an assessment of the "quality of the parliamentary ... review"[103] is to mean anything, it has to mean that what should be reviewed is the quality of the debate that actually took place – as opposed to an assumption of the reasons that may have existed, but were not, in fact, uttered.

39. In fact, when the Court in the past has evaluated the quality of the parliamentary review to confer a wider margin of appreciation, it has studied the *actual* debate. As a consequence, in cases in which Parliament had in fact weighed the competing interests at length, more deference was shown to the State,[104] but, on the contrary, when no such explicit weighing of those reasons had occurred, a negative inference was drawn in respect of the domestic decision.[105]

40. Nothing of the sort is done in the majority judgment. All we find is a general reference to the preamble of the CCP and point 2 of section 3 of Law no. 43/86 to the effect that some provisions were "aimed at reinforcing the legal position of the accused and ensuring effective equality of arms" and that "measures which could prejudice the accused's personal dignity should be prevented".[106] An additional mention is made of the existence of three legislative proposals in 2007. That is all. There is no evidence that the right to self-representation was *actually* taken into consideration when weighing the interests at stake in a Code that is over 500 Articles long, and less still that special consideration was given to defendants with legal training – the universe of cases that the majority consider to be relevant. Had the majority taken the trouble to read the relevant *travaux préparatoires*[107] they would have had to conclude that there was no such evidence, for the simple reason that there was no such debate.

41. Proceduralisation of human rights law is a laudable added value in so far as it complements substantive justice, but an irresponsible abdication

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[101] Judgment, § 117.
[102] Judgment, § 145.
[103] Judgment, § 145.
[104] *James and Others*, cited above, § 48; *Evans v. the United Kingdom* [GC], no. 6339/05, § 86, ECHR 2007-I; *Animal Defenders International*, cited above, §§ 114-16; and *Shindler v. the United Kingdom*, no. 19840/09, § 117, 7 May 2013.
[105] *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 79-80, ECHR 2005-IX; *Dickson*, cited above, § 78; and *Alajos Kiss v. Hungary,* no. 38832/06, § 41, 20 May 2010.
[106] Judgment, § 145.
[107] I am referring to the *travaux préparatoires* of the Code itself and of Laws no. 59/88 and no. 48/2007, mentioned in paragraph 146 of the judgment. The aforementioned *travaux préparatoires* are publicly available online.

of the Court's supervisory powers when it replaces the latter.[108] While this is a careful line to tread, the majority's suggested approach is to see procedural justice as an alternative (not a complement) to substantive European supervision. This transforms the national decision-making procedure into a fetish and the Court into an agnostic as to outcomes, ignores the fact that unfair outcomes may result from faultless national decision-making procedures and ultimately leads to a reduced level of standard-setting. [109]

42. In the present case, the proceduralisation of the margin of appreciation promotes unwarranted formalism and window-dressing. The majority cut some corners here. This approach to the legislative debate is highly problematic, to say the least. It is one thing to consider that the Court can look at the intensity and quality of parliamentary debate or other forms of domestic procedures to look for indicia of the "necessity" of a restriction of a Convention right. But it is quite another thing to *replace* the protection of rights with mere rubber-stamping of parliamentary proceedings. Hardly any law enacted by any parliament in any circumstance would fail to pass the extremely low standard the majority are applying to the review of parliamentary proceedings. If this examination is all it takes to release member States from their duties, the margin of appreciation will, in practice, always be unlimited.

43. More gravely, the majority wrongly assume that the accused had a right to submit observations, statements and requests "in which he could address questions of law and facts"[110]. With regard to questions of law, this statement is simply false. Questions of law in observations submitted by a defendant, even with a legal background, are simply ignored in Portuguese courts. In fact, the applicant, like any other defendant, was barred in absolute terms from presenting his own technical defence. He had to be assisted by counsel during all the procedural steps in which he was involved. Under Article 302 §§ 2 and 4 of the CCP, only defence counsel

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[108] See the joint dissenting opinion of Judges Ziemele, Sajo, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders International*, cited above, § 9.

[109] See the critical remarks of the former Vice-President of the Court Judge Tulkens, "Conclusions Générales", in Sudre, Frédéric (ed.), *Le principe de la subsidiarité au sens du droit de la Convention européenne des droits de l'Homme* (Anthemis 2014), p. 406: "le danger de la procéduralisation est que le contrôle de la Cour s'épuise dans le constat qu'il est satisfait aux impératifs procéduraux et ne comporte plus d'aspect substantiel. La procéduralisation risque alors d'être un alibi d'un contrôle sur le fond et pourrait faire le jeu de ceux qui veulent alléger la surveillance de la Cour sur les décisions étatiques." For recent scholarly literature on this problem, see Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments", in (2015) *Human Rights Law Review*, 745-774; Gerards and Brems (eds.), *Procedural Review in European Fundamental Rights Cases*, CUP, 2017; and Arnadóttir, "The 'procedural turn' under the European Convention on Human Rights and presumptions of Convention compliance", in (2017) *International Journal of Constitutional Law*, 9-35.

[110] Judgment, § 156.

has the opportunity to request the taking of additional evidence by the investigating judge and to summarise his or her own conclusions as to the sufficiency of the evidence gathered and the questions of law which arise.[111] Under Article 360 § 1 of the CCP, only defence counsel is given the floor by the trial judge, following the taking of evidence and the pleadings of the public prosecutor's office in particular, in order to address the court in oral pleadings setting forth the conclusions, in fact and in law, to be drawn from the evidence produced.[112] Under Article 98 § 1 of the CCP, the applicant could submit notes, written pleadings and requests at any stage in the proceedings without his defence lawyer's signature.[113] But he could not conduct "his own technical defence", which means that he could not raise or discuss any legal issue. This is the well-established case-law of the Supreme Court and the courts of second instance and the reason for that is the following: "the right of petition is not designed to enable the accused to take the place of his or her lawyer".[114] Amazingly, the majority themselves cite, in paragraphs 57 and 148 of the judgment, jurisprudence of the Supreme Court which contradicts the statement of the majority in paragraph 156.

44. But this is not even the only false statement on the facts. The majority refer to the examination of the mandatory representation of defendants "in almost all criminal proceedings".[115] This is again a serious misrepresentation of national law and case-law. The majority themselves cite, in paragraphs 37 and 57 of the judgment, the case-law of the Supreme Court according to which a lawyer may "never" represent himself in criminal proceedings and the provisions authorising judges and lawyers to represent themselves before courts are purely and simply "inapplicable in criminal cases".

45. These are not clerical errors. These are false representations of decisive elements in the majority's reasoning. These are statements for which the Court bears sole responsibility and which cannot be imputed to the parties, quite simply because they never put forward such arguments. Neither the applicant nor the Government ever argued that defendants could conduct their own technical defence and submit observations on legal aspects. In fact, they both argued precisely the opposite, in a crystal-clear, concordant way.[116] In any court of law worthy of the name, errors of this

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[111] Judgment, § 46.
[112] Judgment, § 48.
[113] Judgment, § 42.
[114] Judgment, § 43. See also Supreme Court of Justice, judgment of 25 September 2008, case no. 2300/08; Judgment of the Guimarães Court of Appeal of 9 January 2017, Case no. 228/14.6JABRG-A.G1; Judgment of the Coimbra Court of Appeal of 3 June 2015, Case no. 2320/12.2TALRA-A.C1; Judgment of the Evora Court of Appeal of 24 September 2013, Case no. 599/09TAOLH.
[115] Judgment, § 118.
[116] Judgment, §§ 105 and 107 for the position of the Government and §§ 94 and 96 for the position of the applicant. The majority's line of argument is not even attuned to the

calibre would be a sufficient reason to consider the judgment null and void for being based on false representations with a decisive influence on the findings. Rule 80 of the Rules of Court is designed precisely for these types of serious errors. Only this legal avenue can remedy the above-mentioned errors regarding Portuguese law and case-law which, for the purposes of Rule 80, must be regarded as decisive factual elements.[117]

B. The review of the decision taken in the present case (§§ 46-54)

46. After having found "relevant and sufficient grounds" for the blanket prohibition on self-representation, the majority promise to "examine, in the context of the overall assessment of the criminal proceedings, whether the domestic courts, when applying the impugned rule, also provided relevant and sufficient reasons for their decisions".[118] The majority do not fulfil this promise either.

47. In order to "examine the quality of the judicial review"[119] in the present case, the majority cite some domestic judicial decisions relating to defendants other than the applicant. The majority cite case-law of the Portuguese Supreme Court in which it "explained the philosophy behind the restriction on conducting one's defence alone, and the aims which the provision of mandatory legal representation sought to achieve", such as "the need to provide for the dispassionate conduct of a case", "the need to ensure that the accused had technical assistance" and the "tension between the status of an accused person and the responsibilities of defence counsel".[120]

48. However, none of the decisions cited were delivered in the applicant's case. It is the majority themselves who add that the Court "further accepts that even a defendant trained in advocacy, like the applicant, may be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case".[121] This is, by the way, the only line in which the majority consider why a lawyer

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Government's submissions.

[117] See the case-law of the Court on misinterpretation of legal and factual arguments submitted by the parties with a decisive influence on the outcome of the case: *Baumann v. Austria* (revision), no. 76809/01, 9 June 2005. On the requirement of a "new fact" for the revision of a judgment, see *E.P. v. Italy* (revision), no. 31127/96, 3 May 2001; *Pupillo v. Italy* (just satisfaction), no. 41803/98, 18 December 2001; *Viola v. Italy* (revision), no. 44416/98, 7 November 2002; *Perhirin and 29 Others v. France* (revision), no 44081/98, 8 April 2003; *Karagiannis and Others v. Greece* (revision), no. 51354/99, 8 July 2004; *Sabri Taş v. Turkey* (revision), no. 21179/02, 25 April 2006; *Davut Mıçooğulları v. Turkey* (revision), no. 6045/03, 16 December 2008; *Fonyódi v. Hungary* (revision), no. 30799/04, 7 April 2009; and *Hertzog and Others v. Romania* (revision), no. 34011/02, 14 April 2009.

[118] Judgment, § 143.

[119] Judgment, § 147.

[120] Judgment, § 148.

[121] Judgment, § 153.

should not be allowed to conduct his or her own defence, an issue which is nevertheless "the thrust of the case".[122] In any event, all the decisions taken by the domestic courts in the instant case[123] are rather an extension of the *in abstracto* analysis of the legislation, not an *in concreto* analysis of the particular circumstances of the applicant's case, for the simple reason that the domestic courts could not exercise any discretion so as to avoid any disproportionality in a particular case.[124]

49. It is patent, from the summary of the facts set out in the judgment itself, that the domestic courts gave no relevant and sufficient grounds as to why the applicant could not be permitted to represent himself. The majority, however, attempt to replace the domestic courts in the assessment of the particular circumstances of the case. For example, the majority say that the general grounds for the ban on self-representation "appl[y] even more forcefully where, as here, a defendant was suspended from the Bar, was not therefore a duly registered lawyer ... and had already been charged with insulting a judge".[125] Maybe these reasons could have been relevant to forbid the applicant to represent himself, but there is no indication in the "Facts" part of the judgment that these were actually the reasons why the applicant was prevented from doing so in the present case. The domestic courts said nary a word about these facts. It is not this Court's job to assess these facts *per se*, as a court of first instance. Hence, I will refrain from second-guessing what the domestic courts could have been thinking, and so should the majority have done.

50. A similar pattern arises when the majority come to analyse the consequences for the "overall fairness" of the trial of the applicant's inability to represent himself. The majority make a series of assumptions and inferences that the domestic courts themselves did not make. For example, the majority consider it important that the applicant "does not appear to have challenged the qualifications or quality of the court-appointed lawyer".[126] Of course, the negative, dubitative wording "does not appear" is used only because the majority cannot be sure of an assessment that the domestic courts did not make.

51. Also, when assessing the effects of the "overall fairness" of the proceedings, the majority make contradictory assertions that show how difficult it is to replace the domestic courts when evaluating the reasons for which a decision was taken. The majority say that the "applicant never alleged before the Court that he had been unable to present his own version

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[122] Judgment, § 110.
[123] Judgment, § 152.
[124] Contrast with *Gillow*, cited above, § 56, and *Ždanoka*, cited above, § 128, and their requirement of "sufficient degree of individualisation" when a law bars a category of people from exercising a Convention right.
[125] Judgment, § 154.
[126] Judgment, § 162.

of the facts or his own interpretation of the relevant legal provisions to the courts".[127] Immediately afterwards, they contend that "the mere fact that [the court-appointed lawyer] did not respond to the Constitutional Court's inquiry regarding the endorsement and signature of his constitutional appeal, written by himself, cannot, as such, be considered a mistake."[128] This was evidently not a "mistake": it was a choice by the court-appointed lawyer. It reveals nothing less than a disagreement between the applicant and the court-appointed lawyer regarding the legal strategy to be pursued, which indeed rendered the applicant "unable to present ... his own interpretation of the relevant legal provisions" to the Constitutional Court. This choice of the court-appointed lawyer not to endorse the applicant's constitutional appeal is at the heart of the applicant's complaint that he could not discuss his own interpretation of the relevant legal provisions, because he was not allowed to put forward his own technical defence.

52. The gravest of things is that this happened not once, as the majority say, but twice, because the applicant's appeal against the final judgment was also declared inadmissible, owing to the lack of a signature by the court-appointed lawyer.[129] The applicant was also unable to present his own interpretation of the relevant legal provisions to the court of appeal.

53. Finally, the most unfortunate stylistic device is used to present the applicant as a troublemaker who "lacked the objective and dispassionate approach considered necessary under Portuguese law to effectively conduct his own defence". [130] To make the finding of the domestic courts seem "not unreasonable", the majority invoke the applicant's criminal record and chastise his behaviour as "a repeat offence, which could have led to a custodial sentence of four months and fifteen days" and which "cannot be considered as minor", [131] omitting to mention that the offence with which he was charged was punishable, alternatively, by a mere 180 day-fines.[132] This knife-sharpening language, which serves the purpose of putting forward a derogatory image of the applicant, is inadmissible. It goes beyond everything that the domestic courts ever said about him. If this stylistic device is intended to turn the soundbite-hungry reader against the applicant, it fails to do so. As already mentioned, nowhere in the domestic courts' decisions are these facts established with regard to the applicant.[133]

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[127] Judgment, § 163.
[128] Judgment, §164.
[129] Judgment, compare §§ 16 and 20.
[130] Judgment, § 165.
[131] Judgment, § 165. To quote the partly dissenting opinion of Judges Sajó, Lazarova-Trajkovska and Vučinić, joined by Judge Turković, in *Simeonovi v. Bulgaria* [GC], no. 21980/04, ECHR 2017: "The overall fairness analysis as applied in this case runs the risk of replacing the evaluation of the fairness of a trial with that of a plausibility of a conviction."
[132] Judgment, § 50.
[133] The domestic courts only stated that "the applicant was not entitled to act in the

Nowhere in the "Facts" part of the judgment of this Court are these alleged "considerations" of the domestic courts to be found. What this device actually reflects is a drafting technique liable to result in a first-hand, direct personality assessment of the applicant, which unfairly stacks the deck against his case.

54. As I see it, the Government did not provide "relevant and sufficient grounds" either for having prevented the applicant from representing himself or for the general rule entailing that prohibition. The majority not only fail to show the domestic authorities' reasons, but also make an inappropriate, and failed, attempt to replace them with their own reasons, as if they were a first-instance court.

Second Part – A *pro persona* approach to the case (§§ 55-80)

V. The Court's relevant case-law (§§ 55-61)

A. The unclear legacy of *Croissant* (§§ 55-59)

55. Having rejected the majority's approach, I present forthwith my own view of the case, starting with an analysis of the pertinent Strasbourg case-law. Article 6 § 3 (c) provides that everyone charged with a criminal offence has the "minimum right" to "defend himself in person or through legal assistance of his own choosing". According to an old precedent of the Commission, this disjunction is for the State to solve:

> "the Commission held that Art. 6 (3) (c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manner the defence should be assured. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court."[134]

56. The majority hesitate between consolidating this "disjunctive" reading of Article 6 § 3 (c)[135] and discarding it:

> "The Court observes that an absolute bar against the right to defend oneself in person in criminal proceedings without the assistance of counsel may, under certain circumstances, be excessive".[136]

57. Only one of the cases that the majority cite dealt with an absolute bar on self-representation: the *Correia de Matos* inadmissibility decision.[137] In

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proceedings without the assistance of the defence counsel" (judgment, § 13), and not that he was mentally unfit or that he "lacked" the mental capacity to represent himself (§ 165).

[134] *X v. Norway*, no. 5923/72, Commission decision of 30 May 1975, DR 3, p. 44.

[135] Judgment, § 122.

[136] Judgment, § 137.

all the other cases cited by the majority, the provision on mandatory legal assistance was not an absolute one, but one that depended on the circumstances of the case.

58. In *Croissant*, the Court stated:

> "The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings (Article 140 of the [German] Code of Criminal Procedure ...) – which finds parallels in the legislation of other Contracting States – cannot, in the Court's opinion, be deemed incompatible with the Convention."[138]

In spite of the apparently general terms in which this statement is made, two considerations should be given particular weight.[139] Firstly, the applicant in the German case enjoyed the legal assistance of two defence counsel of his own choosing, but objected to the assignment of a third counsel by the court against his will. He did not object to the court's appointment of counsel as a general matter, but only to the appointment of a third lawyer, which he considered unnecessary. On the contrary, the Court found that there was "relevant and sufficient justification" for the domestic court to appoint the third lawyer, having regard to the grounds of the domestic decision: the subject-matter of the trial, the complexity of the factual and legal issues involved and the defendant's personality.[140] Secondly, and more importantly, the German Code of Criminal Procedure established, and still establishes, self-representation as a general rule, to which the cases of mandatory legal counsel listed in Article 140 are an exception. Hence, the Court should not rush into precipitate conclusions, as it did in the *Correia de Matos* inadmissibility decision,[141] on the right to self-representation on the basis of *Croissant*.

59. The same argument could be made regarding the two other cases of court-appointed counsel cited by the majority. In *X v. Finland*, a legal counsel (and guardian) was appointed because the Forensic Psychiatry Board deemed that the applicant was not able to conduct her own defence.[142] Furthermore, legal counsel in criminal proceedings was optional in Finland except in cases where there were special reasons.[143] Lastly, the decision of the Commission in *Weber v. Switzerland*[144] was also directed against a provision of the Geneva Code of Criminal Procedure that provides for

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[137] *Correia de Matos* (dec.), cited above.
[138] *Croissant v. Germany*, 25 September 1992, § 27, Series A no. 237-B.
[139] Croquet, "The right of self-representation under the European Convention on Human Rights: what role for the limitation analysis?", in (2012) 3 *European Human Rights Law Review* 292-308, rightly criticising the legal uncertainty created by the erroneous interpretation of *Croissant* in the Court's first *Correia de Matos* decision.
[140] Ibid., §§ 28 and 30.
[141] *Correia de Matos* (dec.), cited above.
[142] *X v. Finland*, cited above, § 182.
[143] Ibid., §§ 124-26 and 190.
[144] *Weber v. Switzerland*, no. 24501/94, Commission decision of 17 May 1995.

mandatory legal counsel only in cases tried by a *cour d'assises*, against a general background of optional legal representation.[145]

B. The "necessary in the interests of justice" test (§§ 60-61)

60. Furthermore, if the Court has stated more generally that "a legal requirement that an accused be assisted by counsel in criminal proceedings cannot be deemed incompatible with the Convention", it has qualified this statement with the proviso that the right enshrined in Article 6 § 3 (c) could be interfered with only in the presence of "relevant and sufficient grounds for holding that this is necessary in the interests of justice".[146] Three main conclusions can be drawn from this crucial proviso. Firstly, the "relevant and sufficient grounds" for restricting the Convention right refer to the required reasons for a judicial "holding". The choice of words is not anodyne. The key word in the sentence is "necessary", which corresponds to the test to be applied in the judicial "holding". The necessity test is an integral part of the proportionality test.[147] Secondly, when doing the balancing between the conflicting interests at stake, the interests of justice are to be put on one scale of the balance and the defendant's choice of form of representation on the other scale. Thirdly, the proportionality test (which includes the necessity test) is an implicit, overarching limitation clause of both rights enshrined in Article 6 § 3 (c) of the Convention, the right to defend oneself in person and through legal assistance, no reason existing to treat the first limb of sub-paragraph (c) differently from the second limb in terms of the applicable implicit limitations.

61. In the light of the Court's case-law, the majority consider that an "absolute bar" against self-representation "may ... be excessive".[148] I would not qualify this assertion: an absolute bar *is* excessive, which in this context means that it is contrary to the Convention. I will show why there are literal, teleological and systematic reasons to recognise that the right to self-representation is a self-standing right in the structure of the Convention.

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[145] See Article 29 of the Code of Criminal Procedure of Geneva.

[146] Among other authorities, *Lagerblom v. Sweden*, no. 26891/95, §§ 50 and 54, 14 January 2003, and *Mayzit v. Russia*, no. 63378/00, § 66, 20 January 2005, following *Croissant*, cited above, § 29.

[147] On the three stages of the proportionality test, see my opinion in *Mouvement raëlien suisse*, cited above.

[148] Judgment, § 137.

VI. A self-standing right under the Convention (§§ 62-67)

A. The textual element of interpretation (§§ 62-64)

62. Everyone charged with a criminal offence has the right to "defend himself in person or through legal assistance of his own choosing". The text of Article 6 § 3 (c) defines one right (the right to defend oneself) with two possible means of exercising it (in person or through legal assistance). If these words are to mean anything, there has to be an element of choice in the sort of defence that criminal defendants are entitled to put forward. There has to be at least a category of cases in which a person is allowed to represent him or herself and reject legal counsel. This element of choice, of course, need not be absolute, and this Court has indeed found situations in which this choice was reasonably restricted.[149]

63. What cannot be argued is that Article 6 § 3 (c) is complied with whenever a person is allowed to defend himself or herself *either* in person *or* through legal assistance of his or her choosing. The right to self- representation in criminal procedure is as unqualified as the right to legal assistance of one's choosing, since it is not subject to any explicit limitation clause, as, for example, the right to legal aid is. No one would argue that the right to counsel would be satisfied if a State denied a person access to a lawyer but at the same time granted him or her the right to defend his or her own case. It would be hard to adhere to the strict *disjunctive* reading of Article 6 § 3 (c) in such a scenario. There is absolutely no grammatical reason to think differently of the first tenet of the Article, which is placed in a symmetrical position in relation to the second one. Otherwise, we would be reading "everyone has the right to defend himself *unless* he is being defended through legal assistance", which is clearly not what the Convention says.

64. As a matter of strict textual interpretation, one has to go a step further. Three features of the provision at issue put the emphasis on the active role of the defendant in putting up a defence and making a choice with regard to the form of his or her representation. First, in Article 6 § 3 (c) the form of self-representation comes prior to that of legal assistance. Second, in the event of legal assistance, the person providing it is a mere agent of the defendant, assisting and not replacing him or her, and that is how the word "through" in the second part of the sentence can be more aptly interpreted. Third, the use of the active voice in the text stresses the active role of the defendant in choosing his or her defence strategy and his or her preferred form of representation.

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[149] For example, *Croissant*, cited above, § 29.

B. The teleological element of interpretation (§§ 65-67)

65. Having said this, my understanding is not based exclusively or primarily on a literal argument, but on a teleological one: only an understanding of the right to self-representation as a self-standing right in the context of the Convention is consistent with the fundamental conception of the criminal defendant as a subject of the procedure, rather than its object. Such *pro persona* understanding of criminal procedure law, which is actually a legacy of Cesare Beccaria's *Dei Delitti e delle Pene* and the subsequent Enlightenment revolution in the field of criminal procedure law, should have illuminated the reflections of the Court in the present case.[150]

66. In criminal proceedings underpinned by human dignity and the rule of law, the State must show the defendant, the victims and the wider society that what the defendant did is worthy of reproach. Prosecution can be seen as a procedure through which the State tries to explain and demonstrate that what a person did was contrary to the common rules of the community – and the action of the defence is the symmetrical counter-explanation, a person trying to show that in fact he or she did not do what the prosecution claims, or that what he or she did was not in fact contrary to the communitarian law.

67. The fact that these claims must be translated into the often arcane language of law should not obscure the dialogical character of the procedure or entail its expropriation from the defendant: the dialogue is, in principle, between the defendant and the State. This is recognised only by an understanding that, in principle, the defendant should not have anyone imposed between the State and himself or herself when engaging in the defence, and that he or she should be able to *choose* if he or she prefers to be assisted by someone who is presumably more competent in translating his or her assertions into the language of law. This teleological construction of the Convention flows easily from the above-mentioned three grammatical characteristics of the text at stake. On the basis of the harmonious textual and teleological elements of interpretation, one cannot but conclude that respect for the defendant's autonomy as a legal subject is the lifeblood of Article 6 § 3 (c). The core of everyone's right to defend himself or herself lies in the autonomy to choose his or her defence strategy free from undue

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[150] To buttress the argument, a review of European history could have helped to show that dictatorships usually deprive defendants of choice as to the form of representation and impose legal assistance on them. See the example of such restrictions in Nazi Germany and Austria, first in the special criminal courts (*Sondergerichten*) and afterwards in all ordinary criminal courts: *Verordnung der Reichsregierung über die Bildung von Sondergerichten vom 21. März 1933*, § 10; *Verordnung über die Zuständigkeit der Strafgerichte vom 1. Februar 1940*, § 32; *Verordnung zur Durchführung der Verordnung über die Zuständigkeit der Strafgerichte vom 13. März 1949*, § 18; *Verordnung zur weiteren Anpassung der Strafrechtspflege an die Erfordernisse des totalen Kriegs vom 13. Dezember 1944*, § 12.

State or other pressure and to take a free decision regarding the more convenient form of representation as part of that strategy.[151]

VII. A non-absolute right under the Convention (§§ 68-80)

A. The systematic element of interpretation (§§ 68-76)

68. The construction of Article 6 § 3 (c) proposed above looks all the more plausible when we pay attention to the legal landscape in which the Convention develops.[152] The practice of European States, of international human rights law and of international criminal law converges in recognising the right to self-representation in criminal procedure. I have already shown above how the fact that the majority call the extensive practice within the Council of Europe member States a "trend" rather than a "consensus" is inconsequential. I will briefly expand on the shape of this practice in the Council's domestic jurisdictions to show how, regardless of this nominative disquisition, there is certainly a common ground from which Portugal departs.

69. The Court has examined the legislation in thirty-five member States other than Portugal. Thirty-one of them establish the right to self-represent as a general rule, while the other four, while establishing a general prohibition on self-representation, allow for significant exceptions to the prohibition. Portugal's absolute bar on self-representation lies at the extreme of this spectrum. Certainly, many of the countries that allow for self-representation as a general rule also provide for significant exceptions. Ireland and Poland, indeed, are the only ones that do not provide any kind of exception to this right. In Malta, even if there are almost no situations of mandatory legal counsel as such, the courts would insist on the defendant accepting legal assistance. In the Republic of Moldova, even if mandatory legal counsel is provided for in some cases, the accused is normally allowed to ask for a voluntary waiver of this requirement, and such a request may be rejected by the judge or the prosecution.

70. Other countries are more precise in the exceptions to the right to self-representation. For example, nineteen[153] out of the thirty-one States that accept self-representation as a general rule would make exceptions according to the level or stage of jurisdiction. In general, the higher the

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[151] On the core of the right in an Article 6 case, see my separate opinion in *Károly Nagy v. Hungary* [GC], no. 56665/09, ECHR 2017.

[152] On the importance of the systematic element of interpretation see my opinion in *Al- Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§ 17-24, ECHR 2016.

[153] Albania, Armenia, Bulgaria, Croatia, Finland, France, Georgia, Greece, Germany, Hungary, Lithuania, Luxembourg, Monaco, the Republic of Moldova, the Netherlands, the Russian Federation, Slovakia, Ukraine and the United Kingdom.

court, the more likely there is to be some sort of obligation to be assisted by legal counsel, especially before the Supreme or Constitutional Court. Some countries specifically require legal representation for certain types of proceedings, such as plea bargaining[154] or extradition.[155] Defendants who are to some degree unable to conduct their own defence on account of a mental health condition of some sort are prevented from doing so in twenty-one[156] out of those thirty-one States. Nineteen[157] out of the thirty-one States provide for mandatory representation depending on the gravity of the offence. Ten[158] out of the thirty-one mandate legal counsel when the defendant is not able to speak the language in which the trial is conducted. Lastly, some countries provide for mandatory legal representation when the accused has been banned from the courtroom or has in some way disturbed the proper conduct of the trial.[159]

71. The remaining four States out of the thirty-five analysed by the Court, which establish mandatory representation as a general rule, provide for sensible exceptions. In Italy and Spain self-representation is allowed in criminal proceedings concerning minor offences. In Norway, while the rule is that defendants are obliged to have legal counsel, the judge may accept an accused's waiver of this right, after a "holistic assessment" that takes into account all the circumstances of the case, such as the severity of the offence, the complexity of the legal issues, the ability of the indicted person to conduct his or her own defence, and the level of the court. Only San Marino rivals Portugal in the strictness of the rule, although even in this country the accused is allowed to perform some procedural acts on his or her own, such as filing an appeal.

72. The Court has also reviewed some important countries outside the Council of Europe. Canada and Hong Kong allow self-representation in all cases, while the United States of America allows it as a general rule, with a few exceptions, such as in proceedings before the Supreme Court.[160]

73. This extensive consensus has also found its way into international criminal tribunals, whose practice has also shown that the non-absolute right to self-representation entails the ability to refuse to accept court-appointed counsel.[161] The Appeals Chamber of the International Criminal Tribunal for

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[154] Croatia, France, Georgia, Latvia, Montenegro and Ukraine.
[155] Lithuania and Slovakia.
[156] Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Georgia, Germany, Hungary, Latvia, Lithuania, the Republic of Moldova, Montenegro, Romania, the Russian Federation, Slovenia, Turkey and Ukraine.
[157] Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, Georgia, Germany, Greece, Hungary, Lithuania, the Republic of Moldova, Montenegro, Romania, the Russian Federation, Slovenia, Sweden, Turkey and Ukraine.
[158] Armenia, Austria, Bulgaria, Georgia, Hungary, Latvia, Lithuania, the Republic of Moldova, the Russian Federation and Ukraine.
[159] For example, Croatia, Georgia and Malta.
[160] See *Faretta v. California*, 422 U.S. 806 (1975).

the former Yugoslavia (ICTY), in the *Milošević* case, interpreted Article 21 § 4 (d) of its Statute – whose wording is substantially identical to Article 6 § 3 (c) of the Convention – to enshrine a right to self- representation, which could be restricted only "guided by a general principle of proportionality". Indeed, the Appeals Chamber considered that the decision that had assigned the defendant counsel against his will was grounded "on a fundamental error of law: the Trial Chamber failed to recognize that any restrictions on Milosevic's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial".[162] The restrictions to "a right as fundamental as" self-representation were, therefore, "excessiv[e]".[163] The Appeals Chamber ratified this understanding in the *Šešelj* decisions,[164] and extended the right to self-representation in appeal procedures in *Krajišnik.*[165]

74. The Special Court for Sierra Leone (SCSL) took a more restrictive approach to the right to self-representation, although never calling into question the principle that "Article 17(4)(d) [substantially identical to Article 6 § 3 (c) of the Convention] does guarantee to an accused person, first and foremost, the right to self-representation. This is clear from the plain and literal meaning of that provision." However, it held that this right was not absolute, and that counsel could be imposed when the interests of justice so required. The Trial Chamber identified, therefore, a list of reasons that justified the imposition of counsel in that particular case, such as the fact that it was a joint trial.[166] In another case, the Appeals Chamber of the

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[161] See Ambos, *Treatise on International Criminal Law*, 2016, III, 165-67; Boas and others, *International Criminal Procedure*, Cambridge University Press, 2011, Volume III, 156-63; Abeke, *The right to self-representation in International Criminal Jurisdictions*, Tilburg University, 2011; Zahar, "Legal aid, self-representation and crisis at the Hague Tribunal", in (2008) 19 *Criminal Law Forum* 241; Scharf, "Self-representation versus assignment of defence counsel before international criminal tribunals", in (2006) 4 *Journal of International Criminal Justice* 31; Temminck Tuinstra, "Assisting an accused to represent himself: Appointment of *amici curiae* as the most appropriate option", in (2006) 4 *Journal of International Criminal Justice* 47; and Jørgensen, "The problem of self-representation at International Criminal Tribunals: striking a balance between fairness and effectiveness", in (2006) 4 *Journal of International Criminal Justice* 64.

[162] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, § 17.

[163] Ibid., §18.

[164] *Prosecutor v. Šešelj*, Case no. IT-03-67-PT. Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003; and *Prosecutor v. Šešelj*, Case no. IT-03-67-AR73.3. Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006.

[165] *Prosecutor v. Krajišnik*, Case no. IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005.

[166] *Prosecutor v. Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, 8 June 2004.

SCSL upheld the mandatory assignment of counsel to a defendant who was obstructing the proceedings against him.[167]

75. Lastly, I have set out above the conclusions reached by the HRC, and why this Court should take special care to engage in a meaningful dialogue with the HRC's findings. I reproduce those considerations here. The Court should have aligned itself with the HRC and concluded, on the one hand, that a general ban on self-representation was diametrically opposed to Article 6 § 3 (c) of the Convention and, on the other hand, that any restriction of the right of self-representation should "not go beyond what is necessary to uphold the interests of justice".[168] This would be in line with the Court's previous case-law, as shown above. The Court has repeatedly admitted that, in order to justify limitations to the right to legal assistance of one's own choosing, domestic courts must present "relevant and sufficient reasons for holding that this is necessary in the interests of justice".[169] This implicit, overarching limitation clause of Article 6 § 3 (c) is also applicable to the right to self-representation in criminal procedure. In other words, any interference with that right must respect the core of everyone's right to defend him or herself and must observe the principle of proportionality. The central question in this regard is precisely to weigh the competing interests at stake, namely, on the one hand, the defendant's personal autonomy and, on the other hand, the public-interest reasons invoked by the national authorities to limit that autonomy. In this proportionality analysis, the State should give precedence to the least intrusive means, safeguarding as far as possible the core of the right.

76. The HRC mentions three such reasons: (1) when the defendant is substantially and persistently obstructing the proper conduct of a trial, (2) when the defendant is facing a grave charge but is unable to act in his or her own interests, and (3) when it is necessary to protect vulnerable witnesses from distress or intimidation if they are to be questioned by the accused. In particular, the second reason could be interpreted in a way that allows for compulsory imposition of legal counsel in cases of particular legal complexity or when the prospective penalties are sufficiently grave. I should add that these reasons are not exclusive and that States may have other strong grounds for imposing legal counsel, always under the supervision of this Court.

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[167] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Application for Leave to Appeal: Gbao – Decision on Application to Withdraw Counsel, 4 August 2004.

[168] HRC General Comment No. 32, cited above, § 37. This does not mean that the Court should blindly follow the HRC, especially if the latter reviews its own position in a restrictive way.

[169] *Lagerblom*, cited above, §§ 50 and 54.

B. The application of the Convention standard to the case (§§ 77-80)

77. In the light of the above, the facts and the legal framework of the case leave no room for doubt. Under Article 287 § 4 of the CCP, in ordering the opening of the adversarial investigation the judge must always appoint a defence lawyer for the accused if the latter does not have a lawyer or court-appointed defence counsel. An accused who is a lawyer must be represented by counsel, failing which the proceedings will be rendered irrevocably null and void (Articles 119 (c), 62 and 64 (d) of the CCP).

78. Prior to the entry into force of Law no. 49/2004 of 24 August 2004, an accused who was a lawyer was entitled to conduct his or her own defence if the offence of which he or she was accused did not carry a custodial sentence (Article 64 § 1 (b) of the CCP). However, almost all the criminal offences provided for by Portuguese law carry a prison sentence, either in combination with or as an alternative to a fine. Offences punishable solely by a fine (without imprisonment) were exceedingly rare in 2004 and are even rarer now. The Articles and paragraphs of the Criminal Code list 292 different offences, of which only three are punishable just by a fine (without imprisonment). In any event, under Article 49 of the Criminal Code, a fine which has not yet been enforced can always be replaced by a prison term.

79. Since the entry into force of Law no. 49/2004 of 24 August 2004, an accused who is a lawyer may never represent him or herself, at any stage of the criminal proceedings, according to the unanimous case-law of the Constitutional Court, the Supreme Court of Justice and the courts of appeal.[170]

80. The national proceedings in the present case took place between 2013 and 2015. The domestic law and case-law applicable at that time are still unchanged today and are very clear: the applicant, a lawyer, was barred in absolute terms from representing himself at any stage of the criminal proceedings and from making his legal case before the courts. In a word, the applicant never had his day in a court of law, because he was never listened to.

VIII. Conclusion (§§ 81-82)

81. When the letter and the spirit of Article 6 § 3 (c) of the Convention coincide as exactly as they do with regard to the question of self-

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[170] See Constitutional Court judgment, Case no. 196/07; Constitutional Court judgment, Case no. 461/2004; Supreme Court of Justice judgment of 20 November 2014, Case no. 7/14, Supreme Court of Justice judgment of 12 June 2014, Case no. 7/14; Supreme Court of Justice judgment of 1 July 2009, Case no. 279/96.0TAALM.S1; Supreme Court of Justice judgment of 7 April 2005, Case no. 3236/04; Judgment of the Porto Court of Appeal of 12 October 2011, Case no. 1997/08.8TAVCD-A.P1; Judgment of the Coimbra Court of Appeal, of 3 June 2015, Case no. 2320/12.2TALRA-A.C1; Judgment of the Coimbra Court of Appeal of 13 June 2007, Case no. 910/06.1TBCTR.C1.

representation, it ill behoves a court to engage in contortions to thwart both. That contortionist exercise is further discredited if the Convention is read in the light of the prevailing consensus in international law and the domestic practices of Contracting States.

82. This case proved to be more controversial than it might first have appeared. A literally divided Court took the path of least resistance and confirmed the respondent Government's stance. But the divide within this Court reflects two radically different perspectives of criminal procedure and the rights of the defence. In this regard, this judgment heralds a return to the biases of the tormented black past of Europe, those biases that categorised defendants as objects in the hands of the almighty State, which could always dictate what was in their interests, even against their own will.

JOINT DISSENTING OPINION OF JUDGES PEJCHAL AND WOJTYCZEK

1. We respectfully disagree with the view of our colleagues that Article 6 §§ 1 and 3 (c) of the Convention has not been violated in the instant case.

2. The case raises the question of the purpose of the procedural guarantees. The majority expressed the following view in this respect (see paragraph 120 of the judgment):

> "The minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases, are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Ibrahim and Others*, cited above, § 251 with further references)."

We agree with the view that procedural law is instrumental in relation to substantive law and is the tool for implementing substantive legal rules. One of the main aims of any legal proceedings is to produce substantially just outcomes. However, the role of procedural law is not limited to guaranteeing substantive justice. Procedural law also has autonomous aims and serves self-standing values which include human dignity, physical integrity, freedom, personal autonomy and procedural justice.

It is obvious that the right to defend oneself is an essential element of a fair trial. However, the purpose of the right to defend oneself is not limited to influencing the outcome of a criminal trial. The Convention rights should be viewed as a system and not as stand-alone guarantees that may be applied in isolation from each other. Article 6 § 3 should be read not only in the context of the other paragraphs of Article 6 but also against the backdrop of other Convention provisions and especially Article 3, Article 5 and Article 8.

The right to defend oneself is also the right to defend oneself against preventive measures taken during an investigation, especially against remand custody and other restrictions on personal freedom. One of its aims is to minimise the scope and the intensity of preventive measures taken at the pre-trial stage and pending trial, such as remand custody. The rights guaranteed under Article 6 § 3 are therefore closely connected with the rights guaranteed by Article 5 and Article 8. A person charged with a criminal offence may also face the risk of ill-treatment and may have to defend himself against such threats. In this context, the right to defend oneself and the right of access to a lawyer from the moment of the first questioning by the investigative authorities are also an important safeguard against ill-treatment by State officials, and especially the police and prison authorities. It should therefore be regarded as part of States' obligations under Article 3. Defence may also be necessary against the press, who may be tempted to stigmatise the accused as the perpetrator, thereby affecting his

reputation and privacy. In this context, restrictions upon the right to defend oneself have to be assessed not only from the viewpoint of Article 6 but also from the perspective of other provisions of the Convention, especially Articles 3, 5 and 8.

3. Article 6 § 1 sets forth the standards of procedural justice by using the terms of "fair" hearing in the English version and "*cause entendue équitablement*" in the French version. This general requirement of procedural justice is further specified in respect of criminal proceedings in paragraphs 2 and 3 of Article 6, and includes the right to defend oneself in person or through legal assistance of one's own choosing.

A hearing that is fair and the right to defend oneself presuppose the right to be heard, which means not only the "right to speak" but also the "right to act" in the proceedings. The accused is entitled not only to present his own version of events but also to participate actively and to perform acts which produce legal effects in the proceedings. The legal subjectivity of a person is the first precondition of procedural fairness. In other words, procedural fairness presupposes the recognition of the person concerned as a legal subject, and every mentally competent person should enjoy full legal capacity in proceedings. A trial cannot be fair if the accused is just an object of the procedure and not an active subject who is able not only to present his views but also to participate actively by exercising his procedural rights in person.

Very often defence in a legal trial requires making fundamental choices: whether to plead guilty to some or all of the charges, to plead not guilty or to enter a plea bargain; whether to tell the truth or to lie, and in which way; whether to contest the impartiality of the judges, and so on. Those choices, which presuppose carefully weighing conflicting values and different risks, may have a decisive impact on the future of the accused. A lawyer may help the person concerned by identifying possible defence strategies, their prospects of success and the risks incurred, but he cannot personally bear the consequences of the choice. The accused bears all the consequences of those choices and therefore can never be deprived of the freedom to decide about his own future. We regret that the majority decided to leave these fundamental issues completely unaddressed.

4. The Court has recently developed its case-law under Article 8, stressing the importance of personal autonomy as protected by that provision (see, for instance, the judgments in the cases of *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Bărbulescu v. Romania*, [GC], no. 61496/08, § 70, ECHR 2017 (extracts)). Personal autonomy should be protected in all contexts, including in the context of criminal proceedings. The right to defend oneself, which is protected under Article 6, and the right to individual autonomy, protected under Article 8, overlap to a certain extent and reinforce each other. They both require that the accused can determine freely how he wishes to defend himself in

criminal proceedings. The Court, as master of the legal characterisation of the facts, should have communicated the complaint not only under Article 6 but also under Article 8 of the Convention.

We note in this context that the US Supreme Court expressed the following views (*Faretta v. California*, (1975) No. 73-5772, 30 June 1975, opinion of the Supreme Court, delivered by Justice Stewart in which Douglas, Brennan, White, Marshall, and Powell, JJ., joined):

> "In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. ...
>
> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law'. Illinois v. Allen, 397 U.S. 337, 350 -351 (Brennan, J., concurring) [422 U.S. 806, 835]."

We agree with this approach.

5. The Convention interpretation should observe the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. The point of departure is the letter of the Convention. It is true that the wording of Article 6 § 3 is not unequivocal. This provision guarantees everyone the right to "defend himself". The right to a defence may be exercised "in person or through legal assistance". The object of the right enshrined in Article 6 § 3 (c) is defined in the following terms: "to defend himself in person or through legal assistance of his own choosing". We would like to stress in this context that the formulation contained in this provision is not a logical disjunction with two rights as operands. The text does not refer to "the right to defend himself in person or the right to defend himself through legal assistance". The wording in question defines the object (the content) of a single right and enumerates the possible means of its exercise: it is the right to defend oneself in different ways listed in this provision.

We note furthermore that coordinating conjunctions in natural language cannot be equated with operators in logic. The conjunctions "or" in English and "*ou*" in French do not impose the conclusion that it would be for the State to choose the way in which the defence may be carried out. The State cannot be said to fulfil its obligations under Article 6 § 3 if it merely grants

either the right to defend oneself in person or the right to defend oneself through legal assistance.

The fact that the phrase "defend himself in person/*se défendre lui-même*" is placed before the phrase "through legal assistance/*avoir l'assistance d'un défenseur*" puts the emphasis on the personal autonomy and legal subjectivity of the accused. The use of the active infinitive further emphasises the active role of the accused.

The essential core of the right to defend oneself encompasses the right to determine the manner in which the defence should be assured. This is the right to defend oneself, not just the right to be defended. If the accused cannot determine for himself the line of his defence his right becomes meaningless and the trial cannot be regarded as fair. The State has to recognise the right to defend oneself effectively, but the defence may be in person or through legal assistance. All these considerations suggest that the choice of the means of defence is left to the accused and not to the State. Persons charged with a criminal offence may choose either to defend themselves in person or through legal assistance, or both in person and thorough legal assistance. Moreover, if a person charged with a criminal offence chooses to defend himself "through legal assistance of his own choosing", the lawyer must act within the scope of the instructions given by that person.

6. We agree with the view that the right to defend oneself is not absolute and that certain restrictions on this right may be justified. In certain circumstances restrictions concerning the choice as to whether or not to appoint counsel may be justified. The legislation may also require that certain procedural acts have to be performed by qualified lawyers. However, the restrictions imposed must preserve the essential content of the right in question and observe the requirement of proportionality.

The majority expressed the following view (see paragraph 122 of the judgment):

> "According to the long-established case-law of both the Commission and the Court, Article 6 §§ 1 and 3 (c) thus guarantees that proceedings against the accused will not take place without adequate representation for the defence, but it does not necessarily give the accused the right to decide himself in what manner his defence should be assured (see *Correia de Matos*, cited above; *Mayzit v. Russia*, no. 63378/00, § 65, 20 January 2005; and *Breukhoven v. the Czech Republic*, no. 44438/06, § 60, 21 July 2011)."

We fundamentally disagree with this approach. A situation in which an accused who is mentally competent does not have the right to decide himself in what manner his defence should be assured constitutes an infringement of the substance of the right to defend oneself, explained above, and is incompatible with the requirement of a fair hearing in Article 6. In our view the case-law of the Court should be aligned with the Convention.

7. We note that the provision in question refers to "legal assistance/*assistance d'un défenseur*". The Convention does not refer to *representation* by a lawyer. The role of defence counsel is to assist the client, not to replace him. The lawyer has to advise the client and to perform legal acts in compliance with, and within the limits of, the instructions given by the client. This role of the lawyer is emphasised particularly strongly in the French text of the Convention. While the law may provide for the compulsory assistance of a lawyer it should not establish a monopoly for the lawyer to perform all legal acts in the proceedings. The accused should in principle be empowered to perform legal acts if he so chooses; only certain especially important acts, such as cassation appeals, may be reserved for the lawyer, provided that such a restriction is proportionate to the aim pursued and does not infringe the substance of the right in question.

In paragraph 156 the majority list the procedural rights of the accused. We would like to rectify here one point which has not been accurately reflected in this paragraph. The Portuguese Supreme Court found that the rules of domestic law allowed accused persons to prepare their defence together with defence counsel. They could also submit observations, statements and requests which did not raise questions of law (case no. 7/14.0TAVRS.S1, judgment of 20 November 2014, paragraph XI – see paragraph 57 of the reasoning).

The majority refer to being "assisted by counsel" and to "the requirement to be assisted by counsel" (see, for instance, paragraphs 153 and 158). We note in this context that the rights of the accused to defend himself in person are very limited under Portuguese law. All acts which produce legal effects have to be performed by an advocate, with the exception of the right to revoke measures carried out by the advocate. Therefore the instant case is not about the compulsory *assistance* of a lawyer in criminal proceedings but about the *incapacitation* of the accused in criminal proceedings. The accused is more a passive object of the proceedings, who has to bear the consequences of his counsel's choice, than an active legal subject able to assert his autonomy and determine his destiny. This is clearly an illiberal and paternalistic element of the legal system of the respondent State.

8. The majority expressed the following view (paragraph 153):

> "The Court can accept that a member State may legitimately consider that an accused, at least as a general rule, is better defended if assisted by a defence lawyer who is dispassionate and technically prepared, a premise reflected in the relevant provisions of Portuguese law on which the impugned decisions in the present case were based. It further accepts that even a defendant trained in advocacy, like the applicant, may be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case."

We agree that the assistance of a lawyer is typically beneficial to the accused from the perspective of the most favourable outcome of a criminal case. The lawyer approaches the case with the distance required in order to

choose the best defence strategy, and acts free from the personal stress stemming from the possibility of a conviction. However, the present case raises the fundamental question whether the State may limit the rights of an individual in order to protect him from his own irrational behaviour. Such an approach is called paternalism. We do not rule out the possibility that the State may impose such restrictions. However, in our view, the interests of the accused cannot justify the restriction of his personal autonomy to the extent provided for in Portuguese law. If one follows the logic of the majority one might well accept that citizens may be better protected if, instead of taking part in person in political life and exercising their own political rights, they leave this task to those who are dispassionate and technically prepared.

9. The majority refer, in paragraphs 117 and 129, to the judgment in the case of *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, ECHR 2013 (extracts)). That judgment set forth the following standards:

> "108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (*James and Others*, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (for example, *Hatton*, at § 128; *Murphy*, at § 73; *Hirst* at §§ 78-80; *Evans*, at § 86; and *Dickson*, at § 83, all cited above) ...
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> 114. ... The prohibition was therefore the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights."

The judgment in the case of Animal Defenders International links the proportionality assessment with the democratic nature and quality of the process by which the conflicting values and interests are carefully assessed and weighed. The democratic pedigree of a legislative provision is considered as an argument in favour of its compatibility with the Convention. We are not persuaded that the quality of the legislative process can justify disproportionate measures, but the question of the democratic or authoritarian pedigree of a legislative measures may be relevant from the viewpoint of the interpretation of the Convention, especially for the purpose of establishing the existence of a "common heritage of political traditions, ideals, freedom and the rule of law" or addressing questions concerning the existence of the so-called "European consensus".

We note in this context that the impugned provisions were introduced in Portugal in 1924 during a period of non-democratic rule. While it is true that they were maintained after the establishment of constitutional democracy, the principle of compulsory representation in criminal proceedings has never been discussed in Parliament, nor has its necessity

been considered by its members or by experts appointed in the legislative process. No arguments for or against were put forward in the legislative process. No deliberate legislative choice was made. The quality of the parliamentary review of the impugned measure cannot be regarded as satisfactory (contrast with paragraph 146 of the reasoning). The Court is dealing here with a remnant of a non-democratic period, serving the economic interests of a specific professional group.

We would like to stress here that the Preamble to the Convention refers, *inter alia*, to "an effective political democracy", "a common understanding and observance of ... human rights" and "a common heritage of political traditions, ideals, freedom and the rule of law". It is problematic to accept that restrictions on rights introduced under authoritarian or totalitarian regimes are part of this heritage and should be taken into account for the purpose of assessing the existence or lack of the so-called "European consensus".

10. The majority emphasise the margin of appreciation left to the High Contracting Parties under the Convention. We agree with the view that States should enjoy a broad margin of appreciation in the implementation of the Convention. The margin of appreciation has to be respected in particular in the process of weighing conflicting values for the purpose of assessing the proportionality of a measure. This margin ends, however, where the essential minimum core of a right begins.

11. We note that the Human Rights Committee recognised that the Covenant on Civil and Political Rights guarantees the right to defend oneself without a lawyer (see UN Human Rights Committee, *Correia de Matos v. Portugal*, Comm. 1123/2002, U.N. Doc. A/61/40, paragraphs 7.3, 7.4 and 7.5., and General Comment No. 32 entitled "Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial", CCPR/C/GC/32, paragraph 37). While we agree with this view we regret the fact that it was not supported by more detailed legal argument and in particular that the rationale and values underlying this right were not set forth by the Committee, as this omission deprives the views expressed of their persuasive force. It would have been useful to accompany the views expressed under the Covenant by more extensive reasoning explaining the interpretive choices made by the Committee.

We have here a paradoxical situation in which there is a universal standard much higher than the regional standard established by the case-law of this Court. In any event, the respondent State has the obligation to adapt its domestic legislation to the International Covenant on Civil and Political Rights, and the outcome of this case does not affect that obligation. The majority decided to challenge the Human Rights Committee, disregarding the provisions of the Convention and engaging in a fight for the preservation of the margin of appreciation under the Convention in an area where this margin of appreciation has in any event been considerably

reduced by the entry into force of the International Covenant on Civil and Political Rights. The final result is simply an increased fragmentation of international human rights law.

12. In conclusion: the restrictions imposed on the accused in the instant case prevented him from determining how his defence should be conducted and therefore infringed the substance of the right to defend oneself guaranteed by Article 6 § 3 (c) of the Convention. Moreover, the criminal proceedings involving the applicant, considered as a whole, were blatantly unfair and violated the right to a fair trial guaranteed by Article 6 § 1 of the Convention. We regret that the majority decided to condone a paternalistic measure reducing the fundamental human right to defend oneself to the right to be defended. Such an illiberal approach is not without consequences. The instant judgment paves the way for wide acceptance of paternalistic elements in legal systems.

DISSENTING OPINION OF JUDGE BOŠNJAK

1. I unfortunately cannot agree with the majority that in the present case there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

2. In this particular case, the Grand Chamber was invited to revisit the Court's case-law on the right of an accused to defend himself in person in criminal proceedings, as guaranteed by Article 6 § 3 (c) of the Convention. In a past case involving very similar facts, the same applicant was refused leave to do so and was instead assigned a lawyer to represent him. A Chamber of this Court dismissed his application as manifestly ill-founded, on the grounds that it fell within the States' margin of appreciation whether to allow an accused to defend himself in person or to assign him a lawyer[1]. Subsequently, the applicant submitted a communication based on those very same facts to the United Nations Human Rights Committee (hereinafter "the HRC"), arguing that his analogous right under Article 14 § 3 (d) of the International Covenant on Civil and Political Rights had been violated. In its Views adopted on 28 March 2006, the HRC found that the above-mentioned right on the applicant's part had not been respected[2].

3. While coherence in international human rights law is important, the Court is not bound by the position of the HRC and is not expected to adapt its case-law on account of a specific instance of discrepancy in the views of the two bodies. In my opinion, however, the position taken by the Chamber in application no. 48188/99 was incompatible with some fundamental human rights principles applicable to criminal procedure. These principles are clearly discernible from the existing case-law of our Court on different Article 6 issues. Therefore, the Grand Chamber was faced with an opportunity to align the Court's case-law on matters of principle.

4. It is my belief that in the light of the fundamental principles of procedural fairness as also enshrined in Article 6 of the Convention, criminal proceedings are to be understood as the resolution of a legal dispute between two parties, one being the prosecutor, asserting that the accused has committed a criminal offence for which he is also criminally responsible, and the other being the accused, defending himself against the prosecutor's claims. Thus the accused is to be perceived as an autonomous subject of the proceedings, a position which was historically far from self-evident. Often an accused was considered an object of examination or a source of information, his confession being the "crown jewel" of evidence.

5. This conception of procedural fairness is also clearly reflected in the case-law of this Court. Although they are not explicitly mentioned in the text of Article 6 of the Convention, the Court has, for example, considered

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[1] *Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII.

[2] *Carlos Correia de Matos v. Portugal*, Views, UN Human Rights Committee, Eighty-sixth session: CCPR/C/86/D/1123/2002, adopted on 28 March 2006.

that the right to silence, the privilege against self-incrimination and the principle of equality of arms form an integral part of the Article 6 guarantees[3]. If proceedings are to be considered fair, the accused cannot be turned into an object of the proceedings and be compelled to testify against himself. The right not to incriminate oneself lies at the heart of the notion of a fair procedure under Article 6[4]. A situation where an accused is turned from a subject to an object of the proceedings would be fundamentally unfair.

6. As an autonomous subject of criminal proceedings an accused can, at least in principle, decide on the manner in which he wishes to be defended. Consequently, he is entitled to determine whether he needs legal assistance in his defence or not[5]. In a particular case, his choice may seem to be counterproductive, irrational or simply incompatible with what an independent observer would consider to be in the accused's best interest. However, in a democratic society an individual is in principle entitled to such choices for various reasons. First and foremost, the State is not omniscient. It might not necessarily understand the rationale behind the accused's actions and is not necessarily best placed to know what is good for his position in a particular set of criminal proceedings. Furthermore, the State's intervention is not necessarily designed in good faith. It might interfere with the defence in order to impose its own interests in a particular set of proceedings. Finally, autonomy as such is incompatible with outside interference. Just as a patient may in principle refuse medical assistance, an accused may refuse legal assistance. The right to choose counsel also implies a right not to choose any[6].

7. Consequently, I fundamentally disagree with the view of the majority that Article 6 §§ 1 and 3 (c) of the Convention does not give the accused the right to decide himself in what manner his defence should be assured and that the decision to allow an accused to defend himself in person or to assign him a lawyer falls within the margin of appreciation of the Contracting States. Such a paternalistic approach, denying any autonomy on

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[3] See, for example, the judgment in *John Murray v. the United Kingdom*, 8 February 1996, *Reports of Judgments and Decisions* 1996-I, where the Court pointed out that the rationale of the right to silence and the right not to incriminate oneself is to secure the aims of Article 6 and protect the accused from the authorities in order to avoid miscarriages of justice. In *Kress v. France* [GC], no. 39594/98, ECHR 2001-VI, the Court reiterated that the principle of equality of arms requires that each party be given the opportunity to present his case in a way that does not place him at a substantial disadvantage with regard to his opponent.

[4] See *Weh v. Austria*, no. 38544/97, 8 April 2004.

[5] From a comparative perspective, autonomy was considered by the Supreme Court of the United States as grounds for the right to decline representation, in *Faretta v. California*, 422 U. S. 806 (1975). The Supreme Court derived a right to self-representation from the Sixth Amendment, grounding it on the commitment to freedom of choice.

[6] *Vergès, Etienne*: "Les droits de celui qui décide de se défendre seul et le principe d'égalité" (Cons. Const. 23. nov. 2012), *Rev. Pén . Dr. Pén*. 2012, p. 917.

the part of the accused to determine his defence, is in my view incompatible with procedural fairness.

8. Like any principle in law, the accused's autonomy to determine his own defence may have limits and the court conducting the criminal proceedings may be called upon to intervene. In doing so it may assign an attorney to assist the accused contrary to the latter's wish to defend himself without counsel. Various convincing or even compelling reasons may exist calling for such intervention. First and foremost (a), the autonomy of the accused may be factually diminished, for example, on account of illness[7], disability or age[8]. Equally (b), the autonomy of the accused may be considerably limited owing to the circumstances of the case. He may be in a situation of special vulnerability, for example in cases of deprivation of liberty coupled with a first appearance or questioning where the interview statement will be used in court[9], or during plea bargaining. In such situations, an attorney can reasonably act as a buffer preventing the State and its agents from overriding the subject status of the accused. The vulnerability is all the more evident where the accused is facing a long-term custodial sentence or other serious punishment[10]. Likewise, the legal and factual complexity of a case may render the legal assistance of an attorney obligatory[11]. Furthermore (c), the court may establish that the accused is conducting his defence in a manifestly irrational manner. Finally (d), it might be necessary for the court to intervene if the accused abuses his right to self-representation in order to undermine the authority of the court, or has a negative effect on the interest of his co-accused in having the proceedings conducted in an expeditious manner[12]. This list is not an exhaustive one –

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[7] See the ICTY case of *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004. The accused exercised his right to self-representation from the beginning of the proceedings. Upon a second motion of the prosecution, owing to the deterioration of the accused's health, the ICTY appointed counsel. However, the accused was still entitled to defend himself whenever his health so permitted.

[8] See, for instance, the judgment in *Lloyd and Others v. the United Kingdom*, nos. 29798/96 and 37 others, 1 March 2005, where two applicants aged under 21 failed to pay local taxes or court-imposed fines and were sent to prison without being legally represented during the trial.

[9] See, for example, the judgments in the cases of *Dikme v. Turkey*, no. 20869/92, ECHR 2000-VIII, and *Kolu v. Turkey*, no. 35811/97, 2 August 2005.

[10] See, for example, the judgment in *Granger v. the United Kingdom*, 28 March 1990, Series A no. 174, where the applicant faced a five-year custodial sentence.

[11] See, for instance, the judgment in *Benham v. the United Kingdom*, 10 June 1996, *Reports* 1996-III, where the criminal proceedings involved complex issues of fact and law.

[12] In the case of *Samuel Hinga Norman*, the Special Court for Sierra Leone (SCSL) held that six factors were to be taken into consideration when deciding whether an accused's right to self-representation should be limited. Amongst others, it stressed the public interest in seeing the trial completed swiftly and a possible tension between allowing one accused's right to self-representation and the right of his co-accused to a fair and swift trial. See the SCSL case of *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-04-14-T, Decision of

other circumstances pertaining to a specific case or a specific defendant may also call for mandatory legal assistance.

9. It goes without saying that the High Contracting Parties are better placed than the Court to establish whether, in a particular case, any compelling reasons exist for interfering with an accused's choice to conduct his own defence. In doing so, they enjoy a certain margin of appreciation. But the onus is on them to produce such reasons in the proceedings before the Court should a dispute on the matter arise. These reasons must be concrete and pertain to the case in question. They must also be compatible with the principle of fairness, encompassing the guarantees of Article 6 of the Convention.

10. In the present case the applicant was assigned counsel simply because the law mandated representation if a prison sentence was possible, however remote this possibility may have been under the circumstances. The applicant could not successfully apply for leave to represent himself, as the national law did not provide for any exceptions. In their observations before the Grand Chamber the respondent Government asserted that the overriding interests of justice and the effective defence of a defendant legitimised the provisions of the Code of Criminal Procedure on compulsory representation, which were applicable in the applicant's case. However, the Government failed to specify any interest of justice pertaining to the case in question and, in particular, why the applicant should be considered incapable of defending himself effectively. In addition, the assignment of counsel to the applicant was clearly futile: the lawyer did not perform any acts in the applicant's defence, while the applicant was prevented from acting in his own defence. In short, it is clear that in the present case no interests of any sort were served by interfering with the applicant's right to self-representation.

11. In such circumstances, I cannot but conclude that the interference with the applicant's autonomy in conducting his defence in criminal proceedings had no reasonable and concrete justification and was not fair under the circumstances. Consequently, I believe that the Grand Chamber should have found a violation of Article 6 §§ 1 and 3 (c) of the Convention.

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8 June 2004 on the application of Samuel Hinga Norman for self-representation under Article 17(4)(d) of the Statute of the Special Court.